

REDACTED FINAL REPORT

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

Public Authorities	District Council of Coober Pedy Department of State Development Minister for Mineral Resources and Energy
Public Officer	The Hon Tom Koutsantonis MP
Ombudsman reference	2016/08630
ICAC reference	2016/000091
Date of referral	28 October 2016
Issues to be assessed	<ol style="list-style-type: none">1. Whether the District Council of Coober Pedy committed maladministration in public administration through its negotiation and execution of a Power Purchase Agreement with Energy Generation Pty Ltd2. Whether the District Council of Coober Pedy, by executing a Power Purchase Agreement with Energy Generation Pty Ltd in circumstances where that agreement was not considered by the elected body in its final form, acted in a manner that was wrong3. Whether the Department of State Development, through its participation in the development of a Power Purchase Agreement between the District Council of Coober Pedy and Energy Generation Pty Ltd, and by recommending that the Minister for Mineral Resources and Energy execute a Deed of Grant and Letter of Comfort subsidising payments made by the District Council of Coober Pedy under that agreement, committed maladministration in public administration4. Whether the former Minister for Mineral Resources and Energy, the Hon Tom Koutsantonis MP, committed maladministration in public administration by committing the State of South Australia to subsidise payments made by the District Council of Coober Pedy under a Power Purchase Agreement with Energy Generation Pty Ltd.

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Jurisdiction

This matter arose from a referral 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 first referral**).

Section 14B of the *Ombudsman Act 1972* provides:

14B—Referral of matter by OPI or ICAC

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

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

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

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

The first referral arose out of a report to the Office for Public Integrity made by a whistleblower.

The first referral gives rise to a range of issues concerning the decision of the District Council of Coober Pedy to enter into a Power Purchase Agreement with Energy Generation Pty Ltd and certain actions of the Department of State Development and the former Minister for Mineral Resources and Energy with the effect of subsidising the council in respect of its obligations under this agreement (issues one, three and four).

In the course of my investigation the Commissioner referred an additional matter to the Ombudsman pursuant to section 24(3) of the ICAC Act, as raising other issues that should be dealt with by my Office (**the second referral**).

The second referral arose out of a report to the Office for Public Integrity and concerns the decision of certain officers of the District Council of Coober Pedy to execute the Power Purchase Agreement in circumstances where the agreement had not been considered by the council's elected body in its final form (issue two).

Summary and recommendations

My final views are as follows:

1. The District Council of Coober Pedy committed maladministration in public administration for the purposes of section 5(4) of the ICAC Act through its negotiation and execution of a Power Purchase Agreement with Energy Generation Pty Ltd.

In respect of this issue, I invite the Minister for Transport, Infrastructure and Local Government to:

- consider whether to exercise his powers of direction under section 273(2)(b) of the Local Government Act; and/or
 - consider whether to recommend to the Governor that the council be declared to be a defaulting council under section 273(2)(c) of the Local Government Act.
2. The District Council of Coober Pedy's failure to ensure that official records in its custody concerning the project were maintained in good order and condition appears contrary to law for the purposes of section 25(1) of the Ombudsman Act.
 3. The District Council of Coober Pedy, by executing a Power Purchase Agreement with Energy Generation Pty Ltd in circumstances where that agreement was not considered by the elected body in its final form, acted in a manner that was wrong for purposes of section 25(1) of the Ombudsman Act.
 4. The Department of State Development, through its participation in the development of a Power Purchase Agreement between the District Council of Coober Pedy and Energy Generation Pty Ltd, and by recommending that the Minister for Mineral Resources and Energy execute a Deed of Grant and Letter of Comfort subsidising payments made by the District Council of Coober Pedy under that agreement, did not commit maladministration in public administration.
 5. The Department of State Development, by omitting to demonstrate in relevant briefings to the Minister for Mineral Resources and Energy that a proposed Power Purchase Agreement between the District Council of Coober Pedy and Energy Generation Pty Ltd was fairly and reasonably priced when considered against comparable projects, acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

To remedy this error, I recommend that the Department for Energy and Mining revise its briefing template so as to prompt the author to identify, where relevant to a procurement activity involving the proposed expenditure of previously uncommitted State funds:

- any procurement method used in connection with the proposed expenditure
 - the process by which the project has been assessed
 - the outcomes of that analysis (including by reference, where relevant, to any analysis performed by third party consultants or technical experts)
 - other information as may be necessary to inform an assessment of the value of proposal.
6. The former Minister for Mineral Resources and Energy, the Hon Tom Koutsantonis MP, did not commit maladministration in public administration by committing the State of South Australia to subsidise payments made by the District Council of Coober Pedy under a Power Purchase Agreement with Energy Generation Pty Ltd.

Action taken

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

- assessing the information provided by the Commissioner
- seeking and considering records associated with the project from:
 - the council
 - the department
 - the former Minister for Mineral Resources and Energy, the Hon Tom Koutsantonis MP
- seeking and considering a written response from the following current and former officers of the council:
 - then-Chief Executive Officer, Ms Fiona Hogan
 - former Mayor Michelle Provatidis
 - Cr Kylie Hay
 - Cr Boro Rapaic
 - Cr Paul Reynolds
 - former elected member, Mr Peter Pantelis
 - former Acting Chief Executive Officer, Mr David Hitchcock
- seeking and considering a written response from the Department of State Development
- seeking and considering a written response from Mr Koutsantonis
- seeking and considering information from:
 - the Australian Renewable Energy Agency
 - the State Coordinator-General, Mr Jim Hallion
- interviewing under oath or affirmation:
 - former Interim Chief Executive Officer of the council, Mr Anthony Renshaw
 - the former Director, Demand Management and Energy Services, Energy Markets and Programs Division of the department, Mr Nick Smith
 - director of Resonant Solutions Pty Ltd, Mr Graham Davies
- seeking and considering further written responses from Mr Koutsantonis and Mr Smith
- considering additional information and an audio recording supplied by members of the public
- considering:
 - the ICAC Act and the Ombudsman Act
 - the *Local Government Act 1999*
 - the *State Records Act 1997*
 - the *Public Finance and Audit Act 1987*
 - the *Electricity Act 1996*
 - Treasurer's Instruction 8
 - the State Procurement Board's *Procurement Policy Framework*
 - the Department of the Premier and Cabinet's *Guidelines for Assessment of Unsolicited Proposals*
 - the Ministerial Code of Conduct
- preparing a provisional report and seeking the views of the parties
- considering the various responses to my provisional report
- seeking further comment from the council, Mr Hitchcock and Mr Renshaw
- 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;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

Introduction

1. On 30 March 2016 the District Council of Coober Pedy (**the council**) executed a Power Purchase Agreement (**the PPA**) with Energy Generation Pty Ltd (**EnGen**).
2. EnGen is a subsidiary of Energy Developments Ltd, which is itself a subsidiary of the multinational DUET Group. Although EnGen and Energy Developments Ltd are separate legal entities, throughout this report I have adopted the practice of the parties of referring to both companies as '**EDL**'.
3. Under the terms of the PPA, EDL is to generate and sell electricity to the council for a period of 20 years. The PPA provides for the generation of energy by means of a hybrid renewable power station and associated facilities constructed and operated by EDL on a site licenced to EDL by the council.
4. The council is anticipated to pay approximately \$198.6 million (nominal cash flow) to EDL over the life of the PPA.
5. The PPA did not arise from a market procurement process and the probity surrounding the agreement has long been a matter of conjecture and debate within the Coober Pedy community and in local and statewide media reports.
6. It has been publicly acknowledged by members of the council that, at the time it executed the PPA, the council was in possession of a consultant's report, prepared by Resonant Solutions Pty Ltd (**Resonant**), which purported to demonstrate that savings of approximately \$85 million were available to the council on the open market.
7. Questions have also been raised about the merits of certain instruments (specifically, a Letter of Comfort and Deed of Grant) executed by the former Minister for Mineral Resources and Energy, the Hon Tom Koutsantonis MP (**Mr Koutsantonis**), which operate to subsidise the council in respect of its payments to EDL under the PPA.
8. The Letter of Comfort and Deed of Grant were executed on the recommendation of the Department of State Development, which was also involved in the development and negotiation of the PPA.
9. It has been alleged that the PPA and the underlying hybrid renewable project do not present value for money to the council and that the PPA should not have been executed on the information before the council or at all.
10. It has also been alleged that the Letter of Comfort and the Deed of Grant do not present value for money to the State because they have the effect of subsidising a project that does not present value for money and that these documents should not have been executed by Mr Koutsantonis on the information before him or at all.

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.

Response to my provisional report

11. I provided my tentative view to the parties by way of my provisional report dated 17 April 2018.³
12. My provisional report foreshadowed a number of findings, the most notable of which was that the council committed maladministration in public administration in respect of its negotiation and execution of the PPA.
13. The majority of parties made submissions in response to my provisional report. I have provided a brief summary of the most pertinent submissions below. I have responded to certain submissions elsewhere in this report.
14. I make it clear that in preparing this final report I have considered each of the responses provided to my provisional report in full.

Response from the council

Letter dated 15 May 2018

15. The council initially responded to my provisional report by way of letter from its solicitors dated 15 May 2018.
16. The council submitted that it does not accept that it committed maladministration in public administration through its negotiation and execution of the PPA. The council also expressed disagreement with my intention to approach the Minister for Transport, Infrastructure and Local Government in respect of the exercise of his powers under the Local Government Act.
17. The council provided lengthy submissions in support of its position. The vast majority of those submissions focused on the issue of Mr Hitchcock's execution of the PPA. The council also made comments critical of Mr Renshaw's conduct during the 19 January 2016 council meeting and of the department's involvement in the development of the project.
18. The council's submissions are best encapsulated in the following passage:

[W]e are instructed to request you prior to the finalisation of the Report that you [sic] give further consideration to the adverse findings made against the Elected Members which we regard as being unfair whilst the two former Chief Executive Officers of [the council] who were instrumental in the factual matrix leading up to the execution of the PPA have not been held sufficiently accountable for their respective breaches of their duties[.]
19. I have considered the council's submissions in response to my provisional report and, where appropriate, I have acknowledged or responded to those submissions in the body of this report. They have not led to me to change my views in respect of the substantive issues.

Further submissions

20. On 17 May 2018 the council's now Acting-Chief Executive Officer, Mr Colin Pittman, forwarded to my investigation a list of activities the council is said to be undertaking,

³ The council and its former and current officers were supplied with a redacted version of my provisional report that omitted my consideration of the conduct of the department and Mr Koutsantonis.

aimed at improving the council's overall financial position and governance. I have noted this information.

21. On 7 June 2018 my Officer wrote to the council to seek further comment in respect of two matters arising from Mr Davies' response to my provisional report.
22. The first matter concerned a letter from KelledyJones Lawyers to Mr Renshaw dated 9 October 2015. Mr Davies supplied this letter to my investigation with his response to my provisional report. The letter was not previously disclosed to my investigation by the council, notwithstanding my request on 8 November 2016 for, *inter alia*, 'a copy of all reports, correspondence (both internal and external), legal advice and associated documents concerning the PPA and the underlying project'. The contents of the letter are summarised later in this report.
23. The second matter concerned an email exchange between Mr Davies and Mr Hitchcock dated 22 March – 29 March 2016, as supplied by Mr Davies with his response to my provisional report. Again, this correspondence was not previously supplied to my investigation by the council. My Officer sought the council's comment in respect of this correspondence and in respect of further comment supplied by Mr Hitchcock in light of this correspondence.
24. The council did not elect to comment on the first matter.
25. In respect of the second matter, the council expressed criticism of my 'failure to test the position of Mr Hitchcock' by way of his examination under oath. The council requested that it be allowed to participate in any such examination.
26. I have considered the council's submissions in respect of this issue. In the circumstances, I am not persuaded that it is necessary or justifiable that I interview Mr Hitchcock in the manner requested.⁴ Fundamentally, I do not consider that the errors imputed to Mr Hitchcock, even if made out, would absolve the council's elected body from the criticisms expressed in this report. It is not the role of my investigation to resolve the matters at dispute between the council and the Local Government Association relevant to this issue.
27. The council otherwise volunteered that it was unsure as to what information it had previously supplied to my investigation.⁵ Of its own initiative, the council undertook to supply my investigation with further records for consideration.⁶ These records were subsequently provided by way of three arch-lever folders and approximately thirty emails from the council's Acting Chief Executive Officer.
28. Notwithstanding my frustration that this information was not provided previously, I have reviewed the additional materials supplied by the council. I am satisfied that the vast majority of these materials duplicate records previously considered by my investigation. In a few cases, I have added reference to individual records to the body of this report. These records have not altered the views expressed in my provisional report.⁷

⁴ Section 18(3) of the Ombudsman Act provides, *inter alia*, that the Ombudsman 'is not required to hold a hearing for the purposes of an investigation' and 'may obtain such information from such persons and in such manner as the Ombudsman thinks fit'.

⁵ Telephone call dated 15 June 2018.

⁶ Telephone call dated 15 June 2018; letter from Griffins Lawyers dated 18 June 2018.

⁷ The council also urged me to consider the terms of a notice it purports to have served upon Mr Hitchcock under rule 33 of the Supreme Court Civil Rules 2006. Having obtained a copy of this notice from the council, I am satisfied that it is in fact the same notice as was served upon the Local Government Association by the council in November 2017. This notice was supplied to my investigation by the Commissioner at the time of the second referral.

Response from the department

29. Mr Paul Heithersay supplied a consolidated response to my provisional report on behalf of the Department of State Development, the Department of the Premier and Cabinet and Mr Smith. At time of writing, Mr Heithersay was the Deputy Chief Executive Officer of the latter department. Mr Heithersay is now the Chief Executive Officer of the recently-established Department for Energy and Mining, which I understand will incorporate the Energy Markets and Programs Division. Hereafter I attribute Mr Heithersay's submissions to 'the department'.
30. The department largely accepted the views expressed in my provisional report, providing additional comment and clarification as necessary. The department also commented on the terms of my foreshadowed recommendation in respect of its Ministerial briefings.
31. I have considered the department's submissions and have addressed them where appropriate in the body of this report.
32. The department otherwise made suggestions as to how certain passages of my report might be appropriately redacted in the event of the report's further distribution. I will consider these suggestions when considering the exercise of my discretion under section 26(3) of the Ombudsman Act, at which time I will seek submissions from the parties in respect of the issue.

Response from Mr Koutsantonis

33. Mr Koutsantonis responded to my provisional report by way of letter from his solicitor dated 31 May 2018.
34. Mr Koutsantonis did not disagree with my provisional views in respect of the substantive issues however invited me to reconsider certain adverse comments made in respect of his submissions to my investigation.
35. I have carefully considered Mr Koutsantonis' response to my provisional report against the record of correspondence. As a result, I have modified some of my comments. I have separately notified Mr Koutsantonis of my reasons for doing so.

Response from Mr Davies

36. Mr Davies responded to my provisional report by way of letter dated 15 May 2018 and by way of further emails dated 25 May 2018, 27 May 2018, 29 May 2018 and 1 June 2018.
37. Mr Davies' submissions are best encapsulated in the following passage:

I concur with most of your report and believe that you have captured the essence of what is a complex issue, however I do believe that a number of parties appear to have been let off the hook.
38. Mr Davies reiterated his concern that the council had been unduly pressured into executing the PPA. In doing so, he invited me to reconsider my assessment of Mr Smith's evidence and the records supplied to my investigation.
39. I have carefully considered the additional submissions made by Mr Davies in respect of this and other issues. Although Mr Davies would have me draw certain conclusions in

respect of the department's involvement in the process, I do not consider the evidence supplied to my investigation supports such findings.

40. Mr Davies also requested that I examine the conduct of KelledyJones and certain of its officers. I am similarly not persuaded that such a course is warranted on an assessment of the evidence supplied to my investigation.
41. Mr Davies took issue with Mr Hitchcock's evidence to the effect that he (Mr Hitchcock) was not supplied with a copy of Resonant's reports. Mr Davies supplied my investigation with an email exchange said to refute Mr Hitchcock's evidence concerning this issue. I subsequently determined to seek further evidence from Mr Hitchcock in respect of the matter, which I summarise below.

Response from Mr Hitchcock

42. Mr Hitchcock initially responded to my provisional report by way of email dated 9 May 2018. In this email, Mr Hitchcock declined to comment in respect of my provisional views.
43. On 28 May 2018 my Officer wrote to Mr Hitchcock to seek further comment in respect of the additional email records supplied by Mr Davies. Those emails are summarised in the body of this report.
44. On 30 May 2018 Mr Hitchcock emailed my Officer to clarify his evidence as to the issue of his receiving a copy of Resonant's reports. I have identified and considered Mr Hitchcock's further evidence in respect of this issue in the body of this report.

Response from Mr Renshaw

45. Mr Renshaw did not elect to respond to my provisional report.

Responses from the current and former elected members

46. Cr Rapaic responded to my provisional report by way of letter dated 14 May 2018. Cr Rapaic submitted that his 'only mistake' was to defer to the judgement of the State and Federal governments and the council's lawyers and administration.
47. Mr Pantelis responded to my provisional report by email dated 15 May 2018. Mr Pantelis indicated that he agreed with my provisional views concerning the council. Mr Pantelis accepted that he should not have voted to execute the agreement on the information presented to the elected body at the 19 January 2016 meeting.
48. Crs Hay and Reynolds did not elect to provide a personal response to my provisional report.
49. Ms Provatidis did not elect to respond to my provisional report.
50. Cr Justin Freytag responded to my provisional report by way of email dated 5 June 2018. Cr Freytag did not hold office with the council during the period relevant to my investigation, however he expressed a desire to submit further information to my investigation, which I undertook to assess.

51. Cr Freytag's submissions largely focused on the conduct of the department and the council's legal advisors.
52. Concerning the department's conduct, Cr Freytag's submissions are best encapsulated in the following passage:

[T]he State Government had no moral right to foist this massive contract in the manner in which it did on a small country council whose elected members are ordinary people who consider running for council akin to joining Rotary or the Lions club and whose only concern was to make the town a better place. It would be truly sad if these people were opened to the ridicule and hatred of a small remote town by the findings of your report and the highly paid faceless professionals and bureaucrats from "down south" slip into the night unscathed.

53. In making these submissions, Cr Freytag would not have been aware of my provisional views in respect of the department's conduct.
54. As in the case of Mr Davies' response to my provisional report, I do not consider that the evidence supplied to my investigation supports the conclusions Cr Freytag would have me make. While I am not insensitive to the personal and professional circumstances of the individual councillors named in this report, I consider that the criticisms expressed of these individuals by my investigation are necessary and appropriate in the circumstances.

The Minister for Transport, Infrastructure and Local Government

55. It is not my usual practice to supply the relevant Minister with a copy of my provisional report concerning an investigation.
56. In this instance, I deemed it in the public interest that I do so in light of the seriousness of my foreshadowed findings and the potential consequences to the council.
57. The Minister for Transport, Infrastructure and Local Government responded to my provisional report by way of letter dated 14 May 2018. The Minister noted my provisional views and declined to comment further.
58. The Minister was not made aware that my investigation extended to the conduct of the department and Mr Koutsantonis.

Other responses

59. On 4 May 2017 my Office received a complaint from a Coober Pedy ratepayer concerning the probity surrounding the council's execution of the PPA. That complaint caused me to supply the complainant with a redacted copy of my provisional report, identifying my provisional views in respect of the council. The complainant responded to my provisional report by way of email dated 27 April 2018, expressing general satisfaction with my provisional views.
60. One other reporter responded to my provisional report by way of email dated 3 May 2018. That reporter declined to comment in respect of my provisional views concerning the council.

Other changes to my provisional report

61. I have reviewed and made corrections to the transcripts of interview reproduced in this report in accordance with suggestions made by several of the parties.
62. I have otherwise made minor amendments to my provisional report as was necessary.

Chronology of key events

18 December 2003	2003 Letter of Comfort executed by the former Minister for Energy
5 January 2004	Execution of PPA with StateWest Power
28 June 2013	The department provides letter of support to Hydro Tasmania
20 August 2013	Council resolution to offer in principle support for EDL's expression of interest to ARENA
7 November 2013	The council provides letter of support to EDL
15 November 2013	The department provides first letter of support to EDL
24 December 2013	EDL's expression of interest approved by ARENA
4 April 2014	April 2014 KelledyJones advice supplied to council
13 May 2014	Council resolution to offer in principle support for EDL's application for ARENA funding
20 May 2014	The department provides second letter of support to EDL
14 July 2014	Parties advised of ARENA funding commitment
15 October 2014	The department engages SABBLE
20 October 2014	Meeting between Mr Koutsantonis and EDL
9 April 2015	EDL submits unsolicited proposal to the USPSC
18 May 2015	Notice of USPSC determination provided to EDL
1 June 2015	Cabinet approves Mr Koutsantonis to enter into new Letter of Comfort
June 2015 (approx.)	ZEN proposal submitted to the council
June 2015 (approx.)	BESTEC report supplied to the council
22 June 2015	Mr Rusby appointed CEO of the council
27 August 2015	Mayor Staines resigns from the council; Ms Provatidis appointed Acting Mayor
3 September 2015	Briefing supplied to the Minister's office
9 September 2015	Mr Renshaw appointed Interim CEO of the council
18 September 2015	Mr Renshaw communicates the council's 'in principle' agreement to support the EDL project
28 September 2015	Briefing supplied to the Minister's office
1 October 2015	Mr Renshaw communicates the council's agreement to proceed with the EDL project
1 November 2015	Meeting between Mr Renshaw, Ms Provatidis and Mr Davies
3 November 2015	The council engages Resonant
15 November 2015	Resonant's draft review submitted to the council
17 November 2015	Resonant's draft review tabled before the council; EDL provides two-week ultimatum to the council
December 2015 (approx.)	December 2015 KelledyJones advice supplied to council
December 2015 (approx.)	Resonant's summary review submitted to the council
3 December 2015	Meeting between Mr Renshaw and Mr Koutsantonis
7 December 2015	Ms Provatidis writes to Mr Koutsantonis
11 December 2015	EDL's response to summary review submitted to the council
17 December 2015	Resonant's reply to EDL submitted to the council

13 January 2016	ARENA workshop; Resonant writes to the department
14 January 2016	Draft Letter of Comfort supplied to the council
19 January 2016	Council resolution to execute a PPA with EDL
3 February 2016	Resonant's vendor comparison submitted to the council
8 February 2016	Resonant's final report submitted to the council
16 February 2016	Resonant formally directed to stop work
15 March 2016	The council terminates Mr Renshaw's employment; Mr Hitchcock seconded to the council
21 March 2016	Final draft of PPA developed
22 March 2016	Briefing supplied to Minister's office (Letter of Comfort)
29 March 2016	Mr Koutsantonis executes Letter of Comfort
30 March 2016	Mr Hitchcock and Ms Provatidis execute PPA
7 April 2016	Briefing supplied to Minister's office (Deed of Grant)
15 April 2016	EDL notifies State Government of final investment decision
29 April 2016	Mr Koutsantonis executes Deed of Grant

Background and evidence obtained in the investigation

63. Coober Pedy is not connected to the national electricity grid and, during the period relevant to my investigation, received its power by way of eight 500kW diesel generators operated by EDL.
64. Energy has historically been supplied by EDL to the council, which then distributes electricity to the Coober Pedy community. This arrangement is pursuant to a 2004 Power Purchase Agreement between the council and EDL (then StateWest Power Pty Ltd). The terms of this Power Purchase Agreement provided for a supply period of 15 years. That period was scheduled to expire in 2019.
65. The council is responsible for retailing and distributing electricity to the town and is party to the Remote Areas Energy Supplies (**RAES**) scheme. Under the RAES scheme, the South Australian Government provides a subsidy to the council for the difference between the costs incurred by the council in purchasing and distributing electricity to the town and the revenue actually collected from residents.
66. The amount charged by the council to residents is fixed in accordance with a tariff determined by the Minister for Mineral Resources and Energy. Tariffs are ordinarily fixed by the Minister so that small-to-medium domestic customers pay no more than 10 per cent more than the on-grid regulated standing contract tariff. I understand that in the case of Coober Pedy, the tariff has been fixed at parity level since approximately 2014.
67. On 18 December 2003, pursuant to a Letter of Comfort provided to the council by the then-Minister for Energy (**the 2003 Letter of Comfort**), the South Australian Government undertook to continue the RAES subsidy to the council for the duration of the 2004 Power Purchase Agreement.⁸
68. The 2003 Letter of Comfort relevantly provided:
- In accordance with the consent of the Treasurer, I advise that if the District Council of Coober Pedy enters into contracts with Statewest Power Pty Ltd for the generation of electricity for Coober Pedy, it can do so in the comfort that the RAES subsidy will continue, for the duration of the contracts (up to 15 years), on terms consistent with those currently in operation.
- This comfort is provided on the understanding that the long term electricity generation costs are expected to be lower than previously allowed and that after a period of implementation and transition that, as stated in your letter of 25 September 2003, “future savings to be reflected in lower RAES subsidy”.
- Notwithstanding [sic] the review by the State Government of various technical aspects of the contract, the Council needs to ensure its satisfaction and take responsibility for all aspects of the proposed contracts with Statewest.
69. During most of the period relevant to my investigation, the RAES scheme was managed by the Energy Markets and Programs Division of the Department of State Development. This administrative unit previously sat within the Department for Manufacturing, Innovation, Trade, Resources and Energy and is now situated within the Department of the Premier and Cabinet.
70. I have used the term ‘**the department**’ within this report to refer to the administrative unit in which the Energy Markets and Programs Division (or equivalent) was situated at the relevant time.

⁸ A Minister is empowered to enter into financial arrangements with the consent of the Treasurer pursuant to section 18 of the *Public Finance and Audit Act 1987*.

Development of the hybrid renewable project

71. In June 2013 Hydro Tasmania, a renewable energy producer owned by the Tasmanian Government, approached the department for advice and support in developing a number of proposals for hybrid renewable projects across the RAES scheme.⁹ This approach included a proposal that Hydro Tasmania develop a renewables project with EDL for the supply of electricity to Coober Pedy.¹⁰
72. On 28 June 2013 the department advised Hydro Tasmania by letter that it was 'supportive' of this proposal, 'provided that the SA Government RAES scheme subsidy to [the council] is not adversely affected through the on-going contractual electricity purchase arrangements between [the council] and EDL.'¹¹
73. On 9 July 2013 Mr Keith Barker, a representative of EDL, telephoned the department to request a meeting to discuss a renewable energy proposal concerning the Coober Pedy township. Mr Barker advised that EDL was interested in securing funding from the Australian Renewable Energy Agency (ARENA) and intended to meet with representatives of the council to discuss the proposal.¹²
74. I understand that EDL may have met with representatives of the council in July 2013 to deliver a presentation on the proposal. The council advised my investigation that it is unable to locate any records within its system concerning these discussions.¹³
75. The following report was tabled before the council's 20 August 2013 ordinary meeting by the council's Finance & Administration Manager, Mr Damien Clark:

At the July Council meeting [EDL] presented a proposal to install a large scale Solar PV station in conjunction [sic] with the existing Diesel Power Station.

As Council will have seen in last month's presentation EDL are hoping to put an Expression of Interest (EOI) to the Commonwealth Governments [sic] ARENA funding program. The ARENA program has \$400M available for projects that can prove they will be commissioned before June 2018[.]

EDL are asking whether Council would support the EOI so that they can determine whether they should invest time in getting the proposal developed.

Council needs to consider the following:

- Existing Contract with EDL expires July 2019
- This Solar PV Project will require either an amendment to original contract or a separate contract (Power Purchase Agreement)
- KPMG report into Grid connection for Coober Pedy
- Possible Coal/Gas mining operations being developed close to Coober Pedy.

If Council chooses to support EDL in its EOI submission it does not commit Council to signing a contract with EDL.

The main benefits for this proposal to Council are the reduction in risk of diesel price fluctuations and also increased power capacity at peak times.¹⁴

76. At this meeting the elected members of the council resolved, in accordance with the recommendation of Mr Clark:

⁹ There are 13 'off-grid' locations participating in the RAES scheme, ten of which receive power from sites owned by the South Australian Government.

¹⁰ Email from EDL to G Velaitis dated 8 January 2014.

¹¹ Letter from V Duffy to Hydro Tasmania dated 28 June 2013.

¹² Email from G Velaitis to Michael Leane et al. dated 10 July 2013.

¹³ Letter dated 8 May 2017.

¹⁴ Meeting agenda, p. 15.

That Council offer in principle support to [EDL] in submitting an expression of interest to the ARENA Regional Remote Renewables program for the development of renewable power for the Coober Pedy Power Station.¹⁵

77. On 26 August 2013 Mr Barker emailed the department to advise that the council had agreed to 'support the submission of an [expression of interest] to ARENA for funding support'. Mr Barker advised that EDL was working with Hydro Tasmania to establish a preliminary design for the project. Mr Barker observed:

We will continue to work with [the council] with the objective being to offer a lower total cost of power with no compromise on the current reliability and power quality standards.¹⁶

78. On 30 August 2013 Mr Trevor Gleeson, a Senior Project Engineer of EDL, emailed Mr Clark and the council's Chief Executive Officer, Mr Phil Cameron, to seek information regarding the development process and associated matters.¹⁷

Expression of interest to ARENA

79. On or around 23 September 2013 representatives of EDL met with the department to provide an update on the Coober Pedy proposal. Mr Gleeson of EDL later emailed the department:

I note your interest in supporting [the council] and being actively involved throughout the PPA negotiations. As discussed and outlined in [EDL's 26 August 2013 email], we seek a letter of support from [the department] to accompany our ARENA [expression of interest]. We now have a more specific project scope to work with to draft a letter for your consideration.¹⁸

80. On 1 October 2013 representatives of EDL met with Mr Clark and others of the council to discuss project specifics.¹⁹ At this time, EDL also requested that the council confirm its support for a proposed expression of interest that was to be submitted by EDL to ARENA in furtherance of EDL's prospective application for Commonwealth funding.²⁰

81. Mr Gleeson subsequently emailed Mr Clark to attach a draft letter of support for consideration by the council.²¹

82. On 7 November 2013 Mr Cameron forwarded a letter of support to EDL. This letter provided, in part:

[The council] supports EDL submitting an application for project funding to [ARENA]'s Regional Australia's Renewable Industry Energy [sic] Program (I-RAR). Elected Council members unanimously supported a motion for continued renewable project development and submission of a funding request to ARENA by EDL on 20 August 2013.

[The council] is pleased to work with EDL and Hydro Tasmania to further develop the project and will look at any future options including support of a PPA of up to 20 years, provided the overall cost of electricity and on-going contractual electricity purchase arrangements between [the council] and EDL are not adversely affected. We understand negotiation of any future PPA with EDL will occur in parallel with completion of the full feasibility study by EDL and negotiation of the funding agreement between EDL and ARENA over the first half of 2014.²²

¹⁵ Meeting minutes, p. 5.

¹⁶ Email from EDL to G Velaitis et al. dated 26 August 2013.

¹⁷ Email from EDL to D Clark et al. dated 30 August 2013.

¹⁸ Email from EDL to G Velaitis et al. dated 4 October 2013.

¹⁹ Email from EDL to D Clark et al. dated 25 September 2013.

²⁰ Email from EDL to D Clark et al. dated 5 November 2013; email from EDL to D Clark et al. dated 25 September 2013.

²¹ Email from EDL to D Clark et al. dated 5 November 2013.

²² Letter from P Cameron to EDL dated 7 November 2013.

83. Between 4 October 2013 and 15 November 2013 representatives of EDL and the department developed a letter of support to be signed by Mr Duffy and submitted by EDL with its expression of interest to ARENA. During this process a representative of the department observed (emphasis in original):

[W]e cannot commit to a 20 [year] PPA, indeed we can't commit to any particular expenditure beyond support "provided that the project does not adversely affect the subsidy paid to the District Council of Coober Pedy under the RAES scheme".²³

84. On 15 November 2013 the department provided EDL with a letter of support, which stated:

We understand [EDL], in collaboration with Hydro Tasmania, is developing a proposal for a diesel renewable hybrid electricity project for Coober Pedy incorporating up to 6 MW of wind and solar generation that will potentially displace a significant percentage of current diesel use. The project is therefore expected to reduce exposure to diesel price fluctuations and reduce the long term cost of generating electricity in Coober Pedy.

[The department] has an interest in the project as the South Australian Government subsidises the supply of electricity to consumers in Coober Pedy under [the RAES] scheme.

[The department] supports EDL submitting an application for project funding to [ARENA]'s Regional Australia's Renewable Industry Program (I-RAR) provided that the project does not adversely affect the subsidy paid to the District Council of Coober Pedy under the RAES scheme.²⁴

Developing the proposal

85. On 24 December 2013 a representative of EDL emailed Mr Clark and Mr Cameron of the council to advise that ARENA had advanced EDL's proposal beyond the expression of interest stage. EDL suggested that ARENA was generally impressed with the project's potential.²⁵
86. On 8 January 2014 EDL went on to advise the department that ARENA had approved EDL's expression of interest. Mr Barker reported that EDL was encouraged by feedback provided by ARENA during the expression of interest process, going on to state:
- As we have previously discussed our primary engagement on the customer side will be with [the council] but it is our intention to continue to brief you on the progress of the project.²⁶
87. Mr Barker also expressed interest in further dealings between EDL and the State Government across the sites managed under the RAES scheme.²⁷
88. On 31 March 2014 Mr Todd Gordon, Commercial Manager of EDL, advised the department that EDL had provided a Draft Term Sheet to the council to inform the preparation of a new Power Purchase Agreement. This document was not supplied to

²³ Email from M Leane to EDL dated 7 November 2013.

²⁴ Letter from V Duffy to EDL dated 15 November 2013.

²⁵ Email from EDL to D Clark et al. dated 24 December 2013.

²⁶ Email from EDL to G Velaitis et al. dated 8 January 2014.

²⁷ Email from EDL to G Velaitis et al. dated 8 January 2014.

the department owing to what appears to have been an understanding at the time that the State Government would remain at arm's length from the project negotiations.²⁸

89. The parties appear to have largely adhered to this protocol in the lead-up to an anticipated meeting of the council to discuss the proposal.²⁹

The 2014 KelledyJones advice

90. On 19 March 2014 Mr Leane of the department emailed Mr Cameron and Mr Clark of the council:

You may be aware that we met with EDL (Keith and Todd) immediately after their last visit to you on 12 March. We had a wide ranging and very useful discussion about what EDL are proposing regarding [the] hybrid renewable-diesel generation system for Coober Pedy. In [sic] raised a couple of issues that are probably more DMITRE - DCCP issues rather than EDL - DCCP issues.

1. What form of procurement process are DCCP planning to follow given our discussions to date are along the lines of "single offer" for a range of good reasons? This will probably need to be articulated within Government at the point of seeking a commitment from the SA Gov for ongoing RAES subsidy to ensure "value for money". I think Gerry [Velaitis, of the department] has sent a separate email to Damien about this although I understand that Damien is on leave at the moment.
2. [...] While it may be early days yet, wondering if you have an reaction as to whether a similar commitment from the SA Gov in relation to RAES subsidy might suffice when you get to the point of considering a PPA (20 year?) with EDL? If we were to need something stronger than the above, we would potentially need a lot more time to secure that.

I say this without committing [the department] to any position as I don't even know who the Minister will be as yet, much less his particular views.³⁰

91. Mr Cameron of the council replied that same day to observe that the council would require legal advice 'in regards to any future contract with EDL including procurement.'³¹

92. On 1 April 2014 Mr Cameron emailed Mr Michael Kelledy of KelledyJones Lawyers:

EDL are currently putting together a proposal to access some Federal funding from ARENA to build a hybrid wind & solar system

Can you please advise on whether Council is legally able to enter into another agreement with EDL for another 20 year period in accordance with its procurement policy etc[.]³²

93. By email dated 4 April 2014 Mr Kelledy provided a response to Mr Cameron's queries (**the 2014 KelledyJones advice**):

[T]he most relevant provision in relation to the matter at hand is section 49(2)(c) of the [Local Government] Act which expressly recognises that the Council need **not** undertake a tender process (or any public or other prescribed process) each time it enters into a contract for goods or services. Rather, the most appropriate method of procurement in

²⁸ Email from EDL to M Leane and G Velaitis dated 31 March 2014 ('In line with the communication protocol we discussed I have not attached the Term Sheet to this email but rather I've asked Phil Cameron and Damien Clark [of the council] to forward it to you.')

²⁹ Email from EDL to P Cameron and D Clark dated 5 May 2014; email from M Leane to P Cameron dated 6 May 2014; email from EDL to P Cameron dated 9 May 2014; email from P Cameron to M Leane dated 9 May 2014.

³⁰ Email from M Leane to D Clark et al. dated 19 March 2014.

³¹ Email from P Cameron to M Leane et al. dated 19 March 2014.

³² Email from KelledyJones to P Cameron dated 4 April 2014.

any given situation is to be determined on a case-by-case basis with regard to the [Procurement] Policy and the Procedure.

Therefore, of direct relevance to your question, is the Council's Procurement Policy which has been developed and adopted under section 49 of the *Local Government Act 1999*. This Policy, consistent with section 49(2)(c), does not mandate tendering or other public processes as a blanket approach. This is also consistent with the second reading speech as recorded in Hansard when the provision was being debated in the Parliament in 1999.

The Council's Procurement Policy is consistent with the above. In particular, it addresses objectives of environmental protection which objectives [sic], in my view, may be relied upon as part of the reasons for not pursuing a tender or other public process. It is, however, necessary to obtain a Council resolution to waive the application of the Policy (i.e. to undertake a procurement process other than in compliance with the Policy) and to record the reasons for doing so.

[...]

[!]t is my opinion that -

- on the basis of the approach and the disclosure of the intellectual capital by EDL you would be justified in determining that there is only one such supplier reasonably available to the Council to achieve the objectives set out in the overheads,
- that the services being proposed are sufficiently specialised,
- supplemented by the fact that EDL approached the Council with the proposal and is a known entity and provider to the Council plus other reasons including those of achieving positive environmental outcomes, that
- the Council may justifiably resolve to waive compliance with its Procurement Policy and proceed to treat with just EDL in relation to the contract opportunity.

As a matter of due caution and to ensure that any suggestions of maladministration can be readily defended, I also recommend that if the Council does proceed in this manner that it retain its own specialist consultant to advise it that the costs of the services proposed to be embodied in the contract and [sic] fair and reasonable and unlikely to be improved through market testing.³³

94. By email dated 7 April 2014 Mr Cameron forwarded the 2014 KelledyJones advice to Mr Leane of the department.³⁴

Further legal advice

95. By email dated 6 May 2014 Mr Cameron emailed Mr Kelledy:

I have a draft report started for a special council meeting to be held next Tuesday[.]

Question:-

At this stage do I need a recommendation to waive going out to tender via Council's procurement policy??

Also Council has a prudential management policy - will we need to do a prudential report for this project as per S48 of the Local Gov Act?³⁵

96. That same day Mr Kelledy advised that 'it is not necessary to obtain a Council resolution which waives compliance with the Policy as part of this report.' Mr Kelledy further advised:

³³ Email from KelledyJones to P Cameron dated 4 April 2014.

³⁴ Email from P Cameron to D Clarke and M Leane dated 7 April 2014.

³⁵ Email from P Cameron to M Kelledy dated 6 May 2014.

If the Council ultimately determines to treat with [EDL] to the exclusion of all others then such a decision will indeed be required – however, the Council will require a dedicated report for such purposes which sets out the reasons for departure from its Policy and also the type of advice I previously identified in terms of independent verification of the tariffs and value for money outcomes.³⁶

97. Mr Kelledy further advised that the council would be required to obtain a prudential report in respect the project in order to satisfy section 48 of the Local Government Act.

The 13 May 2014 special meeting

98. On 13 May 2014 a special meeting of the council was convened during which the council received a confidential report from Mr Cameron and Mr Clark concerning the proposed hybrid renewable project.
99. At this meeting EDL also delivered a presentation to the council on the purported technical and commercial benefits of the proposal.
100. The report of Mr Cameron and Mr Clark summarised the development of the project to date and the cost savings forecasted by EDL. The report observed that the project stood to deliver Net Present Cost savings of approximately \$5.23 million over the life of the agreement.³⁷
101. The report also addressed the matter of the council's compliance with its Procurement Policy, restating elements of the 2014 KelledyJones advice:

Due that [sic] Council has a current power purchase agreement with [EDL] and that [EDL] are looking at a new Renewable Hybrid Power Generation proposal it is prudent to look at what form of procurement process is necessary to ensure "value for money". As a result legal advice (taking into account Council's procurement policy and the [EDL] proposal) has been obtained from KelledyJones Lawyers who have advised:-

in having regard to the content and tenor of the Policy and the considerations as set out in general form at pages 10-13 in particular of the Renewable Revolution Pty Ltd overheads that you have provided to me, it is my opinion that –

- *on the basis of the approach and the disclosure of the intellectual capital by EDL you would be justified in determining that there is only one such supplier reasonably available to the Council to achieve the objectives set out in the overheads,*
- *that the services being proposed are sufficiently specialised*
- *supplemented by the fact that EDL approached the Council with the proposal and is a known entity and provider to the Council plus other reasons including those of achieving positive environmental outcomes, that*
- *the Council may justifiably resolve to waive compliance with its Procurement Policy and proceed to treat with just EDL in relation to the contract opportunity.*

As a matter of due caution and to ensure that any suggestions of maladministration can be readily defended, I also recommend that if the Council does proceed in this manner that it retain its own specialist consultant to advise it that the costs of the services proposed to be embodied in the contract and [sic] fair and reasonable and unlikely to be improved through market testing.³⁸

³⁶ Email from M Kelledy to P Cameron dated 6 May 2014.

³⁷ Meeting agenda, p. 1.

³⁸ Meeting agenda, p. 2 (emphasis in original).

102. The report provided an indication of the future steps to be taken and an indicative timeframe, suggesting that a final investment decision would be required by March or April 2015.³⁹
103. The report also purported to identify the various risks to the council associated with the project:

The first risk is that [the department] will not be a party to a new funding agreement with Council after the current 5 year agreement expires. I raise this as a risk that is unlikely to come into reality, however whenever we look at such a long term contract we need to be aware that the current funding agreement with [the department] does not cover the full term of the proposed PPA contract.

The second risk is that [the department] will not take on the first 5 years of extra costs that have been proposed. For this project to provide savings to the Council/Government it requires 5 years of extra expenses. The project does not “breakeven” until year 2026, on current projections.

The third risk is that the inflation rate and Diesel escalation rate will not go up as proposed.

[...]

Therefore both Council and [the department] need to be aware that the assumptions about this project need to be rigorously examined when committing to a Hybrid PPA agreement.⁴⁰

104. The report concluded with the following recommendation:

That Council offer in principle support to Energy Developments Limited in submitting a full application to the ARENA Board for its Hybrid Renewable-Diesel power proposal for the future supply of power for Coober Pedy.

That prior to committing to any new final future long term agreement for a Hybrid Renewable-Diesel proposal that a commitment for ongoing RAES subsidy is agreed for the contract duration with the State Government (including parity for residential and businesses as agreed via the OPAL campaign).

That Council engages a suitable consultant to undertake a prudential report on the Hybrid Renewable-Diesel power proposal in accordance with Council’s policy and Section 48 of the Local Government Act 1999.⁴¹

105. This recommendation was adopted by resolution of the elected members at the meeting.⁴²

The ARENA funding commitment

106. On 20 May 2014 the department provided EDL with a second letter of support to be submitted by EDL to ARENA with its application for Commonwealth funding. In this letter the department observed that, subject to ARENA support, the project was anticipated to reduce the cost of generating electricity in Coober Pedy. The letter concluded on terms consistent with the earlier letter of support:

[The department] supports further negotiation of the PPA between EDL and [the council] based on principles set out in the Draft Term Sheet, provided that the project does not

³⁹ Meeting agenda, pp. 2-3.

⁴⁰ Meeting agenda, p. 3.

⁴¹ Meeting agenda, p. 4.

⁴² Meeting minutes, p. 3.

adversely affect the subsidy paid by the South Australian Government to [the council] under the RAES scheme.⁴³

107. On 14 July 2014 a representative of EDL notified the council and the department that EDL and ARENA had entered into a formal funding agreement in relation to the project.⁴⁴
108. Mr Nick Smith, the department's recently-appointed Director, Demand Management and Energy Services, forwarded a copy of this email to Mr Nick Antonopoulos, an Adviser to Mr Koutsantonis.⁴⁵ During interview with my investigation, Mr Smith indicated that this was intended to allow Mr Antonopoulos 'to be across it from a media perspective if the government wanted to do some media to support the fact that this had just been announced.'⁴⁶ Mr Smith indicated that he could not recall any previous communications concerning the project being provided to the Minister's office.⁴⁷
109. On 4 August 2014 Mr Leane of the department emailed a representative of EDL and Mr Clark of the council to confirm, *inter alia*, the department's request that EDL:

Compare the current PPA with the likely PPA elements to identify differences to assist [the department] to prepare briefings for senior management, Minister and Cabinet (essentially [the department] will need to demonstrate "value for money" from this project in order to respond to a likely request from DCCP for a letter of comfort from SA Gov).⁴⁸

110. This email concluded:

All of this will obviously be in cooperation with senior Officers from DCCP given SA Gov is "arm's length" from this project.⁴⁹

Technical review

111. From approximately 14 July 2014, the department began to discuss the prospect of engaging an external consultant to assist in reviewing the commercial arrangements under the proposal.
112. It should be noted that my investigation has been provided with exceedingly few records concerning the council's activities in respect of the project during this period. I address the matter of the council's record-keeping practices elsewhere in this report.
113. During this period, Mr Gordon of EDL emailed the department an updated Draft Term Sheet, preliminary siting plan, community consultation plan and sensitivity analysis concerning the renewable resources available at the project site.⁵⁰ These documents were scrutinised by the department, with comments and suggested alterations subsequently being communicated to EDL for consideration.⁵¹

⁴³ Letter from V Duffy to EDL dated 20 May 2014.

⁴⁴ Email from EDL to N Smith et al. dated 14 July 2014.

⁴⁵ Email from N Smith to N Antonopoulos et al. dated 14 July 2014.

⁴⁶ Interview with N Smith, 2 June 2017, transcript at 16:11.

⁴⁷ Interview with N Smith, 2 June 2017, transcript at 16:18 ('Q. Had there been previous communications with the Minister's Office concerning the project, can you recall? A. No, I can't recall that.').

⁴⁸ Email from M Leane to EDL et al. dated 4 August 2017.

⁴⁹ Email from M Leane to EDL et al. dated 4 August 2017.

⁵⁰ Email from EDL to M Leane dated 29 August 2014; email from EDL to C Way et al. dated 4 September 2014; email from EDL to N Smith et al. dated 22 September 2014; email from EDL to P Cameron et al. dated 30 September 2014; email from EDL to M Leane et al. dated 3 October 2014.

⁵¹ See e.g., email from M Leane to EDL et al. dated 27 September 2014; email from N Smith to M Leane et al. dated 29 September 2014.

114. On 1 October 2014 a representative of EDL supplied the department and the council with a copy of Hydro Tasmania's wind and solar resource analysis concerning the King Island reference site.⁵²
115. On 1 October 2014 Mr Leane emailed Mr Clark of the council to propose that the department and the council jointly seek advice concerning the project from 'someone who has experience with similar energy related PPAs elsewhere in the country.'⁵³
116. On 3 October 2014 Mr Clark and the department agreed to seek a meeting with Mr Brett Thomas of the SABBLE Group (**SABBLE**), a consultancy firm specialising in renewable energy projects.⁵⁴
117. I understand that the department met with or otherwise sought the advice of Mr Thomas on a number of occasions over the months that followed. During interview with my investigation, Mr Smith described these discussions:
- A. We just talked about the PPA and the financial modelling, you know, where were potential areas of risk, were the costs fair and reasonable from a capital perspective, from an operational perspective. Just, you know, we talked through the project in general.⁵⁵
118. The department was unable to supply my investigation with records pertaining to its verbal discussions with Mr Thomas; however I have reviewed the email trail between the parties. It is evident that Mr Thomas reviewed EDL's financial modelling at some length and provided regular input on representations made by EDL as the project progressed.
119. During interview with my investigation, Mr Smith observed that the input of Mr Thomas was important to the department's estimation of the value posed by the project:
- A. I think it was useful; absolutely. You know, in terms of for somebody who is a renewable expert who had been a managing director of ACCIONA [an infrastructure and renewable energy conglomerate] in Australia, who'd built wind farms, who had built -- you know had intimate knowledge of renewables. [...] We had confidence, you know; very strong commercial background, very strong understanding of the renewables sector. I had confidence in him. He knew the operating costs of wind farms and that side of things, so I was confident that the advice he was providing was sound.
- Q. So he was providing, I suppose, technical advice concerning the proposal?
- A. Yeah.
- Q. Did he provide any advice at all as to what might be achievable if the project did go to market and whether the project reflected, I suppose, what could be achieved?
- A. Not that I recall.⁵⁶
120. I refer to and reproduce aspects of Mr Thomas' advice in subsequent passages of this report.

Meeting with Mr Koutsantonis

121. On 20 October 2014 Mr Koutsantonis met with representatives of EDL to discuss the project.

⁵² Email from EDL to P Cameron et al. dated 1 October 2014.

⁵³ Email from M Leane to D Clark dated 1 October 2014.

⁵⁴ Email from D Clark to N Smith dated 3 October 2014.

⁵⁵ Interview with N Smith, 2 June 2017, transcript at 18:13.

⁵⁶ Interview with N Smith, 2 June 2017, transcript at 19:4.

122. According to Mr Koutsantonis, this meeting was convened at the request of EDL in the context of EDL's discussions with the department and ARENA concerning the hybrid renewable project.⁵⁷
123. Mr Koutsantonis submitted that he now has only a general recollection of the meeting. According to Mr Koutsantonis, during the meeting he raised with EDL his 'concern that any movement away from diesel not increase power prices or impact on the reliability of electricity supply.'⁵⁸
124. On 23 October 2014 an inter-departmental email was sent by Mr Leane to Mr Smith and Mr Duffy that purported to summarise various aspects of the 20 October 2014 meeting and Mr Leane's subsequent discussions with EDL. Of the meeting, Mr Leane noted:
- The Minister sought a greater level of transparency from EDL which was in my view politely batted away. Commercial in confidence mentioned and a commitment to continue to provide "explanations".
 - In response to the Minister's question about why he should consider supporting the project, EDL stressed diesel savings, particularly reduced exposure to price volatility and environmental benefits.
 - The Minister queried whether tariffs would reduce. My response was that while he set the tariffs, [the department] would be unlikely to recommend this given overall costs to the Government only go down slightly and tariffs are already subsidised.⁵⁹
125. Mr Koutsantonis confirmed to my investigation that Mr Leane's observations are broadly consistent with his recollection of the meeting. Mr Koutsantonis indicated that he cannot recall being personally involved in any other discussions with representatives of EDL concerning the project.⁶⁰
126. Of his subsequent conversation with Mr Gordon of EDL, Mr Leane relevantly advised:
- I indicated to Todd [Gordon] that big picture, there was a bit of confusion surrounding the complexities of the contractual arrangements between EDL, [the council] and SA Gov. That tended to colour some of the discussion around who might be seeking support from the Minister.
 - Todd and I discussed the process for signing the PPA. SA Gov is not directly involved as PPA is between EDL and [the council], however we anticipate that [the council] will seek some assurance from the Minister re longevity of the subsidy arrangements. The Minister raised this in a general sense [during the] 20/10 meeting by pointing out that our commitment to [the council] is limited to 5 years while the PPA will be 15-20 years.
 - I further suggested that the Minister's response would likely be informed by information provided by [the council] about the procurement process they have followed (effectively "single offer") and the strength of arguments presented to support the PPA being "value for money".⁶¹

Continued review

127. On 13 November 2014 Mr Thomas emailed the department a document summarising his preliminary comments on the project. These comments variously touched upon the project's commercial configuration, pricing, 'risk issues' and the underpinning resource estimates supplied by EDL.⁶²

⁵⁷ Letter from Mr Koutsantonis dated 25 January 2018.

⁵⁸ Letter from Mr Koutsantonis dated 25 January 2018.

⁵⁹ Email from M Leane to N Smith et al. dated 23 October 2014.

⁶⁰ Letter from Mr Koutsantonis dated 25 January 2018.

⁶¹ Email from M Leane to N Smith et al. dated 23 October 2014.

⁶² Email from SABBLE to N Smith dated 13 November 2014.

128. Although Mr Thomas' comments raised a number of queries and issues for further exploration, nothing within the records supplied to my investigation suggests that SABBLE cautioned against the State Government subsidising the project.
129. On 14 November 2014 a representative of EDL supplied the department with information to explain the assumptions underpinning EDL's financial model and EDL's approach to developing the proposed tariffs, together with data said to support EDL's diesel price escalation analysis. By this same email, EDL also provided a proposed performance guarantee framework for the department to consider.⁶³
130. On 14 November 2014 Mr Smith emailed other officers within the department, together with Mr Thomas of SABBLE:
- I anticipate that we will be having another conversation with EDL either later today or perhaps Monday. We agreed with Todd that we would continue to keep the dialogue open and regular so that we can address the concerns we have around transparency and risk associated with the project.
- My preference was complete transparency given that this is a Monopoly supply situation and one that extends for 20 years is what is [sic] the risk to SA Government in supporting this and does the project deliver a value for money outcome for the DCCP, DSD, and the broader SA community.⁶⁴
131. On 19 November 2014 Mr Thomas provided further commercial and technical advice concerning the project and the terms of the draft PPA that was then in development.⁶⁵
132. On 28 November 2014 Mr Smith forwarded to Mr Thomas a copy of an updated PPA tariff comparison spreadsheet submitted by EDL. Mr Smith commented that the assumptions underpinning certain of EDL's formulas raised concerns in his mind as to 'the potential risk for the SA government in relation to financial impacts'.⁶⁶
133. Mr Smith also suggested a number of comparative scenarios designed to address this risk. He requested that Mr Thomas produce a sensitivity analysis concerning addressing diesel price escalation and provide further advice on another 'fixed charge structure (or alternative) for solar and wind would deliver more flexibility and shared risk' between EDL and the State Government.⁶⁷
134. On 5 December 2014 Mr Thomas responded to indicate that he generally agreed with Mr Smith's assessment in respect of these matters. At this time Mr Thomas also supplied the diesel price escalation sensitivity analysis that had been requested by the department.⁶⁸
135. It is evident that the department continued to scrutinise EDL's financial modelling over the months that followed.⁶⁹

⁶³ Email from EDL to N Smith et al. dated 14 November 2014.

⁶⁴ Email from N Smith to C Way et al. dated 19 November 2014.

⁶⁵ Email from SABBLE to N Smith et al. dated 19 November 2014.

⁶⁶ Email from N Smith to SABBLE dated 28 November 2014.

⁶⁷ Email from N Smith to SABBLE dated 28 November 2014.

⁶⁸ Email from SABBLE to N Smith dated 5 December 2014.

⁶⁹ See, e.g. email from J Beck to N Smith dated 16 December 2014.

December 2014 correspondence

136. Over the course of December 2014 the department and EDL exchanged a series of lengthy communications centered around the perceived risks under EDL's proposed model and the need for further information from EDL. EDL appears to have largely complied with the department's requests for information.⁷⁰
137. The department also requested that Mr Thomas review EDL's response to various technical matters raised by the department. Mr Thomas responded on 23 December 2014, summarising his advice in the following terms:

EDL appear to continue to base their commercial approach on the fact that ARENA has approved the project for funding and hence has assessed the cost and investment structure for the project. I think that DSD's response to EDL has two parts:

1. Based on SA government's desire to promote renewables – under this element, the project is innovative and we assume that it has been assessed by ARENA against other generally similar projects with solar, diesel components (i.e. hybrid solar). DSD could therefore reasonably assume that this project reflects the current market for hybrid solar, wind, diesel arrangement.
 2. The commercial assessment – here, DSD still has little information and EDL rely on ARENA's assessment of the commercial and financial structure as validation that it provides best value to DSD. However it needs to be recognised that ARENA's mandate is to promote and commercialise new and additional renewable energy and hence the assessment criteria is broader than the commercial PPA through the fact that ARENA has assessed the capital, operating and investment structure. However DSD is still not privy to this information and hence cannot assess:
 - how such figures have been prepared
 - the levels of contingencies etc in the pricing (perhaps 5, 10, 15 or more \$)
 - the expended costs-to-date that have been included
 - The future development costs that have been included to negotiate and delivery [sic] the PPA, financial close etc including internal time, legal documentation, financing DD (if required)
 - the development fee that is included by EDL (if any)[.]⁷¹
138. I reproduce the pertinent aspects of the position communicated by EDL and Mr Thomas' responding comments in the passages that follow:

Hybrid Fixed Charges

EDL: Fixed charges under the proposed PPA were calculated to result in a net cost to DCCP over 20 years that is lower than continuing under a diesel-only power station.

SABBLE: This seems to be the constant, base assumption from EDL that the project will be beneficial to DSD because the fixed cost component is lower than the existing. However this doesn't take into account the fact that DSD is looking to reduce future costs and hence the BAU case (or marginally less) is something that is required for any new system.

EDL: Under the proposed PPA, the hybrid charges will escalate at CPI and are not linked to fuel costs which have historically escalated above CPI.

The funding grant amount was agreed with ARENA by reference to EDL's detailed assumptions regarding capex, lifecycle costs, EDL return metrics and the fixed charges as described above.

SABBLE: However, it needs to be noted that ARENA has different drivers to DSD in that ARENA is looking to catalyse the delivery of new renewable technologies

⁷⁰ Email from M Leane to EDL dated 16 December 2014; email from EDL to V Duffy dated 18 December 2014.

⁷¹ Email from SABBLE to N Smith dated 23 December 2014.

(including hybrid technologies) and its principal points of reference for acceptability of a project are adherence to ARENA program merit criteria, technology viability, commercialisation pathway and reasonable commercial and investment structure measured against other proposed industry ARENA projects and benchmarks. From a DSD perspective, its criteria are firstly [sic] does the proposed generation system meet supply requirements at an acceptable cost to Coober Pedy and DSD. Additionally, of course the project has benefit because it is renewable based and hence supports SA government policy to increase renewable supply.

EDL: ARENA has compared this project against others nationally to ensure it is cost competitive and EDL's return is reasonable based on the risks of construction and operation for 20 years.

SABBLE: I would not expect that ARENA has a large number of hybrid solar, wind, diesel projects at the scale proposed for Coober Pedy. ARENA, whilst being very conscious of projects being appropriately structured to provide reasonable investor returns and not windfall gains, is unlikely to scrutinise detailed capital costs, development costs, development fees etc as would be the case in a competitive commercial approach or under a commercial negotiation.

EDL: In the absence of ARENA funding (\$18.5m), which is approximately half the upfront capital cost, the project would not be commercially viable at the fixed charges proposed.

SABBLE: Fair point and accepted. Hence if DSD **does** want to establish a hybrid renewable project at Coober Pedy in the immediate future (i.e. under current technology and pricing structures), then the proposed project is very likely to be the lowest cost option given the ARENA funding support.

EDL: A key feature of renewable projects is that they have high upfront capex, low opex and therefore result in a higher fixed cost and much lower variable charges.

The amount of ARENA funding was determined to make the project commercially viable while not delivering windfall gains to either of the commercial parties.

SABBLE: However, DSD is not privy to such determination and is not in a position to determine the financial and commercial threshold that was applied in determining "no windfall gain". ARENA's view on this threshold may not be the same as DSD.

ARENA Funding Grant

EDL: EDL discussed the concept of claw back provisions relating to future diesel prices with ARENA funding during the negotiation of the agreement.

No claw back or flexed arrangement was included due to the complexity of the contractual arrangements between ARENA, EDL, DCCP and DSD and how such a claw back mechanism would work contractually.

SABBLE: However, DSD would be interested to understand the structure and pricing of the PPA model that has been built into the EDL investment model for the ARENA funding agreement. Particularly, I would expect that if the ARENA PPA model varies from the model ultimately negotiated with DSD (assuming that this occurs), then there may be a claw-back provision on the funding to reflect any increase in cash flows above those modelled in the ARENA agreement. Perhaps DSD should seek confirmation from EDL that the proposed PPA structure and pricing levels are the same as those included in the ARENA funding agreement model.

Diesel and oil price

EDL: The project effectively provides a 70% hedge to DSD from exposure to future diesel price volatility and escalation.

SABBLE: Previously DSD has stated that reduced volatility adds significant value. However, this doesn't acknowledge that the pricing model assumes an escalation rate for diesel that may not occur in the forward period and that there is no mechanism whereby the fixed charge component is adjusted for downward pricing of diesel.

DSD exposure to cost overruns

EDL: DSD is not exposed to increased project capex.

SABBLE: However, I would assume that the EDL capex assumptions in the ARENA funding model include reasonable contingencies. We do not know what contingency levels have been assumed and hence we are relying on ARENA ensuring that these are not excessive. Presumably, such contingencies are embedded in the capital structure that underpins the fixed cost proposal to DSD.

EDL: EDL bears capex and opex risks.

SABBLE: Similarly as above, DSD does not have information on the level of actual costs and included contingencies and hence relies on ARENA's assessment noting that ARENA's drivers are different to DSD's.⁷²

139. It is evident from the records supplied to my investigation that the department sought further information from EDL in accordance with Mr Thomas' recommendations and, it appears, to the department's general satisfaction.⁷³

The Unsolicited Proposals Guidelines

140. On 14 January 2015 a representative of EDL forwarded to Mr Smith a copy of the Department of the Premier and Cabinet's *Guidelines for Assessment of Unsolicited Proposals (the Unsolicited Proposals Guidelines)*.⁷⁴ By email that same day, Mr Smith referred EDL to various other State Government procurement standards, commenting:

I hope this helps provide some further insight to the vast array of documentation and criteria required to ensure probity, value for money, and long term risk consideration required for the expenditure of taxpayer funds.

As discussed, I will endeavour to come back to you this afternoon on the criteria we would like to consider in regard to the Coober Pedy Hybrid Project.⁷⁵

141. Mr Smith submitted at interview with my investigation:

A. I remember at that time it was the unsolicited bid or the State Coordinator-General's office that had just been set up, and in discussions around providing EDL with access to their -- to the land without having gone through the lease process, there was a discussion around whether we needed to do an unsolicited bid proposal for them to take a lease over the land that had been excised from the opal mining fields.

Q. This is Crown land?

A. Yes. Yeah.

Q. [...] It appears that EDL has forwarded a copy of the Unsolicited Proposals Guidelines to you. Can you recall what prompted that exactly?

A. I think a conversation I must have had with Geoff around he was looking for more information, I said "Well what have you been sent?" And that's when he has forwarded

⁷² Email from EDL to V Duffy et al. dated 18 December 2014; email from SABBLE to N Smith dated 23 December 2014.

⁷³ See e.g., email from N Smith to EDL et al. dated 19 February 2015; email from EDL to N Smith and ARENA dated 19 February 2015 (concerning the alignment of EDL's financial modelling with the information provided to ARENA in support of the funding agreement).

⁷⁴ Email from EDL to N Smith dated 14 January 2015.

⁷⁵ Email from N Smith to EDL dated 14 January 2015.

me the stuff from [the Department of the Premier and Cabinet]. I can't recall the exact conversation, what prompted this email.⁷⁶

Continued review

142. Sometime in or around December 2014 the department commenced developing an analysis of the areas of risk under the proposal that it considered were in need of further clarification. The department sought advice concerning this analysis from Mr Thomas on 30 December 2014.⁷⁷

143. Mr Thomas subsequently responded on 5 January 2015:

I think your summary is comprehensive. In combination with the earlier emails on the EDL proposal, I think that we have covered things off.⁷⁸

144. This document was subsequently supplied to EDL for comment on 5 January 2015,⁷⁹ with EDL issuing a response on 13 January 2015.⁸⁰

145. I reproduce the pertinent passages of the document, including EDL's response, in the passages below (emphasis in original):

Additional Areas of concern:

1. The current PPA runs until 2018. Financially SA Government may be best positioned to wait for conclusion of the PPA contract between EDL and DCCP.

EDL response: The ARENA funding has been set at \$18m to allow the Hybrid PPA to deliver a lower cost than a diesel alternative. This "free" funding won't be available at the end of the current PPA in 2019 (not 2018). Funding Milestones under the current ARENA program must be achieved by 30 June 2018 to receive the milestone payments.

2. As a monopoly supply situation and given the uncertainty in oil prices, DCCP may be wise to approach the market for tender supply for supply options, recognising that this may result in this project being scrapped.

EDL response: EDL has based the Hybrid PPA pricing upon our experience of the cost of ongoing supply from a diesel power station for the town. This diesel base case price was then discounted slightly to make it attractive to DCCP and the SAG. EDL has already provided detailed information regarding the diesel base case to SAG. The level of ARENA funding was determined as the difference between the discounted base case and the actual cost of the hybrid plant. ARENA has benchmarked our hybrid plant cost estimates against other projects nationally, and agreed to provide funding based on these estimates. If DSD has a different view of EDL's diesel base case, we would like to understand those views.

[...]

5. Current grant runs for 5 years not 20. A risk associated with a change in policy from Government which will impact DCCP unless this is committed to otherwise.

EDL response: It is understood that this will be addressed in DCCP's Prudential Review.

⁷⁶ Interview with N Smith, 2 June 2017, transcript at 19:37.

⁷⁷ Email from N Smith to SABBLE et al. dated 30 December 2015.

⁷⁸ Email from SABBLE to N Smith et al. dated 5 January 2015.

⁷⁹ Email from N Smith to EDL et al. dated 5 January 2015.

⁸⁰ Email from EDL to V Duffy et al. dated 13 January 2015.

6. Overall project financial analysis needs to be considered. What is the profit over 20 years for EDL? Is it reasonable? Is it comparative with the existing PPA? As this is a monopoly supply situation that will not be going to market for comparative analysis, is the deal commercially acceptable and best value for money long term?

EDL response: EDL's commercial returns are not relevant to SAG's evaluation of the long term financial attractiveness of the proposed PPA charges. EDL's returns have been approved by ARENA which is driven to minimise the funds applied to the project through setting the funding level to a point that EDL achieves no more than what ARENA considers is a reasonable return. The funding arrangement was itself a robust negotiation between EDL and ARENA which has resulted in EDL accept a return lower than its core business hurdle rate in view of the strategic nature of this project.

It is reiterated that the project as proposed is only possible due to the ARENA funding which enables EDL to invest and provide DCCP the diesel displacement benefits many years ahead of when such a high penetration renewable hybrid would be commercially viable on a stand alone basis. The competitive process has been the allocation of free capital from ARENA which has enabled EDL to offer its customer a long term reduction in power cost AND a reduction cost volatility AND a reduction in greenhouse gas emissions.

7. SA Government has provided their support to this project, on the provision that there will be no adverse impact to the financial subsidy being paid to the DCCP. At this stage it appears unlikely that the proposal will mitigate cost and risk to the SA Government.

EDL response: The underlying structure and principles adopted in the proposed PPA have not changed since EDL first approached DCCP for support. If there are additional items to those raised above that you believe require consideration, please raise them so they can be addressed as expeditiously as possible.

146. During interview with my investigation, Mr Smith affirmed that the above considerations were reflective of the issues that the department was grappling with at this stage of the project's development.⁸¹

147. When asked to comment on EDL's response to these issues, Mr Smith advised my investigation:

- A. Some of it was fair and reasonable, some of it I might have thought, that's a bit wet, a bit weak, and so I did as much drilling into stuff as required.

[...]

- Q. You have got the department raising the issue of whether or not [...] a better project could be obtained by going to market and you have a response from EDL[...] [...] Did that satisfy the department or did the department continue to consider those issues going forward?

- A. I guess it's part of any due diligence, isn't it? I've [later] done a SWOT analysis that says that one of the threats is we are not going to the market place. I want them to justify why to my satisfaction that, you know, there is a commercially reasonable reason for why you should proceed down this path. Now council had taken their own legal advice and said that they were entitled to go down this path. You had these guys that were contracted until the end of 2019. They had \$18.5 million worth of ARENA funding. Nobody else was in a position to build a project at Coober Pedy. Nobody else could deliver it except for EDL under the same, you know, quantum and scope.⁸²

148. Mr Smith otherwise submitted that aspects of this analysis were intended for the purpose of considering a capital restructure of the project that the department was then

⁸¹ Interview with N Smith, 2 June 2017, transcript at 25:17 ('A. Absolutely.')

⁸² Interview with N Smith, 2 June 2017, transcript at 25:25

contemplating. This reconfiguration was later abandoned in accordance with Treasury advice.⁸³

149. On 7 January 2015 Mr Smith forwarded to Mr Thomas a copy of EDL's most recent modelling, including a profit and loss sheet that he had prepared 'to try and understand the profitability of the project overall.' Mr Smith requested Mr Thomas supply his own assessment of the operating expenses of wind and solar generation under the project and 'review my costs and consider if I have missed anything from your perspective.'⁸⁴
150. Mr Thomas responded on 12 January 2015 to provide detailed advice around the projected operating costs under the project.⁸⁵
151. Sometime in or around January 2015 the department began to prepare a SWOT (Strengths, Weaknesses, Opportunities and Threats) Analysis with respect to the project. Mr Thomas later provided substantive input concerning this document. At this time, Mr Thomas opined that 'it is clear at present that no other hybrid renewable technology would be able to provide power at the costs of the proposed EDL project because of the ARENA equity/grant support.'⁸⁶
152. On 29 January 2015 Mr Smith forwarded a copy of EDL's latest financial modelling to Mr Clark of the council.⁸⁷ That same day, Mr Smith emailed Mr Clark a revised copy of the department's SWOT Analysis.⁸⁸ Included under 'Strengths' was the department's observation that 'ARENA funding makes this project financially possible now which no other renewable project currently has capability on.' Under 'Weaknesses', the department observed, *inter alia*, that the council would not 'test the market for alternative supply options.' Under 'Threats', the department noted that 'RAES procurement will be approaching the market for this type of services in February which may throw up more cost effective options.'
153. During interview with my investigation Mr Smith advised:
- A. [The council] were saying "We'd like to see a SWOT analysis on the project" and I went well, here's open transparent communication around all the things that they should be considering as a council before they make a decision. [...] If you assume that the Coober Pedy -- if you assume that they received this project, the weakness of moving with the Coober Pedy hybrid project is that they won't test the market for alternative supply options.
- Q. On the first page again under the heading "Opportunities" you can see the third point: "EDL are one of the few organisations in Australia most capable of bridging this technology further." Why was that?
- A. Because I think, you know, if this comes off and it's proven to be commercially viable, then you have a company who has got, you know, the broad installed megawatts across Australia and globally. They've got a strong balance sheet, they have very good technical knowledge and understanding of remote areas and there are opportunities to then leverage this technology and scale it down/scale it up to produce, you know, more cost-effective options in the future.
- [...]
- Q. Were there any other organisations operating in Australia that had a comparable potential to deliver?

⁸³ Interview with N Smith, 2 June 2017, transcript at 25:30 ('A. it was designed to consider the capital restructure that we had spoken with ARENA and EDL about, about potentially the South Australian government tipping in \$2.5 million worth of capital in light of the huge drop in oil prices. [...] In the end, that was rejected by Treasury, they didn't want to take that risk and they said "We would rather just take the oil volatility risk".')

⁸⁴ Email from N Smith to SABBLE dated 7 January 2015.

⁸⁵ Email from SABBLE to N Smith dated 12 January 2015.

⁸⁶ Email from SABBLE to N Smith dated 27 January 2015.

⁸⁷ Email from N Smith to D Clark dated 29 January 2015 (1).

⁸⁸ Email from N Smith to D Clark dated 29 January 2015 (2).

- A. Well, yes, there are. I mean they are one of the few organisations that I saw as being able to deliver this with the experience. [...] But, you know, when I say “few” I mean a handful of organisations. There’s a lot of small organisations that would pretend they could deliver this, but in reality they would struggle.⁸⁹

154. Mr Clark responded on 30 January 2015 to observe that he ‘agreed’ with the SWOT Analysis provided by Mr Smith. In a follow-up email, Mr Clark advised:

In terms of what Council would require from the State we believe it would be the following:

- A “Letter of Comfort” from the minister saying something to the effect that the State is aware of the project etc and that they support Council entering into a contract with EDL for the period of 20 years.
- Also, some sort of commitment that the government will “stand behind” Council with a funding deed with no less favourable terms than what we have at the moment.⁹⁰

155. On 28 January 2015 a representative of EDL provided the department and the council with a first draft of the proposed new PPA.⁹¹

Treasury and Cabinet discussions

156. From approximately 5 February 2015 the department engaged in discussions with representatives of the Department of Treasury and Finance (DTF) around the then-proposed capital restructure of the project.⁹²
157. On 18 February 2015 Mr Smith advised the DTF and Mr Gaby Jaksa, Deputy Crown Solicitor, of the department’s intention to make a recommendation to Cabinet in relation to the project.⁹³ Mr Jaksa provided limited advice to Mr Smith on the possible application of Treasurer’s Instructions 8 and 15 to any Deed of Grant entered into by Mr Koutsantonis.⁹⁴
158. Documents provided to my investigation suggest that on 1 June 2015, Cabinet approved a submission for Mr Koutsantonis to enter into a Letter of Comfort ‘on similar terms to the current energy subsidy to enable [the council] to enter into the PPA with EDL.’⁹⁵

Submission before the Unsolicited Proposals Steering Committee

159. On 9 April 2015 EDL submitted a proposal concerning the hybrid renewable project to the Unsolicited Proposals Steering Committee (USPSC). The USPSC is chaired by the State Coordinator-General and is responsible for assessing unsolicited proposals against the Unsolicited Proposals Guidelines.
160. The unsolicited proposal abstract submitted by EDL did not refer to the anticipated State Government subsidies to the council in connection with the proposed hybrid generation project. Rather, the abstract appeared to limit EDL’s proposal before the USPSC to a request to lease two Crown land sites in the vicinity of the existing diesel facility and for the granting of an easement running across land from the proposed wind turbine area to the facility.

⁸⁹ Interview with N Smith, 2 June 2017, transcript at 29:8.

⁹⁰ Email from D Clark to N Smith dated 30 January 2015.

⁹¹ Email from EDL to P Cameron et al. dated 28 January 2015.

⁹² See e.g., email from N Smith to G Fenn dated 5 February 2015.

⁹³ Email from N Smith to G Jaksa and G Fenn dated 18 February 2015.

⁹⁴ Email from G Jaksa to N Smith and G Fenn dated 18 February 2015.

⁹⁵ Briefing Minute dated 9 September 2015.

161. Elsewhere in the proposal, under the heading '[c]osts and requirements of government', EDL disclosed:

[EDL] requests the State Government to grant [EDL] leases over areas of land for the Wind Turbines and Solar PV Array at a fair market rent.

[EDL] requests the State Government of South Australia [sic] to grant [EDL] an easement over an area of land in which to run a power cable between the Wind Turbines, Solar PV Array and the existing power station at Coober Pedy.

The SAG provides electricity subsidy [sic] for residents in Coober Pedy through the [council]. [EDL] has requested further SAG support for [the council] in executing a 20 year PPA with [EDL] by agreeing to continue to provide financial support to subsidise the total cost of electricity supply in Coober Pedy over the life of the PPA. The PPA is expected to deliver long term cost savings to [the council] and in turn the SAG over the diesel only alternative. This is the subject of a separate approval process run through Energy Markets and Programs in DSD.

162. It is clear that the department was aware of EDL's proposal before the USPSC and was in favour of the project proceeding outside of the formal Unsolicited Proposals Guidelines process. On 11 May 2015 Ms Catherine Way, the department's Industry Development Manager, emailed the Office of the State Coordinator-General:

I think this one is straight forward and does not need to be considered through the unsolicited proposal process.

Firstly, EDL are after a lease (not freehold) for the land and as such, their structures are not permanent. Secondly, EDL have been providing electricity to the township of Coober Pedy for the past 11 years under a contract with the [council]. Their proposal is to change the way they provide electricity through hybridising the plant. So they have an existing contract to provide electricity.

The other issue is that [Energy Markets and Programs] provides a subsidy for electricity to the [council]. EMP are supportive of the project and has drafted a letter of comfort from the Minister that states they will continue to provide this support. This was to go to Cabinet, but Cabinet Office has requested it be signed off at CE level.⁹⁶

163. On 18 May 2015 the State Coordinator-General wrote to EDL to advise:

The [USPSC] has determined that the most appropriate way to progress this proposal is that it should be managed directly by the Department of State Development and the Department of Environment, Water and Natural Resources and does not need to be considered further as an Unsolicited Proposal.

Please continue to work directly with both of these departments regarding this project.⁹⁷

164. By letter dated 2 March 2017 the State Coordinator-General advised my Office:

The unsolicited proposal from Energy Generation Pty Ltd only related to the lease of crown land. Based on advice from the Department of State Development that lease rates for wind turbines in less remote areas are \$10,000 per turbine, and given that there are only three turbines and land for the solar array, the annual value of the lease is small and significantly below the \$1 million threshold [under the Unsolicited Proposals Guidelines].

165. The State Coordinator-General went on to submit:

⁹⁶ Email from C Way to M Williams and A Ngo dated 11 May 2015.

⁹⁷ Letter dated 18 May 2015.

The USPSC considered this unsolicited proposal out of session on 15 May 2015 and endorsed the recommendation that it should be managed directly by the Department of State Development and the Department of Environment, Water and Natural Resources.

[...]

The [USPSC]'s decision to direct this proposal to the Department of State Development and the Department of Environment, Water and Natural Resources does not imply support or otherwise for the proposal. It merely reflects the low value of the land transaction which falls below the threshold value for application of the [Unsolicited Proposal Guidelines].

Developing the PPA – March to June 2015

166. On 26 March 2015 the council obtained legal advice from KelliedyJones Lawyers identifying the clauses of the PPA requiring further scrutiny from the council's perspective.⁹⁸
167. On 14 April 2015 Mr Koutsantonis wrote to the council to advise that, pursuant to section 37 of the *Development Act 1993* and Schedule 8 of the *Development Regulations 2008*, he had no objections to EDL's proposed hybrid generation facility being constructed within the Coober Pedy Precious Stones Field.⁹⁹
168. On 21 April 2015 the council held an ordinary meeting during which then Mayor Stephen Staines delivered a report briefly touching upon the hybrid generation proposal:

The Coober Pedy Renewable Hybrid Project proposal by [EDL] is progressing rapidly however I am becoming increasingly concerned with the lack of detailed, orderly information being provided to Council with regards to the project. I am yet to be made aware how the project will benefit Coober Pedy residents and ratepayers other than a continuity of power supply (which is an existing requirement under the current contract up until 2019) and a 'good feeling' that up to 70% of our community's power requirements will be generated from renewable sources. I am also concerned that alternative energy supply options have not been tested by approaching the open market.

Council is yet to be presented with an independent assessment by a suitably qualified expert demonstrating the merit of the project to Council and the broader community. In my opinion, the independent assessment is required to ensure that the appropriate level of due diligence is undertaken by Council prior to Council entering into a 20-year Power Purchase Agreement with EDL. Once the requested information is received and reviewed, Council will then be in a position to make decisions that serve the best interests of the people that we represent.¹⁰⁰

169. I pause to observe that I do not know if the above criticisms concerning the level of information being provided to the council in respect of the project were valid because the council does not appear to have retained any real records concerning this period of the project's development.
170. At this same meeting the council and Mr Gordon of EDL responded to various questions on notice concerning the proposal.¹⁰¹

⁹⁸ Email from A Crichton to D Clark dated 26 March 2015.

⁹⁹ Letter to P Cameron dated 14 April 2015.

¹⁰⁰ Meeting minutes, pp. 4-5.

¹⁰¹ Meeting minutes, pp. 8-9.

171. Over the course of May 2015 the department, the council and EDL identified the various matters requiring attention before the PPA could be finalised.¹⁰² This led to Mr Clark advising the department on 28 May 2015:

These are the main issues Council has at this point with EDL:

1. More community support from EDL e.g. community events. At the moment they have committed \$10K per year
2. More community support contract [sic] for construction, civil concrete, local supplier directory. They are a little luke warm [sic] on this issue at the moment.
3. What happens if EDL drop out of the contract (liquidation) transfer price, contract payout?
4. Change in technology over the life of the contract, who gains?

This is the main issue Council has with [the department]

1. Price parity with Adelaide and Domestic & [sic] Commercial consumers over the life of the contract.¹⁰³

172. I understand that these matters were discussed at a meeting between the council and the department on 2 June 2015.¹⁰⁴

The ZEN proposal

173. In or around early June 2015 the council received an indicative proposal for an alternative renewable energy generation project for the township (**the ZEN proposal**).
174. The ZEN proposal foreshadowed a merger of ZEN Energy Systems, Diamond Energy and Central Power Australia which, it was proposed, would develop a 100% renewable energy generation facility in Coober Pedy.
175. Noting that cost assumptions were 'approximate only and require[d] further assessment', the indicative proposal suggested that electricity prices under the ZEN proposal would fall below on-grid prices after the first five years, eliminating the need for any subsidy from the South Australian Government. It was further suggested that the annual cost to the South Australian Government under the first five years of the project would be reduced from \$5.4m to \$1.6m.
176. The indicative proposal closed:
- More detailed work is required to provide a firm final proposal. There is a lack of certainty as to whether such work would be in vein [sic], and therefore request [sic] the establishment of an agreement for payment of feasibility costs, which will only be paid if we submit a final firm proposal and it is not accepted by Coober Pedy. If the proposal is accepted, then the payment will be capitalised into the broader project and will not be required to be paid.
177. On 5 June 2015 Mayor Staines forwarded the indicative proposal to the department for consideration.¹⁰⁵
178. By email that same day, Mr Smith provided detailed feedback on the proposal on behalf of the department:

¹⁰² See, e.g. email from N Smith to EDL and D Clark dated 22 May 2015.

¹⁰³ Email from D Clark to N Smith dated 28 May 2015.

¹⁰⁴ Email from D Clark to N Smith dated 2 June 2015.

¹⁰⁵ Email from S Staines to N Smith and D Clark dated 5 June 2015.

I have had a look at the document and whilst it appears to have some potential, it is very light on content and would require a significant body of work to be undertaken to ascertain the real costs and understanding of the proposal. In addition the current situation does not reflect the true costs of operation and overstates this.

I have endeavoured to cover off on some of the key areas that Council would need to consider if they are serious about considering the Zen proposal:

1. The EDL proposal has taken 2 years of work to reach this stage. It carries \$18.5 million of ARENA funding, has involved significant work involving community consultation, exclusion of land, detailed financial analysis, and has already been to tender for the provision of services for the project.
2. The EDL proposal has just received Cabinet Approval from the SA Government to support this process and has received Treasury support.
3. The Zen proposal does not detail any of the methodology behind it's [sic] assumptions and does not detail how the proposal would integrate the systems – a key technical challenge for EDL – to deliver sustainable, reliable, and high quality power to the DCCP.
4. The proposed cost of long term supply from years 5-15 only allows for 11,100 MW per annum where current demand according to our records is in excess of 12,150 MWh for the community.
5. The proposed current situation estimates 13,250 MWh this equates to an approximate load reduction of 7.4 MWh per day over the next 5 years - a significant ask in any location. The SA Government only provides a subsidy in the vicinity of \$3.5-\$4.0 million subject to diesel prices - not \$5.4 million.
6. The proposal requires the Coober Pedy community to raise \$6.65 million in funds to make this happen - how would council intend to fund this? This is equivalent to interest of \$400k per annum at 6% and on the very basic numbers provided is approximately 1/3rd of the dividend.
7. Capex [capital expenditure] costs appear to be higher than the EDL project.
8. Does the proposed cost include the cost of maintaining and upgrading the Distribution system to enable the high penetration of renewables? Our experience is that this is a key area of concern when introducing distributed renewables in other RAES communities. It also does not take into account the [sic] cost of maintain [sic] and/or upgrade this infrastructure.
9. I note that the Diesel generation assets will be purchased yet it does not talk about the cost of operation of these which is significant in addition to the capital cost of renewables. Alternately does the proposal plan to remove these assets and rely solely [sic] on Solar and Wind – something EDL have been unable to achieve based on their significant resource analysis and demand profiling.
10. Are renewable levels of penetration guaranteed at 70% like the EDL proposal?
11. What rate of return is determined for the dividend to the community? Is the SA Government intended to subsidise this?

I can continue to elaborate on the gaps in the proposal, however, I am concerned that the proposal – being so thin on detail – really generates more questions than it answers and may end up being more expensive longer term than the existing proposal. To undertake a full due diligence on this project would require significant work and contribution from [the council], Zen, and [the department], and is likely to require a period of at least 6 months to complete.

This would more than likely result in ARENA terminating their support for the EDL project and the loss of \$18.5 million of Commonwealth funding. Given the significant expenditure undertaken by EDL and the support provided by both council and the SA Government for their proposal, EDL may have legal recourse to seek damages from [the council], however you would require legal opinion on the potential for this as I am not a lawyer.

I think the council would be prudent to consider the full impacts generated by delaying support for the EDL project. The risk of losing the EDL project is, in my opinion, very high if the council chooses to undertake an analysis on the Zen project and to delay the PPA negotiations.

You have indicated your frustration with EDL in regard to their perceived lack of interest in dealing with [the council] and if that is the case then I suggest that now is the time to be having the conversations with EDL during the final PPA negotiations to address any council concerns.

179. My investigation questioned Mr Smith about this correspondence:

Q. In sending this email, is it fair to say that you were trying to discourage the council from pursuing the ZEN proposal?

A. It was fair to suggest that -- suggesting that this was real, these numbers of energy costs were real was unlikely, and the reality is you would not go and invest 10 cents based on this proposal. [...] [W]hat they were actually asking for was \$100,000 to do a feasibility study and the way that this whole project, this thing here talks is that, you know, there's \$37.5 million worth of capital. So that confirmed that the EDL project was probably about right from a capital perspective. But then we are talking about the council having to borrow \$19 million to invest in this, and, you know what, [...] I spoke to ARENA about it and I said, "What are your thoughts around this?" And they said, "We have not seen anything like this anywhere. We would be really interested in funding it if they could prove their case." But they didn't submit to the RAES [open tender conducted by the department].

[...]

[xxxxxxxxx]
 [xxxxxxxxx]
 [xxxxxxxxx]
 [xxxxxxxxx]
 [xxxxxxxxx]
 [xxxxxxxxx]
 [xxxxxxxxx]
 [xxxxxxxxx]
 [xxxxxxxxx]
 [xxxxxxxxx]¹⁰⁶

180. Mr Smith also spoke of his experience with ZEN at the time:

A. [xxxxxxxxx]
 [xxxxxxxxx]
 [xxxxxxxxx]
 [xxxxxxxxx]
 [xxxxxxxxx]¹⁰⁷

181. My investigation questioned Mr Smith about the question of legal recourse by EDL if the council determined not to proceed with the project:

Q. Did EDL or anyone at EDL ever express to you the possibility that they might seek damages from the council?

A. No, they didn't. That was -- as I said, this is my opinion. From a commercial perspective if I just spent two years and millions of dollars developing a proposal with your support and then you walked away from it, you would potentially consider seeking to recover some of those, from that perspective. [...] Council were aware that that was the due date, and that was, you know -- otherwise there was the potential, if they kept missing milestones, there was the potential for ARENA to just say "Well we are pulling the funding", because ARENA have stated to me quite clearly that they expect 30% of all projects to fall over.

¹⁰⁶ Interview with N Smith, 2 June 2017, transcript at 31:31.

¹⁰⁷ Interview with N Smith, 2 June 2017, transcript at 32:26.

[...]

Q. Did the Crown Solicitor's Office ever provide advice to that effect, that the council could be exposed? [...]

A. I don't think I ever sought it.¹⁰⁸

182. My investigation asked Mr Smith whether the ZEN proposal might have been a prompt for the council to consider testing the market:

Q. Do you think at this point in retrospect it might have been appropriate for the council to go to market? I mean could it have happened at this point in the development of the project?

A. It can happen at any stage. The ramifications are that you lose a project that has just taken two years and it has \$18.5 million of ARENA funding that makes it commercially viable versus something who -- something that somebody is professing to do that is going to be 100% renewable, but we are also buying the diesel engine. There is communication in that document that doesn't add up. When you start to read through the detail of it, it's lacking. It actually raises more questions than it does deliver answers because it is 10 pages long and about 100 words. It's a lot of pretty pictures and numbers and there is not anything underpinning that. There is no analysis of the wind resource, no analysis of the solar resource, no analysis of how you are going to integrate that technology with the batteries. What is the timeframe on the batteries? What is the battery technology you are using? All of this technical stuff is really critical to actually ensuring that you have power. You know, you have to be comfortable if you delivering power to an islanded community that doesn't have access to the national electricity market, that the people who are proposing to deliver that have actually done a lot of due diligence around that, or have delivered projects of this scale before.

Q. And was this was your thinking at the time?

A. Absolutely.

[...]

Q. And do you think that was communicated clearly to the council at the time?

A. I tried. I tried. You know, as I said, from 1 January 2015 to the end of September 2016 I had seven CEOs, three mayors, three different financial officers and God knows how many other councillors. I think half a dozen councillors went through there. So trying to communicate anything was -- I could say it until I was blue in the face and I often did but, you know, having to repeat the story over and over and over and over and over and over again does get a little bit tiring.¹⁰⁹

183. On 13 June 2015 Mr Richard Turner, Chief Executive Officer of ZEN Energy Systems, emailed Mayor Staines:

Professor Garnaut [of Central Power Australia] met with the State Govt representatives late last week regarding our Coober Pedy proposal after your own discussion earlier following our meeting.

Unfortunately we believe a suggestion was made that this may take a couple of years to prepare, when that is obviously very wrong which they have now accepted. They have also accepted that our offer can be prepared in detail in a relatively short period and as long as it doesn't cost the State Govt more than their current commitment of \$3m per year they will accept the offer based on Coober Pedy Councils [sic] desire to proceed with ZEN's alternate proposal.¹¹⁰

184. Mayor Staines forwarded Mr Turner's email to Mr Smith, commenting:

See below email from Richard. I do admire his persistence...

¹⁰⁸ Interview with N Smith, 2 June 2017, transcript at 33:12.

¹⁰⁹ Interview with N Smith, 2 June 2017, transcript at 36:11.

¹¹⁰ Email from ZEN Energy to S Staines et al. dated 13 June 2015.

What State Govt representatives is he referring to?

I'm not adverse [sic] to looking at alternatives but would be loathed [sic] to sacrifice what we have for something that we might have. A bird in the hand etc.¹¹¹

185. By email dated 15 June 2015, Mr Smith responded:

I spoke to Vince [Duffy] about this as he, Catherine Way and Steven Bye met with Ross Garnaut and Tim O'Loughlin last week when I was in Oak Valley, Yalata and Nundroo.

Vince discussed that the consortium would need to develop a comprehensive proposal similar to that of EDL to present to the [the council] for consideration under the terms of our Deed of Grant. In addition this would then need to be taken through the usual Government processes and would require Treasury being comfortable with the proposal.

In effect, due diligence requires that is likely to be a significant body of work and would need to rely upon wind monitoring, solar evaluation, integration of systems, etc to ensure that this was safe, secure, reliable and cost effective in a similar manner to what we have done with EDL. As I previously mentioned, I suspect that this is at the very least 6 months and realistically will be 12 months prior to submission for consideration, then it would need to be reviewed by Government and go through a similar process to the EDL proposal which may take another 6-12 months to finalise.

The information provided in the proposal by the consortium lacks any substantive information that enables a recipient to make an informed decision about the proposal, and it is very much a proposal based on very broad, high level statements of capability and opportunity.

Ultimately the decision needs to be made by the elected members of [the council] as to the best way forward, in alignment with the Deed of Grant terms and conditions.¹¹²

186. That same day, Ms Way of the department separately emailed Mayor Staines:

I think it's worth mentioning the time and effort that EDL have taken to get to this stage of the project. I first started working with the company November 2013. This was in relation to land access for a wind monitoring mast. So the company has been outwardly progressing this project for at least 1 ½ years. I am aware my colleagues may have met with the company earlier than this to discuss the project.

The risk of taking too long in making a decision and contemplating projects that are not developed, nor had [sic] the due diligence undertaken on them as the EDL project has, is that the significant capital from the Federal Government will not be forthcoming. EDL, as I am sure you are aware, have strict milestones to reach before they can access the ARENA capital. So, I agree with your bird in the hand assessment.

I'm sure the Zen proposal has had engineers generating numbers for them, but taking a project from the concept stage of Zen's proposal to where EDL's project is takes extensive work.

It may be useful to note the due diligence that EDL's project went through to receive Federal Funding through the Australian Renewable Energy Agency (ARENA):

- Firstly, an independent panel assesses the technical merits of the project: whether the project is fit for purpose, and whether the same penetration of renewable energy could be delivered in another way;
- Secondly, extensive financial due diligence is undertaken within ARENA;
- Thirdly, the financial model is assessed by a third party such as Deloittes [sic]; and
- Finally, the project undergoes the scrutiny of the ARENA board.

¹¹¹ Email from S Staines to N Smith dated 14 June 2015.

¹¹² Email from N Smith to S Staines et al. dated 15 June 2015.

I thought it also useful to list the approvals that I am working on with EDL in regards to land access:

- They need land to be reserved from the precious stones field - this needs to be proclaimed by the Governor and is in train. Proclamation could be expected late July. To date EDL has received letters of support from all mining and petroleum companies who have a pre-existing interest in the land around Coober Pedy.
- They need tenure - to date the company has been engaging with the Crown lands people and we have another meeting this Friday to discuss options
- They need an Indigenous Land Use Agreement - I understand this has been negotiated and signed by both parties
- They need development approval - I understand this is in train through your Council

I hope this is helpful and am happy to discuss any issues further.¹¹³

Council turnover

187. Between June and September 2015 there was considerable turnover amongst the council's senior staff and elected members, including:
- the resignation of Cr Sue Baines in June and the resignation of Cr Rose Berry in September
 - the appointment of Mr Trent Rusby as Chief Executive Officer of the council in June, following the departure of Mr Cameron earlier in the year
 - the termination, in turn, of Mr Rusby's contract on 4 September 2015 and the appointment of an Interim Chief Executive Officer, Mr Anthony Renshaw
 - the resignation of Mayor Staines on 27 August 2015
 - the resignation of Mr Clark on 11 September 2015.

The BESTEC report

188. In or around April 2015 the council engaged BESTEC to prepare a prudential report concerning the project in accordance with the council's Prudential Management Policy and its obligations under section 48 of the Local Government Act.¹¹⁴
189. This appears to have resulted in a four-page prudential report prepared by BESTEC, which, as near as I can tell, was provided to the council sometime in June 2015 (**the BESTEC report**). This report briefly addressed each of the applicable 'prudential issues' identified in section 48(2) of the Act.
190. In response to the requirement that it identify 'the most appropriate mechanisms or arrangements for carrying out the project', BESTEC proposed:
- (i) Council will engage legal representation to finalise the 20 year contract and Power Purchase Agreement.
 - (ii) Council to engage the services of a third party consultant to undertake project management of the construction and commissioning stage of the proposed project.¹¹⁵
191. The BESTEC report did not purport to identify whether the project presented value for money to the council or otherwise address whether it was appropriate for the project proceed in the absence of a market procurement process.

¹¹³ Email from C Way to S Staines et al. dated 15 June 2015.

¹¹⁴ Letter from BESTEC to Mr Clark dated 14 April 2015.

¹¹⁵ 'Coober Pedy Hybrid Power Generation Prudential Report' dated June 2015, p. 5.

Continued development

192. On 17 June 2016 the Crown Solicitor's Office (CSO) provided legal advice to the department on the terms of the PPA and the allocation of risk under the agreement. This advice was provided with the stated objective of:

ensuring that the risk allocation between [the council] and [EDL] is commercially reasonable given the State is essentially underwriting, or guaranteeing, the Council's liabilities under the PPA¹¹⁶

193. The department continued to seek and consider legal advice in respect of the terms of the PPA over the months that followed.¹¹⁷

194. On 25 June 2015 Mr Clark provided EDL with a revised copy of the PPA incorporating revisions that had been proposed by the council and the department.¹¹⁸

195. On 3 July 2015 Mr Smith provided an update to The Minister's office:

- The Power Purchase Agreement is being negotiated currently between EDL, [the council] and [the department] to try and iron out a number of issues which clarify the PPA detail, ownership structures and potential liabilities that may arise from the agreement.
- Nothing overly significant and should be in a position to present a final copy to [the council] by end of July. CSO need to review final document and have already been involved in the negotiations so far, prior to writing the Letter of Comfort for the Minister to sign.
- I have presented to the council on the merits of the project and attempted to address any concerns they may have around the project. There will be a further presentation along with EDL to council once the PPA has been finalised to ensure the councillors are comfortable with the process.
- EDL have negotiated a delay to the ARENA requirement for EDL to make a Financial Investment Decision based on the fact the PPA negotiations remain on track. ARENA are keen to see this come to fruition, however, understand that the lack of a CEO at [the council] for the last 5 months has created some delays.
- An ILUA has been agreed between EDL and AMYAC the local indigenous community and requires approval from the National Native Title Tribunal
- The Deed of Grant negotiations with [the council] continue and the document has been developed in conjunction with the CSO to incorporate and reflect the move to the new PPA and Hybrid system along with any requirements to prevent any increased liability to the SA Government. This is going through its final reviews now with my team and CSO prior to sending to [the council] for review. Once this is completed a Ministerial will be sent for review and execution.¹¹⁹

196. On 6 July 2015 a regular meeting between the department and Mr Koutsantonis was convened at which the topic of the Coober Pedy project was discussed. I am unaware of what the substance of these discussions was. Mr Smith informed my investigation that, to his knowledge, the department is not in the practice of minuting its weekly meetings with Mr Koutsantonis.¹²⁰

197. On this same day, Mr Rusby, the council's newly-appointed Chief Executive Officer, sent an email to EDL and the department that purported to identify matters requiring further attention from the council's perspective. These variously included the State

¹¹⁶ Email from G Jaksa to R Smithson et al. dated 17 June 2015. The CSO advice was subsequently forwarded to the council on 18 June 2015.

¹¹⁷ See, e.g., email from CSO to N Smith et al. dated 28 August 2015.

¹¹⁸ Email from D Clark to EDL dated 25 June 2015.

¹¹⁹ Email from N Smith to N Antonopoulos dated 3 July 2015.

¹²⁰ Interview with N Smith, 2 June 2017, transcript at 16:31 ('Q. The department has a weekly meeting with the Minister, so it was discussed, you know, over the last three years it has been discussed regularly, but I just -- I can't recall when. Q. Are those meetings minuted at all? A. I don't think so.')

Government's willingness to formally commit to underwriting the deal for its 20-year lifetime, the details of the Indigenous Land Use Agreement entered into by EDL and the potential for a further community contribution from EDL under the agreement. Mr Rusby's email suggested that he was unaware that the department had previously supplied a copy of its SWOT Analysis to the council.¹²¹

198. The records supplied to my investigation do not disclose how the department and EDL responded to Mr Rusby's requests.
199. On 8 July 2015 the department and the council appear to have jointly produced a discussion paper listing various actions to be completed in development of the new PPA. This discussion paper envisaged finalisation of the PPA by 24 July 2015, with a workshop for the council's elected members to review the agreement on 27 July 2015.¹²²
200. On 10 July 2015 Mr Smith emailed a representative of EDL to advise that the DTF was unlikely to support the proposed transfer charge under the agreement 'in its current state'. Mr Smith supplied EDL with a discussion paper 'to help facilitate some discussion around this between [the council] and EDL.'¹²³
201. There followed an exchange of emails between EDL, Mr Smith and the council in which provisions of the PPA concerning transfer charges, liquidated damages and a performance guarantee were renegotiated and revised.¹²⁴ It is evident that the department continued to seek and consider advice from the CSO during this period.¹²⁵
202. On 29 July 2015 a representative of EDL supplied the department and the council with EDL's performance guarantee sensitivity analysis.¹²⁶

Further approaches by ZEN Energy

203. On 20 July 2015 it was announced that the DUET Group had entered into a scheme to acquire EDL.¹²⁷
204. On 21 July 2015 Mr Smith received another email from Mr Turner of ZEN Energy Systems:

Trent Rusby (CEO Coober Pedy) has said we should talk with you regarding their future energy options as they are very concerned about the EDL offer. ZEN has put a proposal forward (preliminary attached) that reduces the Government support payments, produces a lower cost of power for the community, provides the flexibility for expansion they are seeking and a higher level of renewable penetration which is exactly what they want.

We strongly believe that the EDL proposal is a really bad deal for community and government, a fortune in subsidies, high power prices, little flexibility and still 30 per cent dirty diesel.

[...]

¹²¹ Email from T Rusby to EDL et al. dated 6 July 2015 ('Councillors wish to see a SWOT analysis for the PPA and the project from an independent assessors [sic] point of view.')

¹²² Coober Pedy Renewable Hybrid Project: PPA Issues List for Discussion with DCCP/DSD, dated 8 July 2015.

¹²³ Email from N Smith to EDL et al. dated 10 July 2015.

¹²⁴ See, e.g., email from EDL to N Smith and T Rusby dated 23 July 2015; email from N Smith to EDL and T Rusby dated 24 July 2015; email from EDL to T Rusby et al. dated 30 July 2015; email from N Smith to EDL et al. dated 4 August 2015; email from EDL to N Smith et al. dated 14 August 2015.

¹²⁵ See e.g., email from V Duffy to EDL dated 5 August 2015; email from V Duffy to EDL et al. dated 10 August 2015; email from EDL to N Smith et al. dated 13 August 2015.

¹²⁶ Email from EDL to T Rusby et al. dated 29 July 2015.

¹²⁷ ASX release, 'DUET Proposal to Acquire Energy Developments - Announces \$1.67 Billion Equity Raising', 20 July 2015.

We would like to meet and discuss Coober Pedy's options ASAP as this is a project we would have the capacity for straight away and news out today suggests EDL may be sold very soon to DUET. (AFR)¹²⁸

205. On this same day, Mr Smith emailed Mr Rusby:

FYI – and just checking – are you “*very concerned about the EDL offer*”?

I don't think it is appropriate for me to be meeting with Zen, given the Minister provides a Deed of Grant and Letter of Comfort to [the council] to enter into agreements.

The discussions between [the council], [the department] and EDL are confidential and whilst we have done our analysis and provided advice to the best of our ability to ensure that liabilities are limited on this to the maximum extent and to provide advice to Cabinet and the Minister on the relative merits of the project, ultimately the decision to proceed rests with Council.¹²⁹

206. During interview with my investigation Mr Smith was asked to comment on this correspondence:

Q. Can you elaborate on what you meant there [regarding meeting with ZEN]?

A. Well, why would I be meeting with ZEN when this is a council issue? So if he wants to talk to council about their contractual arrangements, and their confidential negotiations with EDL, go and talk to council, don't come and talk to me.

Q. So reading this, you are not saying it's inappropriate to meet with ZEN because the Minister gives a Deed of Grant, you are saying it because the council enters into the agreement?

A. Yeah. It's not my project so don't come and talk to me about a project that is not mine, go and talk to the council, the decision-makers around whether, you know -- and if you think you have a viable alternative, go and talk to council.

Q. Can you recall, did Mr Rusby ever respond to this email at all?

A. I have to go back and check. I mean --

Q. The reason I ask is I haven't seen a response, that's all.

A. It may have been a phone call. At that stage we were communicating regularly by phone and email around the PPA and everything to do with that side of things.¹³⁰

207. Later that day, Mr Smith emailed Mr Turner:

Thanks for your email and I hope you are well. As Trent pointed out, we have been assisting the council with the due diligence on the proposed EDL project as the SA Government has a significant financial interest in the decision. In this instance, I believe it would be inappropriate for me to comment on a Council matter in relation to where the project is at, aside from the fact that negotiations are quite advanced and remain commercial in confidence. I would suggest future communication be directed to Trent in the first instance as the Chief Executive of the Council.

I note your comments around the project and appreciate your thoughts. For your reference, the project has been in development for over 2 years and has been assessed by ARENA against all other renewable projects across Australia and the ARENA board have approved funding for the project for \$18.5 million. It has been through a rigorous technical and financial development process, due diligence, development approvals, ILUA development, and unsolicited bid process within various levels of Government. ARENA have stated on their website “The project would achieve the highest penetration renewable energy in Australia at approximately 70% over the life of the project”. In

¹²⁸ Email from R Turner to N Smith dated 21 July 2015.

¹²⁹ Email from N Smith to T Rusby dated 21 July 2015.

¹³⁰ Interview with N Smith, 2 June 2017, transcript at 37:36.

addition, EDL have invested significant company resources and funds, over this period to satisfy themselves, ARENA, DCCP and ourselves that the project will deliver what they have promised.

I appreciate you providing me with a copy of the ZEN consortium council proposal, it appears to be an innovative and interesting model of investment. I must admit that I found it difficult to understand how the proposed project will achieve the suggested results without a significant body of work being undertaken to ensure that the project is viable across a range of criteria and found a number of the numerical inputs required supporting assumptions. I also noted that the local community would be required to raise significant capital for the project - does this create liabilities for the SA Government? If the project were proven to be viable then this would, I suspect, necessarily result in a similar time frame to the EDL project to enable all of the relevant approvals and appropriate due diligence to occur across the consortium, Government and council.¹³¹

208. On 22 July 2015 Mr Turner responded:

Thanks for your response, I guess our underlying concerns were realised yesterday with EDL's portfolio of remote energy sites being valued at \$1.4Billion for the sale to DUET, this is obviously a highly profitable business. All we can say is if the good folk of Coober Pedy and the State Govt are comfortable to continue to pay these high prices and continue to be subsidised at high levels by the State Government on top of the tax payer funded ARENA grant then there is no opening to look at an alternative. We believe lower pricing with minimal state government assistance moving to zero over 5 years with no ARENA assistance is possible giving Coober Pedy complete independence and in control of their own destiny is a reality here and should be pursued.

In Trent [Rusby]'s absence I met with Mayor Steve Staines before I went on leave and suggested a detailed analysis by ZEN would be at a cost between \$50-100k and would take approximately 3 months. I would strongly recommend doing for peace of mind whichever way you choose to go in the end even though we are relatively confident in our preliminary estimates. There are various ways we can assist with financing of the community equity component which Bendigo Bank have suggested who would be a key aligned partner in this community project.

I'll leave it with you and Trent to discuss and advise your decision.¹³²

209. Mr Smith did not initially respond to this email and it appears that Mr Turner later telephoned the department seeking to discuss the matter further.¹³³ This appears to have prompted Mr Smith to then forward the ZEN proposal and Mr Turner's email to Mr Ian Kay, ARENA's Chief Financial Officer, for comment (emphasis in original):

I am forwarding an email trail between myself and Zen Energy in relation to the Coober Pedy project. I was wondering if you would be interested in responding to Zen's assertions around the project from an ARENA perspective. In particular "***We strongly believe the EDL proposal is a really bad deal for community and government, a fortune in subsidies, high power prices, little flexibility and still 30 percent dirty diesel.***"

These type [sic] of comments have the potential to derail this project with Council members who are already nervous of the time frame on this project. I have already presented to them on the merits of this project at a workshop and the council remains uncertain although the majority of the council are likely to support the project following on from the workshop.

The final PPA detail is being negotiated and is close to being ready for distribution to legal parties for review and we have tentatively booked a date for 25th August to undertake a workshop with the council on this project with EDL and [the department] presenting. It is unfortunate that it has taken such a long period to come to the final PPA detail, however,

¹³¹ Email from N Smith to R Turner dated 21 July 2015.

¹³² Email from R Turner to N Smith et al. dated 22 July 2015.

¹³³ Email from N Smith to T Rusby dated 30 July 2015.

negotiations have been slow to progress around transfer charges, liquidated damages and the Renewable Penetration Guarantee.

I have not shared this information with EDL and would prefer that this is kept confidential between us at this stage.

Perhaps you could give me a call to discuss further when you are free as I would like to ensure that this project is not unduly derailed at the last minute in the face of - at best - a very large and relatively risky promise with no evidence to support the assertions.¹³⁴

210. My investigation asked Mr Smith about the conversation with Mr Kay referred to in this email:

A. He had said that they hadn't seen anything of this type before. They were surprised to see the costs so low and that they would be interested in supporting this, if it came through their funding process, but not in Coober Pedy.

Q. And did he explain why not in Coober Pedy?

A. Because they had already committed to fund this project in Coober Pedy and I think at that stage that the [ARENA] board was starting to get a little bit irritated by the delays in the process and the stuffing around that was going on with the Coober Pedy council.¹³⁵

211. On 30 July 2015 Mr Smith emailed Mr Turner:

I have received your message and request for an update on the Coober Pedy council discussions.

Once again I would like to point out that it would be inappropriate for me to comment on a council matter.

I suggest that your queries be directed to either Trent Rusby in his capacity as Chief Executive Officer, or to Mayor Steve Staines.¹³⁶

212. On this same day, Mr Rusby separately emailed Mr Turner in response to a request for an update on the council's position concerning the ZEN proposal:

At this stage [the council] are actively continuing discussions with State Government regarding options for the townships [sic] future power supply.

I'm not aware if the State Government have given any further consideration to your proposal, other than reference to the recent email traffic between yourself and Mr Nick Smith.¹³⁷

213. The next day, Mr Smith emailed a more substantive response to Mr Turner, advising:

The ZEN proposal offers an alternative option, however lacks any supporting documentation and provision of assumptions. We are unable to realistically review and analyse the proposal without supporting documentation and technical detail. I understand that you have offered to develop this technical and financial analysis to [the council] for between \$50-100k.

I have discussed with Ian Kay, COO from ARENA, and he is not aware of any other project with a similar investment case, however may be interested in funding this type of business case, at an alternate location.

¹³⁴ Email from N Smith to I Kay dated 30 July 2015.

¹³⁵ Interview with N Smith, 2 June 2017, transcript at 39:24.

¹³⁶ Email from N Smith to R Turner dated 30 July 2015.

¹³⁷ Email from T Rusby to R Turner dated 30 July 2015.

As you are aware, the Remote Area Energy Supply scheme is currently out to market for the provision of Generation, Distribution, Retail and Meter Reading services. This Request for Proposal (RFP) has been designed to develop and encourage innovative responses and proposals similar to the one provided to [the council]. I encourage ZEN and its consortium members to submit a fully developed proposal for the provision of a similar business case as presented to the [the council] for the RFP as this will cover 18 power stations and 25 communities across SA.¹³⁸

214. During interview, my investigation asked Mr Smith what ultimately became of the ZEN proposal:

A. It didn't go anywhere, which disappointed me because I was actually really looking forward to being able to see something come into the RAES procurement where we -- you know, this is one town. We are talking about 25 towns in the RAES community so something like that, if it was proven, I would have loved to have just done the analysis on it. But, you know, I think the response was "It's too late" or "It's too hard" or something like that. [...] To me that just highlighted the fact this wasn't a serious bid. [...] It was something that had come out of their mind and thought "let's go and do a feasibility study and see what we can deliver" because at the end of the day if you go back to that document -- what are we talking about [...] -- the next steps, "more detailed work is required to provide a firm final proposal. There is a lack of certainty as to whether such work would be in vain and therefore request the establishment of an agreement for payment of feasibility costs, which will only be paid if we submit a final firm proposal and it is not accepted by Coober Pedy." [...] So if you put that into the context of my email back to Steve Staines, "a bird in the hand is worth two in the bush from our perspective", you know.¹³⁹

215. My investigation asked Mr Smith if he was aware of a similar business case to the ZEN proposal having been adopted anywhere else in Australia. Mr Smith submitted:

A. I know that there's projects that have been slated. I'm not aware of a specific project in the cost profile. [...] I'm about to see an unsolicited bid on one in the Aboriginal lands but I know that the cost of that is significantly higher.

Q. Higher than what ZEN was foreshadowing?

A. Based on the -- much higher. Yeah, like double. [...] And when I did the RAES procurement, I had a good understanding of where renewables were, from that perspective as well.¹⁴⁰

Developing the PPA – July to September 2015

216. The council, EDL and the department continued to develop the technical aspects of the PPA over July to September 2015.

217. On 19 August 2015, during this process, Mr Rusby emailed EDL:

Hello Shane and Todd - a bit of water under the bridge since we last spoke – can you please tell me if there were any outstanding issues for Council still to follow up on other than the indemnity insurance matter (which Council can advise isn't required) and the site licence (which Council has responded to)?¹⁴¹

218. By email Mr Gordon responded that same day:

¹³⁸ Email from N Smith to R Turner dated 31 July 2015.

¹³⁹ Interview with N Smith, 2 June 2017, transcript at 38:19.

¹⁴⁰ Interview with N Smith, 2 June 2017, transcript at 39:3.

¹⁴¹ Email from T Rusby to EDL dated 19 August 2015.

There were no specific points for Council to follow up on regarding the PPA, other than a final review of the contract and updating the Prudential Review to allow execution of the PPA following approval by Council members.¹⁴²

219. On 3 September 2015, Mr Rusby advised the department and EDL that the council had commenced the process of seeking its own legal and prudential advice on the draft PPA.¹⁴³
220. On 7 September 2015, following the resignation of Mayor Staines, Ms Michelle Provatidis, the council's Acting Mayor, sought a briefing on the project.¹⁴⁴ A meeting of the council took place on 15 September in which EDL and the department each presented on the project.¹⁴⁵

Appointment of Mr Renshaw

221. On 9 September 2015 Mr Anthony Renshaw was appointed Interim Chief Executive of the council.¹⁴⁶ I understand that from the perspective of the department and EDL, Mr Renshaw's appointment marked the beginning of difficulties in ascertaining and securing the council's commitment to the project.
222. During interview with my investigation, Mr Smith described Mr Renshaw's involvement in the negotiations in the following terms:
- A. "Confusing at best" is probably the best way of putting it. [...] What he would say and what he would do were not necessarily consistent. So I tried to take him through the project. I tried to explain the risk profile of it. We met a number of different times and I took him through it in great detail and, you know, his advice was that consistently council were supportive of the project, they were poised to proceed with it, but his words were not supported by his actions. That was around that time that everything became very, very confusing as to what actual council's motives were and whether it was council that was driving it or whether it was Mr Renshaw.¹⁴⁷
223. Records suggest that EDL again presented on the project to the council on 15 September 2015. During interview with my investigation, Mr Renshaw indicated that he could not recall the substance of this presentation.¹⁴⁸ The council advised my investigation that it is unable to locate any records within its system concerning these discussions.¹⁴⁹
224. On 18 September 2015, Mr Renshaw emailed EDL to confirm the council's 'in principal [sic] agreement to proceed with the development of the project'. Mr Renshaw further suggested that the council and EDL commence discussions 'toward establishing a \$100,000 per annum Community Development Fund provided by EDL', to be administered by the council.¹⁵⁰
225. When asked how the 'in principle' agreement was reached, Mr Renshaw submitted:

¹⁴² Email from EDL to T Rusby dated 19 August 2015.

¹⁴³ Email from T Rusby to EDL et al. dated 3 September 2015.

¹⁴⁴ Email from D Clark to N Smith dated 8 September 2015.

¹⁴⁵ Email from N Smith to EDL dated 14 September 2015.

¹⁴⁶ Minutes of council meeting on 15 September 2015, p. 13.

¹⁴⁷ Interview with N Smith, 2 June 2017, transcript at 40:46.

¹⁴⁸ Interview with A Renshaw, 23 May 2017, transcript at 11:41 ('A. You know, in terms of that date, you know, I would think that date probably occurred but I don't recall precisely and I don't have my diary. It's 18 months ago. [...] Q. You'll see this is a PowerPoint presentation and the information obviously suggests that this had been presented at that meeting. Does that refresh your memory at all as to -- A. I'm not saying it wasn't, I'm not saying it was. I have no recollection.'))

¹⁴⁹ Letter dated 8 May 2017.

¹⁵⁰ Email to EDL and N Smith dated 18 September 2015.

A. So sitting here today, I would be surprised at those words but if you think about the context at the time and the environment at the time, so it would be reasonable to say early on in the -- my tenure as the acting CEO, there was reasonable pressure on the council to proceed and the language around that was that ARENA's funding, the availability of ARENA's funding would be withdrawn if the council didn't make up its mind in a timely manner and that EDL had gone to the market place for the procurement of appropriate equipment and, as you probably know from your own wisdom, that if you tender for a project the values that put you in that tender have a life, and if those prices or values aren't accepted then they are likely to change. [...] [T]he clock was ticking. [...]

[...]

Q. Returning to the in-principle agreement here, can you recall was there a resolution--

A. That's what I said sitting here today, I'm surprised at those words, but I haven't -- if we had an array of documents in a date order, you know, whether there was a special council meeting or whether there was some other meeting, yeah, without having all of the information, yeah. And it says once again in-principle agreement, it might have been an informal meeting of the council. [...] We might have had a workshop straight after the meeting with EDL to say -- I say might -- what do you want to do here, guys? [...] [T]his wouldn't have been a decision I made on my own.¹⁵¹

226. The council was unable to supply my investigation with any record of such a decision being made.

227. Mr Renshaw submitted that the council's request for an increased community contribution was raised with EDL at his suggestion.¹⁵²

228. On 21 September 2015 Mr Smith emailed Mr Duffy to advise of a conversation with Mr Rusby, who by now was no longer employed by the council:

Trent Rusby touched base last night saying he had heard council had scrapped the proposal.

Not sure where this is headed. Suggest EDL should turn around and just say no to the community development and then force [the council] to say no to the project.

Council has been hijacked by 3 councillors and the good councillors are all resigning giving them even greater power.¹⁵³

229. Mr Smith advised my investigation:

A. This was not long after [Mayor Staines] had resigned. I had had some conversations with him. There had been a number of other councillors that resigned and we felt that there was a clique of councillors that were running their own agenda.

Q. Who were these councillors, can you recall?

A. Yeah. Michelle Provatidis, Boro Rapaic and Paul Athanasiadis.

Q. And who were the "good" councillors, can you recall, referred to in --

A. I think Steve Staines. You know, he was good. Steve Baines the previous Mayor. Ian Crombie. Rose -- I think might even be Rose Baines. You know, people that were there to do a good job, there to consider the process, were reasonable in how they thought about things and, you know, would listen.

Q. And so you said that you felt that the other three councillors were running their own agenda, what was that agenda as you understood it?

A. Not sure. I could never quite work that out.

¹⁵¹ Interview with A Renshaw, 23 May 2017, transcript at 12:34.

¹⁵² Interview with A Renshaw, 23 May 2017, transcript at 13:22 ('A. That was my idea.')

¹⁵³ Email from N Smith to V Duffy dated 21 September 2015.

Q. And did that manifest itself in them trying to obstruct the project? Is that what you are suggesting? I'm just not sure what "hijacking" the council means.

A. Just they had taken control of how the council was thinking. So now whether that's -- that was my interpretation of it. I wasn't there, I didn't see their council meetings and all that sort of stuff, but that was just the feedback that I was getting from the executive, the Mayor --

Q. Mr Renshaw, when you say the executive?

A. No, no, prior to that. So, you know, in my discussions -- you know, you read bits and pieces into discussions that people have with you from Damien Clark, Trent Rusby, Steve Staines, you know. So all of those people, you know, who we'd always had relatively good relationship -- open, honest, transparent relationships with, suddenly it just became a different kettle of fish.¹⁵⁴

230. During interview, Mr Renshaw denied knowledge of any such division between the council's elected members.¹⁵⁵

231. On 22 September 2015 Mr Barker of EDL advised Mr Renshaw that EDL was not prepared to consider increasing the community contribution under the PPA, advising that it was EDL's expectation that the PPA would be in 'executable form by no later than 30 September 2015.'¹⁵⁶

232. On 28 September 2015 Mr Smith emailed Mr Kay of ARENA to advise:

I met with Tony and Michelle on Thursday afternoon to discuss the merits of the project and the steps that needed to be taken to ensure that it proceeded. One of their requests was that Tony chat with you to seek your advice on the project given the significant ARENA involvement in the feasibility study of the project both technical and financial.

[...]

Effectively with all of the changes in council we have had to take the process back to a basic discussion to bring [the council] representatives up to speed on the project. I suspect that he wants to hear this from an alternate party that the project is in the interests of the Coober Pedy community.¹⁵⁷

233. During interview with my investigation, Mr Renshaw described his meeting with Mr Smith:

A. We just sort of talked about the project, you know, who's [sic] the players, just a general discussion about the project. I don't think there would have been any key headline items at that time. It would have been an overview, who the players were, what their roles were. You know, we might have even talked about some milestones, without -- I'm not saying it's precisely what we discussed. We would have had a general discussion about the project.

234. The council advised my investigation that it is unable to locate any records within its system concerning these discussions.¹⁵⁸

235. Also on 28 September 2015, Mr Barker of EDL emailed Mr Smith to advise:

I spoke with Tony over the weekend. I did not come away with a sense of optimism we will come to an outcome like you did from your meeting on Thursday.

¹⁵⁴ Interview with N Smith, 2 June 2017, transcript at 42:8.

¹⁵⁵ Interview with A Renshaw, 23 May 2017, transcript at 15:25 ('A. I would have never said that the council is being hijacked by three councillors, yeah, I'm flabbergasted by that. Shocked or whatever. Yeah.')

¹⁵⁶ Email from EDL to A Renshaw dated 22 September 2015.

¹⁵⁷ Email from N Smith to I Kay dated 28 September 2015.

¹⁵⁸ Letter dated 8 May 2017.

The one positive was that Tony said that the legal and prudential review was advanced and they expected to receive report today or Tuesday. He was meeting with the legal advisers on Saturday evening.

I am struggling to see a way forward and am coming under increasing internal pressure to demonstrate why we should continue to allocate resources to the project.

We still want to do this project but are getting increasingly negative feedback particularly mention of [the council] looking for alternative options.

[...]

Tony made a few other points:-

[...]

- They have not gone to tender on this project - I said that we were the ones who took the initiative to make them aware of the IRAR programme and suggest CP be put forward and sought support to do so by [the council]. Our understanding is that both SAG (Michael Leane) and [the council] (Phil and Damian [sic]) sought separate advice as to whether a new PPA could be entered into without going to tender from a probity perspective and received advice that they could so the CPRH project progressed with the recognition it would need a 20yr PPA.

[...]

- Tony said they would not be in position to execute PPA by end of month unless it was highly conditional. I said what conditions was he thinking and what steps / how long would it take to resolve them because at this point we cannot see an end to the process and are on the verge of pulling out unless we can see a way forward.
- Tony responded that the Council would have no problems with EDL walking away and they have development [sic] two alternative options in the last 2 weeks. This comment in particular demonstrates to me that we are being stalled and the council is not acting in good faith to resolve the matter.

[...]

- I spoke with Ian Kay and told him of the problems of the council and that this had delayed progressing to execution of the PPA. He said that provided we could demonstrate a "path through the weeds" they would stay with us. At this point I am struggling to see that path.¹⁵⁹

236. During interview with my investigation, Mr Renshaw was asked to comment on the representations made by Mr Barker in this email:

Q. Can you recall expressing these concerns to Mr Barker about the lack of a tender process at this time?

A. No, but we would have done that to the State[.]

[...]

Q. You said that it was raised with the State Government; how was it raised? Who raised it, was it by letter or --

A. I would have raised it both orally and in writing.

Q. So you think there might be something on the --

A. Definitely and there's a reply from the State too. Absolutely. That is where the reference around the Coordinator-General or the Director-General was in the correspondence from the State Government, yeah.

[...]

¹⁵⁹ Email from EDL to N Smith dated 28 September 2015.

- Q. Now, again you didn't author this, but do you understand what Mr Barker might be referring to here when he mentions the council might be looking for alternative options?
- A. So it's reasonable for me to say that we are wise people and as we probably know, what we think we say and what we say and what we think we hear and what we hear are four different conversations. So what the discussion might have been between let's say Keith and I, and what is recorded or the inferences that he has gained might not be a full and complete and accurate overview of the discussion. [...] My sense of that language probably goes back to my email to, I think, Keith Barker on 18 September where we said "in principle we like it but there is a lot of work to do", and that we need to get to that stage of understanding of what the formal agreement looked like[.]
- [...]
- Q. "Tony responded that the council would have no problems with EDL walking away and they have developments – I think that should say 'developed' – two alternative options in the last two weeks." Can you recall making any comment like that to Mr Barker?
- A. No. I'm -- I'm a particularly open and transparent person, with a very strong belief that the truth is your friend and so I would have -- I would have -- I'm also an astute negotiator. So I wouldn't have particularly withheld information from EDL but also I would have stimulated them to thinking that maybe they might need to do something different to make this -- I'm going to use the term "more attractive". I'm not saying it wasn't attractive but to make it a more attractive proposition for the council.
- Q. Are you suggesting that you might have referred to alternative providers as a means to achieve a better outcome with EDL?
- A. Yes.¹⁶⁰

237. Mr Renshaw later clarified:

- A. I would have been simply exciting him or stimulating him into thinking of ways in which EDL could make the proposal -- I'm going to say more attractive, so lower the risk, lower the cost, invest in the community; those sorts of issues, yeah.
- Q. So I'm sorry to belabour this but he's quite specific in the points that he says that you made. Do you agree that you raised the issue of the community not trusting EDL, for example, as part of your negotiation? [...]
- A. Yes, once again being an open person, so that is a reflection -- that is my words of the community's views. I'm not saying the community doesn't trust EDL, what I'm saying here is that the sense is that the community doesn't trust EDL. You know, for all intents and purposes EDL were invisible in the community even though they had a power generation plant. [...]
- Q. Do you think this is an inaccurate record of your conversation, is what you're saying? Or is there anything particular that stands out to you as not reflecting what you may have said?
- A. The third bullet point: "Tony responded that the council would have no problem with EDL walking away." So, I'm not saying I didn't say that but it would have been part of the negotiation process to stimulate them into -- into working hard to develop some alternatives that were more attractive, yeah.
- Q. So at this time, was the council seriously considering walking away at all?
- A. I don't know. When I say I don't know, I actually don't know. The -- you know at the time, once again I have been there now for -- is that 21 days or 19 days or something. We don't have any money. The council's on fire. The council couldn't pay its bills. You know, I would have thought that at that stage we were just churning through the process of understanding this transaction and understanding the minutiae of the transaction as best we could[.] [...]
- Q. Where he says "The council would have no problems with EDL walking away", what were you basing that on?

¹⁶⁰ Interview with A Renshaw, 23 May 2017, transcript at 18:15.

A. You know, once again I don't know whether I used those words. I'm not saying I didn't, I'm not saying I did either. It was all in the hurly burly of the negotiations.¹⁶¹

238. My investigation queried whether to Mr Renshaw's recollection the council was actually developing alternative options at this time:

A. We did have some discussion with ZEN, in fact, we had a dinner -- we had some discussions and then a dinner with ZEN[.] [...] [T]he documents that were available to the council from ZEN were moderate, to say the least.

Q. What do you mean by "moderate"?

A. Minimal or -- yeah.

Q. Lacking in detail?

A. Yes. Yeah.

Q. Can you recall what ever came of those discussions with ZEN?

A. No. I think that we just got further down the track and that it became apparent that if the council was going to do something, it was going to do it with EDL through the ARENA/State Government alliance or relationship. [...] [S]o where I have used the term "they have developed two alternative strategies", that is probably a bit of commercial puffery. We certainly having some discussions with ZEN but the timing of that, that was probably just a negotiation ploy, I would have thought.

Q. [...] Can you recall why the council ultimately didn't go with Zen?

A. If I say again, the information that was available to the council from ZEN was -- I have used the term "moderate", lacking in detail, you know, a brief overview rather than of any substance. [...] [T]hrough my experience, that would say to me, you know, they got a phone call at 9 o'clock in the morning saying their tender closed at 4 o'clock in the afternoon, can you put something in.¹⁶²

239. My investigation asked Mr Smith if he could recall Mr Renshaw expressing similar concerns at this time:

A. I think the first line in the email probably indicates the difference in conversations going on. I came away from my conversation with Tony that they were all set to proceed with this, and that they were happy with it, and when I was talking to Keith Barker about this separately, he had a completely different take on things.¹⁶³

Briefings to the Minister's office

240. The Minister's office was formally briefed in respect of the project on 3 September 2015 and 28 September 2015.

241. Both briefings were characterised as providing 'updated information regarding the negotiations of the Coober Pedy Renewable Hybrid Project PPA between [EDL] and [the council].'

242. Each briefing minute purported to summarise the development of the project and the PPA to date. It was submitted that the project was 'estimated to deliver savings of \$5.4 million over the 20 year period of the PPA.'

243. Each briefing minute also advised:

¹⁶¹ Interview with A Renshaw, 23 May 2017, transcript at 24:15.

¹⁶² Interview with A Renshaw, 23 May 2017, transcript at 21:19.

¹⁶³ Interview with A Renshaw, 23 May 2017, transcript at 44:5.

- ZEN Energy (along with a consortium including Central Power Australia (Prof. Ross Gamaut), Bendigo Bank and Diamond Energy) approached council with a late bid for an alternative scheme. The detail provided was an indicative proposal and would require an additional 6-12 months of work to develop and funding from [the council] to develop a feasibility study.
- [The department] advised, after discussion with [the council] and ARENA, that it would not consider an alternative option as a result of the associated delays, the cost to generate a feasibility study, lack of certainty on a commercially viable business case and loss of ARENA funding for this current project.
- ZEN Energy was encouraged to submit a proposal to the RAES scheme open tender for consideration in Government owned sites.

244. The 28 September 2015 briefing further noted:

The CEO of ZEN Power, Mr Geoff Titus, rang [the department] on 23rd September to request background information on the Coober Pedy project as a result of a request from [the council] to meet with them to discuss options.

245. My investigation asked Mr Smith about this telephone call:

Q. Who took that call from Mr Titus, can you recall?

A. I reckon he rang me.

Q. Can you recall the conversation?

A. I can't. No.

Q. Did anything come of that approach?

A. I think Geoff had only just started in the role of CEO by then, because this was not long after 15 -- yeah, he's just taken over from Richard, yeah, so I think he was just ringing to talk to me about where things were up to and what the situation was. I can't remember who had rung him; maybe the Mayor, Michelle Provatidis. Look don't hold me to that, I can't remember exactly.

Q. [...] Why was this included in the briefing, can you recall?

A. Because I think it's important to just point out what stakeholders are doing. ZEN meet regularly with the Minister.

Q. In what context?

A. Just on various different projects, you know. [...] I just thought well it was important to let the Minister know that they had rung[...] [...] I did point out that they had approached council with a late bid for an alternative scheme. So I think that that was probably why that last point was included. So it wasn't just in isolation.¹⁶⁴

246. Both briefing minutes also summarised the staff turnover within the council. The 3 September 2015 briefing warned, following the departure of Mayor Staines:

- This is likely to create some delays in presenting the case to council and a final decision being reached, as [Mr Rusby] has indicated council may choose to wait until a new Mayor elected [sic] to execute the PPA.
- The change in elected council members presents a risk that they may not support the project and opportunities to develop a more cohesive and collegiate model of governance.

247. Noting further staff turnover within the council, the 28 September 2015 briefing also referred to the conflicting discussions with Mr Renshaw and the frustrations communicated by EDL.

¹⁶⁴ Interview with N Smith, 2 June 2017, transcript at 45:21.

248. Both documents appear to have been received and initialed by Mr Antonopoulos. Mr Koutsantonis advised my investigation that he did not personally receive or review either briefing.¹⁶⁵

The October 2015 'special meeting'

249. On 1 October 2015 Mr Renshaw advised EDL and the department:

As previously suggested it was anticipated that the District Council of Coober Pedy would agree to proceed with the project.

The council has just concluded a Special Meeting and reached this understanding.

I will forward more formal advice shortly.¹⁶⁶

250. The council advised my investigation that it is unable to locate any minutes or other records concerning a formal discussion of the EDL project on or around this date.¹⁶⁷
251. During interview with my investigation, Mr Renshaw indicated that he could not specifically recall this meeting, submitting, however, 'if I said that, that's what happened.'¹⁶⁸
252. On 8 October 2015 Mr Renshaw wrote to EDL to advise of the council's 'intention to proceed with the execution of all necessary agreements, contracts and associated documents'.¹⁶⁹
253. Mr Renshaw's letter went on to describe the council's understanding of the project:

Subject to the support and recommendation of the Council's arm's length, independent legal advisory panel, the Council will enter into an agreement with EDL for the installation of a Hybrid Renewable Energy Solution and the operation and management of a Hybrid Renewable Energy Solution for a period of 20 years, in Coober Pedy.

[...]

Subject to the support and recommendation of the Council's arm's length, independent legal advisory panel, the Council will enter into an agreement with SAG that provides for a letter of comfort to the Council in relation to the [RAES] Subsidy to ensure that Coober Pedy customers are charged services fees equivalent to the average of the On Grid Services Fees charged in South Australia, for a period of 20 years.¹⁷⁰

254. Mr Renshaw's letter went on to request that EDL open its books to the council on the project 'on an annual basis' and again 'invited' EDL to raise the community contribution associated with the agreement from \$10,000.00 to \$100,000.00.¹⁷¹
255. EDL and the department separately expressed the view that Mr Renshaw's letter proposed terms that each party could not accept.¹⁷²
256. On 9 October 2015 Mr Smith emailed others within the department:

¹⁶⁵ Letter from Minister dated 5 December 2015.

¹⁶⁶ Email from A Renshaw to EDL et al. dated 1 October 2015.

¹⁶⁷ Email from F Hogan dated 1 June 2017.

¹⁶⁸ Interview with A Renshaw, 23 May 2017, transcript at 22:18.

¹⁶⁹ Letter from A Renshaw to EDL dated 8 October 2015, p. 1.

¹⁷⁰ Letter from A Renshaw to EDL dated 8 October 2015, p. 1.

¹⁷¹ Letter from A Renshaw to EDL dated 8 October 2015, p. 2.

¹⁷² Email from EDL to N Smith dated 9 October 2015; email from N Smith to V Duffy dated 9 October 2015.

I have just spoken to Keith Barker from EDL in relation to their response to the conditional support from the District Council which has continued to make their support conditional on areas which are unacceptable to EDL.

In summary Keith has advised the following:

- EDL management are in discussions with their new owners DUET, around making a decision to walk away from the project.

[...]

I did discuss with Keith that perhaps this was Council trying it on one more time without realising how close they are to forcing EDL to walk away from the situation and that it was worth responding to the letter to confirm the EDL position on acceptance. He agreed that this was worthwhile given the amount of energy and resources committed to the project already.

[...]

I will respond to [the council] reiterating the Minister's position on tariffs being part of the RAES scheme and that the tariff principles are set on an annual basis - I will seek CSO advice on my response on Monday prior to sending.

I remain unconvinced that the council will support this project despite the significant benefits to the local community in direct investment and share EDL's concerns. [...] The messaging from council continues to be inconsistent and conditional.¹⁷³

257. On 11 October 2015 Mr Barker of EDL emailed Mr Smith:

I managed to catch up with Tony at the end of the day on Friday. He gave a different slant on the situation to how we interpreted the letter.

[...]

I asked what they meant in regard to the expectation of the SA Govt on tariffs. I recognise it is not our business but we are trying to understand whether the conditions imposed on you mean the project cannot proceed irrespective of what we do. We interpret the letter to be asking for a guarantee of tariff equalisation for the life of the project which I think is not how you saw it. I asked Tony what the demand is and he said it is asking SA Govt to deliver whatever it is you have been offering. He said he has yet to see the draft letter of comfort so is not sure exactly what is being offered.

Again I find it hard to reconcile the stated position that they are ready to sign with the letter particularly if they are not sure either with the PPA or the letter of comfort just what their situation is.¹⁷⁴

258. Mr Renshaw was invited to comment on this email during interview with my investigation:

Q. So you'll see at the third paragraph there's discussion concerning the tariff situation, and towards the end of that paragraph Mr Barker said: "I asked Tony what the demand is and he said it is asking the South Australia government to deliver whatever it is you have been offering. He said he is yet to see the draft letter of confidence. We are not sure exactly what is being offered." Can you recall saying anything like that to Mr Barker?

A. Yes and no. I'm not saying I didn't say it but I don't recall saying it.¹⁷⁵

¹⁷³ Email from N Smith to V Duffy et al. dated 9 October 2015.

¹⁷⁴ Email from EDL to N Smith dated 11 October 2015.

¹⁷⁵ Interview with A Renshaw, 23 May 2017, transcript at 28:7.

259. Mr Renshaw was asked to elaborate on the council's position concerning the RAES subsidy at this time:

A. I think all along the council was apprehensive about the State in terms of what the State had done in relation to the RAES funding. [...] I don't know when the State amended the RAES funding but, you know, whether it was 2012 or 2013, whatever amendments the State made to the RAES funding had a significant impact on Coober Pedy. People's power bills that say might have been \$10,000 a year went to \$100,000 a year. [...] We were of the view that that letter of comfort was not particularly valuable and that we needed something more concrete or substantial to support the council's concern.¹⁷⁶

260. It appears that on or around 9 October 2015 KelledyJones supplied Mr Renshaw with a formal briefing in respect of the project. That briefing provided an overview of the negotiations to date and the instruments relevant to the project. The briefing concluded:

[T]his is a very significant project for the Coober Pedy area and after review of the documentation, we are satisfied that the risks to the Council are appropriately addressed in the PPA and Site Licence. We consider that the obligations of the parties under these agreements are clear as are the entitlements and enforcement provisions in the event of default.¹⁷⁷

261. On 16 October 2015 a representative of EDL wrote to Mr Renshaw to advise that EDL was not prepared to open its books to the council or increase its community contribution under the PPA. EDL further advised:

If those two items are conditions of or expectations tempering [the council's] commitment to finalise and enter into the PPA then EDL will need to reassess whether it is possible to continue with the project at this time.¹⁷⁸

262. At around this same time, the council entered into separate discussions with the department surrounding the terms of a new Deed of Grant and Letter of Comfort associated with the project.¹⁷⁹

Resonant Solutions

263. On 1 November 2015 Mr Renshaw and the council's Acting Mayor, Ms Michelle Provatidis, met with Mr Graham Davies, Director of Resonant, a consultancy and advisory firm with energy industry experience.¹⁸⁰

264. Concerning the engagement of Resonant, Mr Renshaw submitted:

A. We thought it was timely and appropriate to get some arms-length independent advice about the project.

[...]

Q. So this is in November 2015 and my understanding is that the project at that stage has been under development since about mid-2013, predating obviously your period with the council.

A. Yeah.

Q. Why did the council seek out a consultant at this stage specifically, can you recall?

¹⁷⁶ Interview with A Renshaw, 23 May 2017, transcript at 28:24.

¹⁷⁷ Letter from A Crichton to A Renshaw dated 9 October 2015.

¹⁷⁸ Letter from EDL to A Renshaw dated 16 October 2015.

¹⁷⁹ See, e.g., email from N Smith to A Renshaw dated 20 October 2015.

¹⁸⁰ Report to 17 November 2015 council meeting. According to Mr Davies, a representative of Tonkin Consulting was also present; letter from G Davies dated 15 May 2018.

A. Because of me. [...] I simply suggested to the council at around about this time that I just think we need some arms-length and independent advice to make sure we are doing the right thing. It's really about our, I would argue, expert probity.

[...]

Q. And what were the council's expectations of Mr Davies; what was the council hoping to obtain from him and his services?

A. [...] So all the information that has been provided to the council to date, essentially, had been provided by players, parties to the agreement. And in terms of fiduciary obligations and being a competent executive, you need to, at least, have some oversight, and the view around this was that this would be at least oversight, and it would be at least oversight and that it had the capacity to identify the strengths and weaknesses of the project, not just the PPA or not just the agreements, but look at the strengths and weaknesses of the mechanical elements of the project. Was -- was solar an ideal alternative energy? Was wind an ideal alternative energy?¹⁸¹

265. My investigation asked Mr Davies how the council presented the project to him at this time:

Q. Can you recall at the time how was the EDL project described to you by the council, if at all?

A. It was described in broad terms. I was also aware of it through what was public information is a hybrid wind, solar, diesel, battery combination. They had concerns over process, I suppose, with some of it. At the time I thought the work would be slightly more technical than commercial, if you like. [...] [T]hey also had issues with the commercial process. [...]

Q. I know you can't recall the exact words, but do you recall the gist of the concerns that were expressed at that meeting?

A. Yeah, one of them was that – and certainly it was Tony speaking, not Michelle. So Michelle really just echoed – or really didn't – I didn't feel had her head around it. It's a complex project. It was about process, as one of the issues.

Q. And what do you mean by "process"?

A. I don't know the time where they'd mentioned there'd been no tender. Yeah, I mean, we had a reasonably lengthy discussion. It was obviously about ourselves as well, there was a fair amount – you know, whatever – can you look at these things? How do you go about it? [...] They were looking for a degree of independence. [Mr Renshaw] also had concerns about EDL. [...] He had concerns about the company and its relationship, the relationship with the council.¹⁸²

266. My investigation asked Mr Davies whether the terms of Resonant's engagement involved investigating alternatives to the EDL proposal:

A. Not necessarily straightaway. So [the original terms of engagement] were to get a preliminary report out [...] and then [Mr Renshaw] said can I give a proposal to expand it. [...] Having said that, I think in formal discussion I did add some options yeah, later on. But not at that meeting, he wasn't looking for alternatives.¹⁸³

267. On 3 November 2015 Mr Renshaw emailed Mr Davies to confirm the terms of Resonant's engagement by the council:

As mentioned, to get started we wish to engage you to review the documentation the Council has received and then to prepare a report for the Council to consider in terms of how you may assist the Council to;

¹⁸¹ Interview with A Renshaw, 23 May 2017, transcript at 30:16.

¹⁸² Interview with G Davies, 8 August 2017, transcript at 7:44.

¹⁸³ Interview with G Davies, 8 August 2017, transcript at 8:45.

1. Complete or otherwise [sic] its negotiations with the [sic] Energy Developments Limited
2. Complete or otherwise [sic] its negotiations with the South Australian Government
3. Consult, inform and advise the Coober Pedy community, business and industry on the proposal and concept including any advantages and or disadvantages
4. Consult, inform and advise the Coober Pedy Council and the Coober Pedy community on the known and anticipated changes, impacts and outcomes of renewable energy technology, application and outcomes including the long term economic and financial sustainability of investment decisions in Hybrid Renewable Energy generation, storage and implementation[.]¹⁸⁴

268. During interview with my investigation, Mr Davies spoke of a telephone call between Mr Renshaw and Mr Turner, then-CEO of ZEN, described as having taken place at or around this time:

Q. At the time Resonant was engaged, did you ever get the impression that the council was contemplating other suppliers?

A. Not then but soon thereafter, which I was aware that they were - they had had discussions.

Q. And how did you become aware of that, do you recall the context?

A. Yes. Tony Renshaw wanted to get ZEN Energy to fly up to Coober Pedy to make an announcement. I must confess I was in a meeting where Tony invited me in. He said "Oh, we have got to phone the CEO of ZEN" or he may not have been at the time, to get Ross Garnaut to fly out. And he did not disclose that I was in the meeting and it went to a teleconference. That was my first warning that this – that it was not good protocol. And he said "Look, we want Ross Garnaut to be here to announce, you know, new reliable power". [...] [Mr Renshaw] wanted a grandstanding announcement. [...] So I didn't know all of what I was getting into when I started off but I was starting to smell that something was not right.

[...]

Q. Did Mr Renshaw explain what the purpose of all that was afterwards or before?

A. He – yes. During around that time, he's had concerns of EDL's price, which at that stage then I said EDL's price is way off the scale. It's just – they don't have experience. There's no tender process. This is just ludicrous. Tony agreed.¹⁸⁵

269. On 15 November 2015 Resonant produced a confidential draft review of the EDL project (**Resonant's draft review**) for consideration by the council. The executive summary of this report gave a scathing assessment of the project:

- From a governance perspective, due process appears to be lacking:
 - There has not been a competitive process and although EDL is the incumbent energy supplier, they have not yet undertaken any renewable project;
 - There appears to be insufficient transparency to [the council] in the process of consultations with community, ARENA and [the department];
 - A strategic direction and risk assessment aligned with [the council] has not been presented'
 - The relationship between EDL (AU and UK) and Energy Generation Pty Ltd is not presented, which has the potential to cause confusion or dilute [the council's] recourse;
- The commercial outcome appears sub optimal:
 - The contract is for 20 years, with difficult exit clauses;

¹⁸⁴ Email from A Renshaw to Resonant dated 3 November 2015.

¹⁸⁵ Interview with G Davies, 8 August 2017, transcript at 9:13.

- It locks in [the council] to a minimum \$170M commitment;
- Liquidated Damages have low caps for significant lack of performance and/or lack of accountability;
- Insufficient incentives are included to reduce electricity prices;
- Charge rates to not incentivise minimising diesel;
- The PPA does indicate lower costs than current, however this may not benefit [the council];
- The contracts are excessively complex and from experience, it then becomes difficult to manage and address recourse;
- The electricity cost average is forecast at 65c/kWh. This is double typical grid prices, and it is believed this could be noticeably lower;[...]
- Unmanaged solar PV can be connected, but only up to 150kW. Residents could consider going off grid for economic reasons. This issue does not appear to have been addressed;
- Decreasing costs of solar PV may encourage community defection leaving [the council] with an over capacity of power;
- The technical solution presented is generally feasible but not optimal:
 - The proposal does reflect general industry standards of recent times
 - It however does not reflect the rapid decrease in renewable costs, which suggests a better than 70/30 Renewable/Diesel split is possible;
 - No consideration for continuing the existing arrangement in parallel with a 100% renewable option is considered. Trends indicate that this is now feasible and cheaper;
 - It is uncertain whether an analysis of matching demand curves with supply has been undertaken;
 - No apparent consideration was given to smart meters, demand management or efficiency. Such practices could reduce peak load and lead to greater diesel displacement and ultimately lower costs;
 - It is uncertain what alternative storage options were evaluated;
 - The balance of 2MW PV and 3MW wind has changed to 1MW PV and 4MW wind indicating that the mix is still being refined;
 - The proposal limits other distributed generation (such as scattered small generators along the grid), which could be very beneficial if managed;
- On a general note, there is an economic distortion in the complete arrangement. There appears no incentive for either the Council, individuals in the community or EDL to reduce or better manage demand, as any “gaps” are absorbed by the Government
- The proposed contract does appear to have advantages over the current arrangement in terms of a lower electricity rate.

270. Elsewhere, the report observed:

There is a certain pressure in place for [the council] to sign the contract as it is due to expire on 31 December 2015. There is no guarantee that a new proposal will be offered. In addition, [the department] and ARENA commitments cannot be guaranteed.

Having said this, there is also no obvious incentive for [the council] to sign the contract now, as the community is assured of reliable power until 2019 under the current contract.

In consideration of the risk of a lost opportunity the following is noted:

- There are a number of companies that could provide a Hybrid Generation Project

- The SA Government can gain a significant benefit by having the cost of electricity reduced – in the order of \$34M over 20 years [...]
- The Federal Government can gain a significant benefit by having diesel displaced due to Fuel Tax Credits – in the order of \$26M over 20 years [...]
- [The council] to [sic] not appear to lose out if no contract is signed
- Renewable energy costs are continually declining, whereas diesel is trending upwards.

Based on the above, it is considered highly likely that terms acceptable to both governments could be negotiated, and thus the risk of losing the renewable opportunity is negligible.

271. The report concluded with the following recommendations:

The following steps are recommended for moving forward:

1. G Davies visit Coober Pedy to assess the site and discuss the report with council
2. Ascertain what titles and commitments have been approved (eg. titles, funding grants, letters of intent etc.), and what still needs to be done for the full go ahead.
3. Invite the community to sessions that describe the options under consideration and their implications.
4. EDL/[EnGen] to clarify the relationships between them and the partnership
5. The detailed proposal from EDL be obtained for review (if possible)
6. A more thorough assessment of the renewable opportunity be undertaken, which considers load switching. The economics to be compared against the proposal.
7. A meeting be held with [the department] to consider their position
8. A meeting be held with EDL to consider their position
9. A meeting be held with ARENA to consider their position
10. This report be reviewed and the information be verified, or alternatively redrafted in a formal and more detailed submission
11. Follow up visits as required to Coober Pedy to discuss with [the council]
12. Assess whether the PPA, Site License and Termination documents be redrafted, accepted or scrapped. In this case, a tender process to be undertaken.
13. Consider a new economic model that provides incentives to all parties to obtain economic efficiencies[.]

272. During interview with my investigation, both Mr Renshaw and Mr Davies were unequivocal that the elected members of the council were supplied with a copy of this report.¹⁸⁶

273. During interview with my investigation, Mr Renshaw was invited to comment on the council's receipt of this report:

Q. If we just look at the executive summary on page 3, there's the second dot point which says: "From a governance perspective due process appears to be lacking. There has not been a competitor in the process and although EDL is the incumbent energy supplier they have not yet undertaken any renewable project." And then you'll observe that the executive summary goes on to suggest that the commercial outcome of the deal appears suboptimal and the technical solution presented is "generally feasible but not optimal". Can you recall, what was your reaction to receiving this report?

¹⁸⁶ Interview with A Renshaw, 23 May 2017, transcript at 36:33 ('Q. Do you recall if it was circulated to the elected members? A. Absolutely right; beyond reapproach'); Interview with G Davies, 8 August 2017, transcript at 13:44 ('Q. And was it your impression that the elected members had received a copy of that report and read it? A. This one? Yes.')

A. I'm not surprised at all; consistent with the knowledge or thoughts that I had.

[...]

Q. Just to make sure I'm understanding this correctly, Mr Davies' criticisms here in the executive summary were broadly consistent with your own feelings --

A. Yes.

Q. -- in relation to the PPA?

A. Yes.

Q. At this time or --

A. We need to be aware -- I say again it's important to be aware it's not just the PPA, it is the PPA and the -- the -- the machinery --

Q. The technical --

A. The technical aspects, yeah.¹⁸⁷

274. Concerning the council's response to the report, Mr Renshaw submitted:

A. I would have thought -- I don't know, but I would have thought that we gave it to Nick Smith and we would have given it to EDL to comment on and provide their comments. [...] It was another part of the negotiation process, whether you consider it to be a tool or a device or information or knowledge that was available to the council to continue its discussions with the State and with EDL and with ARENA.

Q. Just to clarify, the council has received this report and it was intending to use it to achieve a better outcome with EDL?

A. I say, again, to make a decision that was in the best long-term interests of Coober Pedy and the economic and financial sustainability of Coober Pedy. You probably heard me say that a few times. That is what executive decision-making is about. It's okay if we make a decision about -- make a [decision] today that produces a particular outcome for you today, but as an executive you have to respond to and make decisions that are based on what the impact is likely to be tomorrow.¹⁸⁸

275. During interview with my investigation, Mr Davies commented on the council's reception of the report:

A. They loved it. All the councillors who were there when I flew up to meet them. [...] And this report, as it stands is for comment. So it's not a definitive report. But, you know, as a consultant, you're careful that you don't, you know -- but it actually proves to be pretty accurate in retrospect[.]¹⁸⁹

276. Mr Davies later elaborated:

A. [The council members] suspected that the project was not good for the council. And now, how they came to that view at that stage I don't know, but they felt uncomfortable with it, it was expensive. They didn't like EDL as a company. They said it's not good for the town and there'd been other issues prior to that. So the relationship was not good. They liked my thinking with putting forward ideas, even about the hydrogen. I found actually they were quite knowledgeable about options available. [...] [T]hey thought it was a good report.

Q. [...] Was there any dissent on the council?

A. There was no dissent. There were some were perhaps a little bit quieter on it [...] -- my take would have been they were feeling "I'm out of my depth and so I don't know whether to comment one way or the other".¹⁹⁰

¹⁸⁷ Interview with A Renshaw, 23 May 2017, transcript at 36:33.

¹⁸⁸ Interview with A Renshaw, 23 May 2017, transcript at 38:38.

¹⁸⁹ Interview with G Davies, 8 August 2017, transcript at 13:44.

¹⁹⁰ Interview with G Davies, 8 August 2017, transcript at 14:4.

277. On 16 November 2015 Mr Davies wrote to Mr Renshaw in an attempt to identify the scope of the review to be conducted by Resonant in light of Resonant's draft review. In this letter, Mr Davies identified Resonant's anticipated deliverables:

- Final draft of initial assessment report CP-rep-15-01,
- Interim feedback to Council on critical aspects,
- Presentation material to explain in simple terms to the community the technology proposed and various options that could be considered. This could also include elements of the economics if required,
- A final report that collates all gathered information, assesses the current proposal from a technical/commercial basis, presents alternative costed options, and provides recommendation for the future,
- Contracting model options and a framework for a competitive tender process.¹⁹¹

278. During interview with my investigation, Mr Renshaw was questioned about the final bullet point appearing in this document:

Q. Was there a discussion about a competitive tender process that you recall?

A. My only thoughts around that, that public tender process or community tender process was this issue around the [State] Coordinator-General, and then Graham saying "There's one or two people that can help you", and he made reference to this chap, I think Siemens, but I could easily be wrong. [...]

Q. Did the council ultimately engage Mr Davies on the terms in this correspondence?

A. I can't actually remember. [...]

Q. Does it look consistent with what the council was engaging Resonant to do at this time; if anything?

A. Sure, yes. So the initial thoughts around Graham were to review what we had and to provide us with -- I'm only repeating the terms -- arms-length and independent expert advice about what was in front of us and if other things emerged out of that, well from time to time those sorts of things do. And did we engage Graham to go and find the alternatives? No. Did we expect that he would find alternatives? Possibly. So that some alternatives came out of the work he did didn't surprise me but it wasn't -- my sense it wasn't part of the formal engagement. The formal engagement was to understand what we had in front of us and what the connotations and ramifications of that were.¹⁹²

279. Mr Davies was far less equivocal in his submissions to my investigation:

Q. At this stage was the council seriously contemplating a competitive tender process?

A. Yes.

Q. And what made you think that?

A. We had telephone conversations. They asked me to draft up the documents, which I'd already started. So, yes. So I drafted up what type of document you'd need for tender. I'd given a list of eight possible companies we could go to, in the initial draft. So, very much so they wanted a tender.

Q. And when you say 'they', in your conversations with them, who in particular?

A. In my notes, I'd have to go back, but probably four or five councillors and Tony and Michelle would have been aware, you know, we were looking at a tender process. I can't remember the time scope involved but they certainly -- and I think there would have been an email that was sent to that effect; I can't recall. So it was pretty clear: go

¹⁹¹ Letter from G Davies to A Renshaw dated 16 November 2015.

¹⁹² Interview with A Renshaw, 23 May 2017, transcript at 44:3.

ahead. I knew various companies to get involved in, to list. So I listed the likes of some of them.

Q. And did you get the impression that they were serious about abandoning the EDL deal?

A. Yes. Abandoning insofar as not necessarily totally but it needed a serious revamp.¹⁹³

280. The report appears to have been tabled before the council's 17 November 2015 ordinary meeting.¹⁹⁴ The minutes concerning this meeting do not record any discussion or decision by the elected members in respect of the report's contents or recommendations.

Ultimatum from EDL

281. The department and EDL appear to have struggled to communicate with representatives of the council in the period immediately following Resonant's engagement.¹⁹⁵ On 15 November 2015 a representative of EDL emailed Mr Smith to advise of a conversation he had with Mr Renshaw the previous day:

He said that Graham [Davies] has not been formally engaged and that he is going to meet Council and agree to a scope for 1st stage of project which Tony [Renshaw] sees as reviewing all the documentation at hand and coming up with a plan to engage with EDL, SA Govt, and the CP community.

I asked how long did he think this would take and then the subsequent process? Tony's response suggested he is thinking in terms of 6 months rather than a few weeks. I said that this was too long for us and we will send him a formal letter to that effect.

He said we should understand that Council and the community knows nothing about this project, he has been showing councillors documents which they say they know nothing about; the community knows nothing about it.

I reminded him that all of the current council have been there for 12 months and we and [the department] (separately) has [sic] met with them on a number of occasions, we have always said we are happy to meet to provide more details of how the project will work, answer questions but they have not taken us up.

[...]

I am very concerned that we have run out of time. I will be discussing with my CEO and Shane [of EDL] over the next 24 hours but my thought is we are likely to seek some engagement with [the department] / SA Govt. to see if there are any options for intervention by Govt. because we will not keep resources allocated to this project indefinitely and I suspect ARENA which has been patient so far is running out of patience.¹⁹⁶

282. During interview with my investigation, Mr Renshaw acknowledged suggesting to EDL that the council required a significant amount of additional time to review the project.¹⁹⁷

283. On 17 November 2015 Mr Smith emailed his colleagues and the Minister's office:

I have spoken with Keith Barker this morning who has advised [the council] that EDL's Managing Director, Greg Pritchard has placed a timeline of 2 weeks for [the council] to

¹⁹³ Interview with G Davies, 8 August 2017, transcript at 17:2.

¹⁹⁴ Confidential minutes of 17 November 2015, item 5 ('Cr Peter Pantelis moved and Cr Paul Athanasiadis that [sic] the Council receive the report prepared by Resonant Solutions Pty Ltd dated 15 November 2015 Reference RS/15/CP/01').

¹⁹⁵ See email from EDL to N Smith and C Way dated 11 November 2015.

¹⁹⁶ Email from EDL to N Smith dated 15 November 2015.

¹⁹⁷ Interview with A Renshaw, 23 May 2017, transcript at 41:47 ('Q. Can you recall saying anything like that? A. Something like that, yeah. Yeah, I was of the view in November that we still had a lot of work to do.')

support the project or EDL will walk away from the project. He is not interested in meeting to discuss terms or conditions of the project and is only prepared to meet with [the council] to agree to the proposal or cancel it.¹⁹⁸

284. During interview with my investigation, Mr Renshaw was unable to recall the council receiving an ultimatum of this kind from EDL.¹⁹⁹
285. That same day, Mr Koutsantonis' Chief of Staff, Mr Tom Carrick-Smith, contacted Mr Smith to advise that the Minister's office did not 'want this project to fall over'. Mr Carrick-Smith queried whether it would be appropriate for the Minister's office to intervene in the discussions with the council.²⁰⁰
286. Mr Smith responded to advise that 'the message from council (despite being somewhat inconsistent with actions) is that they want this project to go ahead.' Mr Smith went on to advise '[p]ending today's [sic] discussion, it may be worth engaging with them more actively.'²⁰¹ Mr Carrick-Smith subsequently responded to confirm that the Minister's office was 'ready to facilitate direct discussion if required.'²⁰²
287. On 18 November 2015 Mr Barker of EDL emailed the Minister's office to request a telephone call between Mr Koutsantonis and EDL.²⁰³ There is no evidence before my investigation that such a call was ultimately effected and I am conscious of Mr Koutsantonis' evidence to the effect that he had no further discussions with EDL beyond the 20 October 2014 meeting.
288. On 19 November 2015 Mr Barker of EDL emailed Mr Smith:

Had a phone hook-up with Tony [Renshaw] yesterday with CEO Greg. We reiterated we needed [the council] to commit to project within the next 2 weeks or we will walk away.

[...]

Tony said he did not have mandate to commit to two weeks but indicated it could be possible by end of year which is really before Christmas. He said the Council still had "anxieties" about the project and they were wanting to make sure they were doing the right thing for the community. We asked what those anxieties were and he said they were preparing a list but couldn't nominate anything.

[...]

Overall it was a tense meeting with Tony responding to Greg's statement that we have other projects to do by saying CP has other issues to concentrate as well [sic].²⁰⁴

289. My investigation was provided with a copy of an undated email, sent by Mr Duffy of the department to the Minister's office, which appears to have followed a meeting between the department, the council and EDL on 20 November 2015. Mr Duffy advised the Minister's office:

With regards to most recent events, [the council] recently appointed a technical consultant to provide them with advice on the project, Graham Davis [sic], as well as a legal consultant. [Energy Markets and Programs Division] met with representatives from [the council] and their consultants on Friday 20 November all day to take them through the project in fine detail.

¹⁹⁸ Email from N Smith to T Carrick-Smith et al. dated 17 November 2015.

¹⁹⁹ Interview with A Renshaw, 23 May 2017, transcript at 43:1 ('Q. Can you recall receiving an ultimatum like from that EDL at this stage? A. You know, I used that term a few times, I'm not throwing anyone under the bus. Yes or no, I don't recall.').

²⁰⁰ Email from T Carrick-Smith to N Smith dated 17 November 2015.

²⁰¹ Email from N Smith to T Carrick-Smith dated 17 November 2015.

²⁰² Email from T Carrick-Smith to N Smith dated 17 November 2015.

²⁰³ Email from EDL to S Livaditis dated 18 November 2015.

²⁰⁴ Email from EDL to N Smith dated 19 November 2015.

Many of the issues appear to be related to the fact that [the council] have had such significant changes in their executive and Council[.] [...] There also remain [sic] a lack of trust from councillors toward the SA Government in regard to tariffs and their inability to control future prices under the model.

In addition, it is understood that their technical consultant has formed a view that he could develop a better, lower cost project than the one proposed and negotiated by EDL. Unfortunately, there is no alternate project developed and it would have to be developed from scratch. EDL are understood to be very frustrated and have indicated that they are getting close to walking away from the project.²⁰⁵

290. The council advised my investigation that it is unable to locate any records within its system concerning its participation at this meeting.²⁰⁶
291. It appears that on 21 November 2015 Mr Renshaw emailed the elected members of the council to propose that a special meeting of the council be convened in late November at which point EDL, the department, KelledyJones and Mr Davies would each be invited to present on the project. Mr Renshaw's email further provided:

Special Conditions

7. State Government and Graham Davies agree pricing [sic] model for future operations, that satisfies [the council]
8. State Government, EDL and KelledyJones agree to changes to agreements between EDL and [the council], that satisfies [the council]
9. Other matters, consideration of alternative technology and other options[.]²⁰⁷

'Intense negotiations'

292. On 24 November 2015 Mr Smith emailed Mr Davies a copy of EDL's financial modelling, as previously reviewed by the department.²⁰⁸ Mr Smith and Mr Davies met later that afternoon to discuss the project.²⁰⁹
293. The council supplied my investigation with a copy of Mr Davies' typewritten notes concerning this meeting.²¹⁰ The document is not signed and it is unclear whether it was ever supplied to the department. The document relevantly provides:

Purpose and Background

GD and NS met to ensure that the different financial analyses of the project were consistent.

EDL had provided a 20 year tariff projection in a spreadsheet which DSD had verified. Resonant (GD) provided a financial analysis [...] which was based on the first year costing with different scenarios of diesel/renewable makeup, forwarded on 23rd Nov.

Financial Correlation

[...]

²⁰⁵ Email from V Duffy to B Subasi et al. (undated), forwarding header dated 3 December 2015.

²⁰⁶ Letter dated 8 May 2017.

²⁰⁷ Email from A Renshaw dated 21 November 2015. The copy of this email provided to my Office does not identify the original recipients.

²⁰⁸ Email from N Smith to A Renshaw et al. dated 24 November 2015.

²⁰⁹ Letter from N Smith dated 22 September 2017.

²¹⁰ 'DSD-Resonant Solutions discussions', dated 24 September 2015 [sic]; email from Resonant to A Renshaw dated 8 January 2016.

NS and GD agreed that the figures were all close enough to provide certainty of the respective modelling to determine \$6.5M as the forecast tariff, payable by DCCP.

The conclusion was that the financials, although done in a different manner, were sufficiently consistent for the basis of further discussion.

*NS requested if it were possible to get a copy of the ARENA due diligence, however GD stated he would have to check with DCCP as this may be confidential {GD can now confirm this is confidential and cannot be distributed}.

Commercial

Although from different sources, NS and GD were in agreement that the capital amount forecast was in the \$30 to \$35M amount.

GD and NS could not agree on whether the figures were reasonable. GD considered the amounts excessive by a significant amount and suggested that half this could be possible with a competitive process. NS felt the capital figure was reasonable.

[...]

Risk was discussed and it was agreed that grid defection was a risk. NS considered it minor, whereas GD said from trends available, it was in fact likely. [...] There was much discussion around this and this risk [sic] posed, but no real consensus.

Technical Aspects

GD stated that technically what was proposed was feasible but definitely not optimal for Coober Pedy's location.

[...]

General Discussion

[...]

NS noted that there was no guarantee of State of [sic] ARENA support if DCCP did not accept the contract. GD agreed this was a risk, but thought it negligible.

Summary

NS was satisfied with the EDL proposal, whereas GD considered there were major deficiencies and could not recommend proceeding, however this was subject to a final report.

294. On 25 November 2015 KelledyJones provided further comments on the draft PPA and proposed Deed of Grant to the department on behalf of the council. Although these comments appeared to take into account some of the concerns expressed by Resonant in its draft review (e.g. raising the issue of potential grid defection), they largely suggested that the PPA and associated Deed of Grant could be revised in a manner acceptable to the council.²¹¹
295. On 27 November 2015 Mr Renshaw emailed Mr Crichton of KelledyJones, Mr Davies and the elected members of the council to provide an update on the council's discussions with EDL concerning a purported lack of transparency surrounding the amount provided by EDL under the Indigenous Land Use Agreement. This email also purported to identify the council's position at the time:

²¹¹ Email from A Crichton to N Smith et al. dated 25 November 2015.

The Council wishes to delay advancing any negotiations with the State and believes we should be very considered and only reactive to any further information provided by the State.²¹²

296. That same day Mr Barker of EDL emailed Mr Smith and Mr Adam Crichton of KelledyJones:

I mentioned to Tony yesterday that if the timetable for execution of the 7/8th is realised we will need to insert some CP's to cover off some outstanding issues which we would like to go through aswell [sic]. Tony referred me to Adam to handle this for him.²¹³

297. On 28 November 2015 Mr Renshaw emailed the elected members to advise of his intention to discuss the project with Mr Adrian Tisato, a private solicitor. It is a matter of public record that Mr Tisato has acted for Mr Koutsantonis in respect of other matters.

298. Mr Renshaw's email provided:

I propose to ask for 3 to 6 months moratorium on any decision to allow us (Graham Davies essentially) to develop the options.²¹⁴

299. Mr Renshaw advised my investigation:

A. I had a sense that Adrian was able to help us in terms of our discussions with the State government.

Q. And had you had previous dealings with Adrian before?

A. Only socially.

[...]

Q. Was the council seeking that moratorium at this time?

A. Yes.

[...]

Q. My understanding is that KelledyJones were acting for the council in the negotiations as well, so why speak to Mr Tisato, rather than someone at KelledyJones?

A. Well, once again arms-length, independent advice, the -- and oversight. You know, the, that's what professional executives do to make sure they are doing the right thing. So that's just -- it was just oversight and, you know, good governance and good probity to make sure that -- that we were ticking off all of the boxes.

Q. So was there a sense that KelledyJones weren't at arms-length from the agreement at this point, is that why you engaged another solicitor?

A. Oh no, it's just good governance from an oversight standpoint. So, you know, you as professionals, yourselves, would, you know, have some information available to you and you would give that to your colleague or partners for oversight. Yes, it's just about being professional.²¹⁵

300. During interview, Mr Renshaw indicated that he could not recall the outcome of this discussion with Mr Tisato.²¹⁶ The council advised my investigation that it is unable to locate any records within its system concerning these discussions.²¹⁷

²¹² Email from A Renshaw to A Crichton et al. dated 27 November 2015.

²¹³ Email from EDL to N Smith and A Crichton dated 27 November 2015.

²¹⁴ Email from A Renshaw to M Provatidis et al. dated 28 November 2015.

²¹⁵ Interview with A Renshaw, 23 May 2017, transcript at 45:28.

²¹⁶ Interview with A Renshaw, 23 May 2017, transcript at 46:10 ('Q. What was the outcome of the discussions with Mr Tisato concerning that moratorium? A. I don't know.')

²¹⁷ Letter dated 8 May 2017.

301. My investigation asked Mr Davies if he could recall discussing the prospect of a proposed moratorium with Mr Renshaw at this time:

Q. Do you recall discussing that proposed moratorium with Mr Renshaw at all?

A. Not in those terms but I know he wanted to meet Adrian, and [Minister] Koutsantonis. It was going to be a Saturday. He said can I be available. You know, I didn't see the email. And I know he wanted to delay it to get his head around. So, broadly, yes, the gist of that, not the specific numbers.

[...]

Q. And obviously you didn't draft this email but when Mr Renshaw there is saying - or speaking about you developing the options, what do you interpret that to mean at this time?

A. I would say, really, the tender process.²¹⁸

302. Mr Koutsantonis advised my investigation that he recalls a 'brief' conversation with Mr Tisato. According to Mr Koutsantonis, Mr Tisato suggested that a meeting between the council and Mr Koutsantonis be convened to discuss the project. Mr Koutsantonis indicated that this conversation may have been the impetus for a meeting between Mr Renshaw and Mr Koutsantonis that subsequently took place on 3 December 2015.²¹⁹

303. Shortly after the discussion with Mr Tisato, Mr Renshaw emailed Acting Mayor Provatidis:

As suggested Adrian has agreed to assist the Council.

The target is to secure a moratorium on any decision in relation to the EDL agreement [for] a period of 3 to 6 months and during this period Graham Davies will be empowered to prove up some alternatives or otherwise.

[...]

Adrian agrees the Council's proposed actions are worthy and satisfy any ethics and governance test.

Adrian believes that the proposed moratorium is achievable, subject to information the State my [sic] hold, which we are not privy too [sic] and should this be the case, he will over view [sic] this with us.²²⁰

304. On 30 November 2015 Mr Renshaw emailed Ms Provatidis and Cr Paul Athanasiadis:

I have just finished a review with Michael [Kelledy] and he has expressed the view that we have been very prudent and thorough in undertaking the work we are doing and the proposed next steps.²²¹

305. During interview with my investigation, Mr Renshaw submitted that the 'next steps' referred to in this email 'would have been things like, you know, PPA, letter of comfort, RAES funding, the review of the machinations of the -- all the mechanics of the project.'²²²

306. On 1 December 2015 Mr Smith emailed a representative of EDL:

I have spoken to Adam Crichton from [the council's] legal firm KelledyJones and have also rung Tony Renshaw to find out an update.

²¹⁸ Interview with G Davies, 8 August 2017, transcript at 20:30.

²¹⁹ Letter from Mr Koutsantonis dated 25 January 2018.

²²⁰ Email from A Renshaw to M Provatidis dated 28 November 2015.

²²¹ Email from A Renshaw to M Provatidis and P Athanasiadis dated 30 November 2015

²²² Interview with A Renshaw, 23 May 2017, transcript at 48:12.

[...]

The Minister remains very supportive of the project and this has been communicated to Adam and I will also do so to Tony if/when he returns my call. I understand that Adam has relayed my conversation with him on Friday to Tony and Tony is aware of the issues with Graham [Davies'] opportunity theories and commercial reality.²²³

307. During interview with my investigation Mr Smith was questioned about this email:

Q. You have said towards the end of that email, "The Minister remains very supportive of the project"; was that the case?

A. Well yeah. I mean, you know, he could see this was a reasonable project. It ticked a lot of government priorities in terms of carbon abatement, renewable energy and low carbon investment. It's in a regional location, has regional jobs, mining, you know, improves that mining investment for the future. He was very supportive of it on the basis that we had provided him with the information around why we thought that this was a reasonable project to support.

[...]

Q. And how was that support actually expressed to the department, can you recall?

A. [...] I don't know, just through the weekly meetings. It was you know, "Okay well if you want to go ahead with it go ahead with it". It was nothing like "I want this project, I think this needs to go ahead". It was just "If you think this is a good deal I'm happy to support it".²²⁴

308. When asked to elaborate on his issues with Mr Davies' initial assessment of the project, Mr Smith submitted:

A. Look I'd have to check because that was his report, his three-page report on all of the stuff that was wrong with it and I think [...] it might have been about the testing the beneficial clause in the current PPA and going and installing 100 kilowatts distributed power and all this sort of stuff. [...] [T]he commercial reality and what Graham was suggesting as risk factors were different to our understanding, the legal advice that council were getting from KelledyJones. So -- and it highlighted his fundamental misunderstanding of the PPA terms. Yes, it was a complex PPA but by necessity because you have wind, solar, enabling technology, diesel generation all coming on stream at different times and the construction of that, it was a complex deal. Once that is commissioned, it becomes a relatively simple PPA and is based on the PPA that they already have got in place with EDL. So it just highlighted to me that he really doesn't understand how legal documents work and how commercial arrangements work.

Q. Did any of Mr Davies' criticisms of the PPA result in changes being made to it, can you recall?

A. I don't know whether there were any specific criticisms that he made around it. It was more KelledyJones advice around back to backing deed of grant obligations. [...] I'm not sure whether anything, you know, specifically related to the technical component to that was incorporated. I don't recall any of it.²²⁵

309. On 2 December 2015 Mr Davies emailed Mr Renshaw to provide an update concerning Resonant's review of the project. In this email, Mr Davies foreshadowed certain recommendations he anticipated making to the council, including:

- 1) Defer any date for signing as long as possible

²²³ Email from EDL to N Smith dated 27 November 2015.

²²⁴ Interview with N Smith, 2 June 2017, transcript at 47:25.

²²⁵ Interview with N Smith, 2 June 2017, transcript at 48:27.

- 2) Engage with DSD for financial support in taking this further – as they will be the major beneficiary
- 3) Engage with SA Government (DSD) and/or EDL to highlight the significant risks to which DCCP is exposed and rewrite the current PPA to both simplify and improve the commercial outcomes of the contract.
- [...]
- 5) Apply to ARENA for funding to undertake a feasibility study into a 100% Renewable Energy Project[.]
- [...]
- 6) Initiate an Expression of Interest (EOI) to gauge indicative prices and technology available on the open market for a PPA and/or EPC (Engineer, Procure, Construct)[.]
- [...]
- 9) Initiate a Request for Tender (RFT) for either a PPA or EPC[.]²²⁶

310. Mr Davies' email concluded:

I do not recommend signing the PPA or at the very least, it needs to be shown why you should.²²⁷

311. On 2 December 2015 a representative of EDL emailed the department to suggest that the prospective 'town hall' meeting proposed by the council was likely to be delayed until the New Year. In this email EDL queried whether Mr Koutsantonis' approval of the Deed of Grant and Letter of Comfort could be arranged to occur simultaneously with the council's execution of the PPA.²²⁸

312. My investigation was provided with a copy of an audio recording of a meeting said to have taken place between Mr Renshaw, Mayor Provatidis and two community representatives on 2 December 2015. I have reviewed the recording and am satisfied that it holds little relevance to the issues raised by the referral. Although it has been suggested by various parties that Mr Renshaw at this meeting suggested that the finalisation of the PPA was 'at least two years away', it is clear from the context of the discussion that Mr Renshaw was intending to refer to the works contracts associated with the commissioning of the project.²²⁹

Meeting with Mr Koutsantonis

313. On 3 December 2015 Mr Renshaw met with Mr Koutsantonis and representatives of the department. Mr Smith was not present for this meeting.²³⁰

314. Mr Renshaw described the meeting on the following terms:

- A. It was really to -- to, you know, get a really strong commitment from the State around the project and support for Coober Pedy[.] [...] I can remember making a remark about something and I said something like "Do you know if we sign this agreement that it's going to create this liability for the council?" and they went "Pardon". Some things you remember. I can remember that they want "Pardon". They had no understanding of the ramifications for the council.

[...]

²²⁶ Email from Resonant to A Renshaw dated 2 December 2015.

²²⁷ Email from Resonant to A Renshaw dated 2 December 2015.

²²⁸ Email from EDL to N Smith and V Duffy dated 2 December 2015.

²²⁹ Recording at 42:30 ('...it could be two years before any public tenders are released...').

²³⁰ Interview with N Smith, 2 June 2017, transcript at 49:40 ('Q. Can you recall, were you present at that meeting at all? A. No, I was at Umuwa in the APY Lands').

Q. What was the Minister's role in that meeting, can you recall?

A. My sense of meeting with the [Minister] was he was the decision-maker for the State.

Q. Did he express any views about the project at all?

A. Yes, he did. I was a bit surprised actually.

Q. What did he say?

A. He said early on -- my sense -- he said "It's a decision for the council", the words were like, once again I'm not throwing the [Minister] under the bus in terms of these words but the impression I got early on was "We don't give a toss what you do, it's a decision for the council". [...] I remember early on being very disappointed by that. In fact, quite taken by it: that I thought that here was an agency that had invested three or four or five years in a project and, you know, it's five minutes to midnight and here's the decision-maker of the State saying words like "We don't give a toss". Sorry that's on the recording, Tom, but anyway. That is my impression. You know, his words weren't that, his words were something along the lines of "It's a decision of the council, we don't mind what you do", the sense of it was. I was really quite -- in fact, I was offended by it.

Q. Was this the only meeting that you had with the Minister personally, can you recall?

A. No, I think I had another one. But I would have to go back through the records.

Q. Around this time in the chronology, do you know?

A. That is 3 December. Yeah, I have got a sense that I had another one, whether it was in December, whether it was in January, [...] I don't recall.

Q. Had you had any previous interactions with the Minister's office in relation to the project at this point?

A. No.²³¹

315. Mr Koutsantonis advised my investigation that he cannot recall a second meeting with Mr Renshaw. Mr Koutsantonis indicated that he was on a period of extended leave from 15 December 2015 to 18 January 2016.²³² Nothing within the records supplied to my investigation suggests that a second meeting took place.

316. Mr Renshaw further described his conversation with Mr Koutsantonis:

Q. What did you say to that when [the Minister] said "we don't care what you do"?

A. [...] There would have been, you know, quite a long pause, now whether it was 15 seconds 30 seconds. We put the clock on and we sit here and don't talk each to each other, 15 seconds is a long time. I made sure that point resonated with those people.

Q. And what were the particular liabilities for the council that you were worried about?

A. First of all if we signed -- so once again, in context, the council didn't have any money. The council wasn't generating any regular recurring income, and if we -- there was -- I can't remember what the default clauses were in the PPA, but if we hadn't paid the bill after three months or we hadn't paid their bill after six months then they had the right to effectively foreclose on council and if they did that, then we had to pay them \$50 million or something.

Q. Did you explain all that to the [Minister] in that kind of detail?

A. I don't know; yeah.²³³

317. My investigation queried whether Mr Renshaw recalled raising Resonant's assessment of the project with Mr Koutsantonis on this occasion. Mr Renshaw advised:

²³¹ Interview with A Renshaw, 23 May 2017, transcript at 48:32.

²³² Letter from Mr Koutsantonis dated 25 January 2018.

²³³ Interview with A Renshaw, 23 May 2017, transcript at 56:40.

A. I would have but in the conversation of things like, if we sign this agreement and it falls over, then we have got to pay EDL \$50 million on day one. There was that remark or another remark, I'm not sure. That one sticks in my mind where I remember that all of his staff just went pale. I was quite taken by that.²³⁴

318. Mr Renshaw indicated that he could not specifically recall raising the lack of a market procurement process concerning the project with Mr Koutsantonis on this occasion.²³⁵ Mr Renshaw suggested that the topic of the council's discussions with alternative suppliers was raised, however:

A. [M]y sense was that the [Minister] made mention of ZEN, but whether he didn't make mention of ZEN but made mention of us desiring to use another supplier, I was a bit taken by that too.

Q. Did he express any views on that?

A. He thought that was pretty unfavourable.

Q. Did he elaborate at all?

A. No, [...] my sense is he said ZEN or an alternative supplier and that is what we wanted to do, and that that was not a favourable outcome for the State.

[...]

Q. Was the council still in discussions with ZEN at this time?

A. I don't think so. But I -- I just have to say I don't remember. I don't think so.²³⁶

319. Concerning this meeting, Mr Koutsantonis submitted to my investigation:

It was a short meeting where Mr Renshaw expressed general concerns as to the PPA and said that the Council wanted further guarantees as to customer power prices set by the State under the RAES. I told Mr Renshaw that DSD considered the PPA to be a good deal but that if the Council was dissatisfied then it should not enter into the PPA.²³⁷

320. When asked about the 'general concerns' expressed by Mr Renshaw and whether these related to the lack of a market procurement process, Mr Koutsantonis submitted that he 'does not specifically recall a discussion about a market procurement process' during the meeting.²³⁸

321. Mr Koutsantonis submitted that he sought to 'assure Mr Renshaw that the Council was free to enter into an energy supply contract with any supplier it wished to use and whether to proceed with the PPA was entirely a matter for the Council.'²³⁹

322. Mr Koutsantonis submitted that the 'clear implication' of his comments was that 'the Council was free to approach the market if it wished to do so.'²⁴⁰

323. Mr Koutsantonis indicated that he could not recall saying anything during the meeting that may have given Mr Renshaw the impression that he wished to discourage the council from considering alternative suppliers.²⁴¹

324. My investigation asked Mr Davies if he could recall Mr Renshaw discussing this meeting with him:

²³⁴ Interview with A Renshaw, 23 May 2017, transcript at 50:32.

²³⁵ Interview with A Renshaw, 23 May 2017, transcript at 50:39.

²³⁶ Interview with A Renshaw, 23 May 2017, transcript at 51:16.

²³⁷ Letter from Mr Koutsantonis dated 5 December 2016.

²³⁸ Letter from Mr Koutsantonis dated 25 January 2018.

²³⁹ Letter from Mr Koutsantonis dated 25 January 2018.

²⁴⁰ Letter from Mr Koutsantonis dated 25 January 2018.

²⁴¹ Letter from Mr Koutsantonis dated 25 January 2018.

- A. He said – if it was a meeting, if it was that meeting discussed – how he'd, you know, stood up to them and said “This is not good” etcetera, a bit of a rah-rah, and they're listening and something's going to be done. But very general wishy-washy stuff, I wouldn't give that any substance.²⁴²

325. My investigation asked Mr Smith what, if anything, he was told about the meeting:

- A. I think Vince Duffy sent me an email saying the project is dead as a dodo following the meeting. And I rang Vince and he sort of said that, you know, they were looking to delay the project for three to six months to undertake a market approach based on Graham's report.

[...]

- Q. And the information that you received about that meeting was clear in that Mr Renshaw was requesting a three to six-month moratorium?

A. Well Vince was my boss so we had a conversation around it later on at that stage.

- Q. And did the information you received suggest that that was for purposes of going to market specifically?

A. Yeah. But what that would do, EDL were already saying “We are at trigger point now where we are looking to walk away from this project, so if you go for a three to six month delay, to go and test the market we will walk away. So just be aware if you do that decision that will kill the project”, and that was coming from their CEO Greg Pritchard and their board of directors. EDL were, you know, very strongly considering walking away from the whole project.

- Q. The information we have received from Mr Renshaw is that there was a request for a moratorium but that was to allow the council to sit down and review the agreement rather than in contemplation of any open market process. Does that conflict with what you were told about that meeting?

A. Yes. [...] That three to six month delay may have been a moratorium to review the PPA but I'm sorry, they had been reviewing the PPA since January that year. How much longer do you need to review the PPA? They've got their legal adviser in it, he's reviewed the PPA. Their executive had reviewed the PPA. Tony had reviewed the PPA. We had reviewed the PPA. Crown had reviewed the PPA. I'm not sure what more reviewing would do. You know, it was there. So asking for another three to six months to review the PPA, what else do you need? How many times can you read the same document?²⁴³

326. My investigation asked Mr Koutsantonis whether he could recall Mr Renshaw requesting or otherwise raising the possibility of requesting State Government support for a three- to six-month delay in respect of finalising the PPA. I do not consider that Mr Koutsantonis directly responded to this question. Mr Koutsantonis submitted that he:

told Mr Renshaw that whether to enter into the PPA was a matter for the Council. Therefore any delay in execution of the PPA, to allow for further consideration of the PPA by the Council, was a matter for the Council.²⁴⁴

327. Mr Koutsantonis otherwise submitted that he ‘would not have been concerned by any delay if Mr Renshaw actually raised such a delay’ with him.

328. Later that day, Mr Renshaw emailed Ms Provatidis and Cr Paul Athanasiadis concerning the meeting with Mr Koutsantonis:

We have just been advised that the SA Government believe we are stalling EDL so they will drop off and we can walk ZEN in to take over the project.

²⁴² Interview with G Davies, 8 August 2017, transcript at 29:24.

²⁴³ Interview with N Smith, 2 June 2017, transcript at 50:16.

²⁴⁴ Letter from Mr Koutsantonis dated 25 January 2018.

We have replied that should EDL chooses [sic] not to proceed and [sic] then anything the Council does will be open, transparent and satisfy the highest standards of public procurement.

We are drafting letters and information back to the [Minister] and will have them for consideration later today or tomorrow.²⁴⁵

329. Save for this email, the council advised my investigation that it is unable to locate any other records within its system concerning the meeting.²⁴⁶

The December 2015 KelledyJones advice

330. It appears that KelledyJones supplied the council with further written legal advice in respect of the project sometime in or around early December 2015 (**the December 2015 KelledyJones advice**).

331. The advice purported to summarise various aspects of the draft PPA and the associated Deed of Grant for the council's consideration, before commenting on the procurement process followed by the council.

332. The advice was largely equivocal on the terms of the proposed PPA:

[T]he Council must be satisfied with both the terms and conditions of the PPA before it enters into it and the ongoing security of the State Government financial underwriting support[.]

333. The advice cautioned of the 'significant risk' posed by both the absence of a 20-year commitment from the State Government and the level of discretion afforded to Mr Koutsantonis to determine the subsidy amount under the proposed Deed of Grant. It submitted that a 20-year commitment from the State Government would 'significantly reduce' the risk presented to the council by the agreement.

334. The advice went on to observe:

TENDER PROCESS

We understand that a formal tender process was not undertaken for the project – although we are not aware of what (if any) reasons were recorded for proceeding in this manner for the purposes of ensuring that the Council was not at risk under the procurement policies and section 49 of the [Local Government] Act. Although a tender process may have been undertaken prior to the commencement of the exiting [sic] PPA in 2004, in our view, the project is entirely different to the existing arrangements. Although we do have concern that there appears as though no opportunity was given to other companies to provide a submission for future power generation, we do acknowledge that this particular proposal has been through an external audit process in order to obtain the ARENA funding. This, of course, does not mean that this project is the best option available for Coober Pedy. We do not have any information on other similar projects or what other power generation companies may be able to offer Coober Pedy and, therefore, what benefits might otherwise be achieved for the Council and its community and, also, for the State Government.

335. The advice went on to identify and explain the risk in entering into a 20 year contract with EDL with only five years of guaranteed subsidies from the State Government, before advising:

²⁴⁵ Email from A Renshaw to M Provatidis and P Athanasiadis dated 3 December 2015.

²⁴⁶ Letter dated 8 May 2017.

There are, however, also 'political' considerations to have regard to when making a decision on the project. The State Government has supported the proposal by Energy Generation and has sought to demonstrate its intent, although not in any legally binding manner, to financially support the PPA for the 20 year term. Consequently, there may be, in our view, a real and significant financial risk to that ongoing support should the Council decide to explore other options.

Further, the project has been supported at the Federal level through the ARENA funding. This support has been publicly promoted in National media and we understand the possible \$18.5M granted is substantially higher than other grants offered by ARENA. There is, therefore, a risk that if this project does not proceed it may cause embarrassment to those Government Agencies that have, to date, supported it. There is, in our view, a genuine risk that these Agencies may not support an alternative project of this type (i.e. power generation) to the same extent and may be particularly cautious about any alternative project. As such, whilst there may be other options available to the Council if it seeks to 'test the market' for the purposes of ascertain [sic] alternatives which may be of greater benefit to the Council and its community (either in the short or long term), if such a project does not receive the same level of governmental support, the liability for the Council may be substantially higher. That is to say, the proposal from Energy Generation will provide the Community with ongoing, reliable electricity for the life of the PPA and it comes with substantial Government support. An alternative may not.

336. The advice closed:

A relevant consideration for the Council in determining how to proceed in this matter is the final report of Graham Davies. If his report, with appropriate cost analysis and other data objectively demonstrates that the Council can expect a more acceptable, less of a financial impact [sic] proposition, from Energy Generation, the first step without contemplating a thorough market-testing exercise, is to present the information to Energy Generation for the purpose of seeking an alternative, more financially beneficial, financial proposition. This would also, no doubt, gain further support from a fresh prudential report, consistent with section 48 of the Local Government Act 1999. The risk being that the Council may otherwise, consistent with its obligations under the Local Government Act 1999, with public policy objectives and for the purpose of avoiding any risk of maladministration in its use of public funds, be required to 'test the market' as an objective means of demonstrating the value proposition (or not) of the current Energy Generation proposal. This approach would necessarily be beneficial to the State Government at least from the perspective of it being an independent and objective assessment, and as such would be a wholly supportable stance (not a Gilman approach!).

337. During interview with my investigation, Mr Renshaw was questioned extensively about this document:

Q. Can you recall if anyone else was provided a copy of this document?

A. I think all of the councillors would have. [...] If we received this, then the councillors would have received it. It's beyond reproach.

[...]

Q. "We understand that the formal tender process was not undertaken for the project although we are not sure of what, if any reasons were recorded for proceeding in this manner for the purposes of ensuring that the council was not at risk under its procurement policy in section 49 of the Local Government Act. Although a tender process may have been undertaken prior to the commencement of the exiting" -- I think it should be existing -- "PPA in 2004 in our view the project is entirely different to the [existing] arrangements." Can you recall did this passage give you any cause for concern at the time?

A. I think that -- what I have said about 10 times now -- we have had this letter or this conference with the State around the Coordinator-General and [...] my sense of reading that now is they're probably just putting in writing what I said over the phone to them, or something like that, you know.

Q. There's mention here of a potential lack of reasons being recorded for proceeding in this manner for the purposes of ensuring that the council is not a risk under its Procurement Policy. Did that give you any cause for concern?

A. No, I go back to the issues around the information we had from the State.²⁴⁷

338. When asked how he interpreted the substance of the KelledyJones advice, Mr Renshaw submitted:

A. So I said before about I might have been the originator of some words, I can remember saying early on in reading -- having putting my head around the project "God this looks like Gillman 2" and people seemed to have picked up on that and carried it forward, you know. So my sense of reading a fair bit of this, just today, is this is a bit of a disclaimer or this is just KelledyJones covering their butt. "Look I told you about this, we did the right thing." [...] [W]ithout putting words in Adam [Crichton]'s mouth, I have a sense that Adam and I agreed that we had done the issue of the procurement thing to death and that there was no point in trying to explore it anymore[.] [...] The matter of the procurement, success or failure was dealt with, and that there was no point in raising those matters any more. My sense about this is [...] that KelledyJones are probably just summarising matters and covering their butt. Yeah.

Q. So you don't read that final paragraph to be legal advice to the effect that the council needed to either obtain a better deal from EDL or test the market?

A. So, yes, we certainly heard that advice and we listened to it. I think I have said all along we were negotiating or working with EDL to try and find ways to generate a better outcome; to lower the risk to the council; to lower the risk for the community. So, yeah, we heard that advice, we listened to that advice, we responded to that advice in terms of our negotiations with EDL.

Q. KelledyJones appear to be advising that there was a "genuine risk that these agencies may not support an alternative project of this type (ie power generation) to the same extent and may be particularly cautious about any alternative project"; did you agree with that assessment at the time?

A. Yeah, I think so.

Q. There was a sense that another project might not have the same level of support?

A. I think it's -- I would -- I don't think it's ever been said anywhere by the State but I think it was, it's this deal or the highway.

Q. That was the sense that you --

A. Yeah. Yes.²⁴⁸

339. Mr Renshaw was later asked to clarify:

Q. You didn't interpret this to be serious advice to the council to undertake a competitive tender process?

A. I don't mind you asking that question again, [...] but I go back to what I have said. As I reckon the public procurement thing was done. I don't think there was any point in us, at this time, I don't think -- you know, I'm not reading correspondence that was generated in February or March at this stage, but my sense is the issue around the public procurement or the failure of that public procurement was dealt with and there was no point having a discussion.

[...]

Q. [W]hen the council resolved to execute the agreement, there was no mention of considering the legal advice and "for this reason we are not taking this --"

²⁴⁷ Interview with A Renshaw, 23 May 2017, transcript at 57:44.

²⁴⁸ Interview with A Renshaw, 23 May 2017, transcript at 60:29.

- A. Sure. Thank you. Yes, if we haven't been, in my language, tickety-boo with every dot and every T then I'm happy to say that would be the case. Yeah so I think that's reasonable criticism.²⁴⁹

340. When asked how the advice was communicated to the elected members, Mr Renshaw submitted:

A. There would have been discussion along the lines "Here's our probity review, section 48 review. This is the KelledyJones [advice]. These are the elements of it and you may be able" -- I can't recall the exact conversation, but it would have been something along the lines of "you might recall that we have discussed this element and this is consistent with the commentary we have received from KelledyJones and then moving on, we have discussed this element. This is consistent or set out in their report. This is where we are up to; this is where we hope to get to" et cetera.

Q. I was just wondering was there any discussion about the alternatives put by KelledyJones when this document was put to the --

A. I don't think KelledyJones -- KelledyJones simply suggested that we might like to consider alternatives. They didn't put any alternatives. I think my sense around this report is that they -- now I read it today, it's probably a bit of butt-covering, and saying "Look we have heard Graham Davies and maybe you should listen to him" or words to that effect. They weren't being mute to the other information that was available.²⁵⁰

Resonant's summary review

341. At around this same date, the council also appears to have received a second report from Resonant in respect of the project (**Resonant's summary review**).

342. Resonant's summary review, which identified itself as an extract from Resonant's yet-to-be-completed final report to the council, advised:

Resonant does acknowledge that the proposed technology is feasible, but believes it is sub-optimal.

Specific concerns and risks with the PPA are:

1. The PPA locks [the council] into an expensive (\$6.7M p.a) 20 year contract with no easy way to exit or decrease electricity prices.
2. With prices locked in at levels above metro Adelaide, [the council] would rely on SA Government [...] funding through the RAES to avoid insolvency;
3. With rapidly decreasing costs, it is highly probable that in 5 to 10 years, residents would defect from the grid for economic reasons under the PPA tariff regime. This would necessitate additional DSD support as they would have a bill of \$4.7M even if no electricity was sold;
4. [The council] is also obliged to undertake roads, water, easements, circuit breaker upgrades, site licenses, generation licenses, which further increase their costs;
5. The proposed PPA caps all of EG's risks (outages, penalties) to the detriment of [the council]. It would benefit EG to have no renewables earn \$9.5M in revenue and pay the capped penalty of \$0.4M;
6. The contract is extremely complex to manage, has many ambiguities, inconsistencies, insufficient technical definitions and errors. [...]
7. The complexity of managing the contract would place a large burden on [the council], and to even contemplate and [sic] Beneficial Change would incur substantial legal and other costs;

²⁴⁹ Interview with A Renshaw, 23 May 2017, transcript at 62:21.

²⁵⁰ Interview with A Renshaw, 23 May 2017, transcript at 62:9.

8. There is no economic incentive to ensure an efficient, flexible system that could take advantage of commercialising technologies and reducing costs of storage. Any benefit would have to be 'forced' through the Beneficial Clause;
9. The reported capital of \$33M is excessive in the current market place, and may reflect a price of 18 months ago, but the market is moving fast;
10. It is currently a competitive market, and companies are prepared to trim profits to get work, yet no competitive proves has been undertaken;
11. EDL have had no experience to date with any of the proposed renewable technologies including the DUPS, solar PV, wind, HV feeders. They do have diesel and control of diesel experience;
12. In a meeting, EDL acknowledged they had not considered demand management, load switching, smart meters, increased storage, capacitor banks, distributed solar (which reduces surges) distributed batteries. Given they claimed 1500 configurations, it is surprising that none of these were considered;
13. The proposed system wastes more than 30% of the renewable energy, a combination of items discussed above would could [sic] significantly improve this;
14. There is the very real risk that the system will only be commissioned in Dec 2019, as that is the date the Liquidated Damages kick in for late delivery. EDL have every incentive to delay the project, as they would be able to run more diesel, which is more profitable to EDL;
15. By the time the project is running, 70% diesel will no longer be iconic, particularly for a site with such good wind and solar resource as Coober Pedy
16. To rely on the competence, public image and good will of EDL to ensure the project meets all criteria and does all it can to decrease electricity tariffs is a huge gamble;
17. EDL still have extensive design and project work to do including establishing site locations, systems specifications and sizing, and construction work is not imminent.

343. The report further observed:

It is unfortunate, that the project has progressed this far, there will be further delays if the process goes back to the drawing board. There is also the risk of the ARENA funding being withdrawn. It is likely that a reconfigured less costly more profitable project with 100% renewables would very likely succeed in ARENA granting funds.

344. The report concluded:

Resonant recognises the delay in the project and recommends the following:

- 1) Obtain quotes and initiate installing 100kW of solar PV directly into the 240V feeder under '13.6 Beneficial Change' of the [2004] PPA contract. The payback for such a scheme is estimated as 1 to 2 years – using Simple Payback. It is also a chance to test the Beneficial Change clause;
- 2) Apply to ARENA for funding to undertake a feasibility study into a 100% Renewable Energy Project (REP) with integrated control and demand management with storage options including batteries, hydrogen, compressed air and other.
- 3) Initiate an Expression of Interest (EOI) to gauge indicative prices and technology available on the open market for a PPA and/or EPC (Engineer, Procure, Construct) for
 - a. A comparative system of 70% renewables;
 - b. An iconic 100% renewables with wind and solar at 90%+ and biodiesel for the remainder[.]

345. Mr Renshaw submitted that a copy of this report was supplied to the elected members of the council.²⁵¹ When asked about this issue, Mr Davies commented:

A. I don't know if any of the council received this. It went to Tony. I think its purpose was to go to EDL.²⁵²

346. When asked if the council contemplated following the recommendations within Resonant's summary review, Mr Renshaw submitted:

A. I said previously around Graham Davies being a difficult person, and I have also said that the issue around the -- concern about the probity of the procurement was dealt through the advice of the State. Graham simply never accepted that. Whether -- whether our decision to rely upon the State's advice was wrong, or sound or unsound, reasonable or unreasonable, I'm not saying, but we were of the view that we had put that matter to the State and that the State had replied back to us to this effect and that we were, that the matter had been dealt with. Graham simply wouldn't let it go and then he -- I'm not sure whether it's in this document or a subsequent document, we have a number of documents from Graham. He was proposing that we effectively went alone and did this whole project ourselves and it was going to create a massive liability for the council and he simply wouldn't understand that.²⁵³

347. Mr Renshaw went on to submit:

A. [W]e had a very difficult meeting where the Mayor, Adam, myself, Graham and I think that Michael Kelledy was involved was well, because we also had a series of people from EDL on a telephone hook-up and I don't know whether Nick Smith came to KelledyJones' office for that meeting or Nick was on the telephone as well, and I think we had planned for that meeting to go all day. It went for a long time because I can remember we had a break for lunch and we went down to the cafe and whatnot. The -- and I became aware very early -- and Adam Crichton did -- I'm sorry, I'm not putting words in Adam's mouth -- but Adam and -- I'm of the view that Adam and I became aware very quickly that Graham didn't understand the commercial, long-term commercial aspects of this process. That he was happy, he thought it was a fantastic idea if the council went off and did its own thing and borrowed all this money and, you know, wah, wah, wah. [...] I'm not questioning his intellectual review or the technical review of the project, but early on it was very clear that Graham's thoughts were that we should just go and do our own thing.²⁵⁴

348. My investigation asked Mr Davies about his impression of the council's intentions at this time:

Q. You've recommended that the council initiate an expression of interest process to gauge indicative prices and technology available at the open market. Can you recall, did the council ever suggest to you that it was considering that specific option at the time?

A. Yeah, well, that would be starting off the tender process. So the tender process is you get an expression of interest.

[...]

Q. And there had been specific discussions between yourself and the council about that, that expression of interest process?

²⁵¹ Interview with A Renshaw, 23 May 2017, transcript at 52:33 ('Q. Can you recall who else in the council might have -- A. Everyone would have got it. Q. Including, you mean the elected members? A. Absolutely right, absolutely.')

²⁵² Interview with G Davies, 8 August 2017, transcript at 21:20.

²⁵³ Interview with A Renshaw, 23 May 2017, transcript at 53:34. In responding to my provisional report, Mr Davies objected to this characterisation of Resonant's position; letter from G Davies dated 15 May 2018.

²⁵⁴ Interview with A Renshaw, 23 May 2017, transcript at 54:10.

- A. Yes. As we mentioned earlier on, about expression of interest, I had listed companies who could feasibly do this. I can't recall who it went to but certainly they were aware that there were companies available.²⁵⁵

349. Mr Davies later elaborated on the purpose of the summary review:

- Q. And is it that the purpose of this document was really to put EDL on notice as to what you were saying?
- A. It was – I think that was the essence, that it could be used. He asked me just to summarise things and I was aware that it might go there. So, fundamentally, it could have been used to go to the government, to various other people as well; whereas they may not have felt comfortable going to – putting in the whole original document.
- Q. And exactly what would the purpose have been in providing EDL or the State Government with this document?
- A. Well, I think it was really just to stop that – the project, the non-tender process and go to a tender process. Or that would be part one. Part two would be to get clarity on – or is there something that's been missed? Is this a reasonable project besides that? So it was – so it had the purpose of both. If there's something that has been overlooked, put it on the table. This is your chance.²⁵⁶

350. During interview with my investigation, Mr Davies was asked about the summary review's representation regarding the likelihood of ARENA funding an alternative proposal:

- Q. What was that comment based on, do you recall?
- A. [...] My view is if they came up with another proposal, ARENA would still want to support it. So, yes, you would lose that 19 million. Okay, say "Oh well, here's the other bucket". They would – their brief was to spend money.
- Q. And you said that that was your view. Was that based on past experience with ARENA or was it an intuition? Can you clarify at all?
- A. It was based on the motives of ARENA, that they had money to spend on projects where, if you meet these criteria, they want to spend money and support that, yeah. So a bit of intuition, a bit of background knowledge.
- Q. So there weren't any specific discussions with ARENA on this issue where someone had suggested that they might be likely to fund another proposal?
- A. Tony spoke to Ian Kay on that and Ian Kay, according to Tony, said he knew EDL, this was a windfall project for EDL. Okay. I'm going to have difficulty proving it but I clearly remember those words. I thought truly that's a case for stopping it. But I got the feeling then that if – ARENA would still certainly consider anything else of this nature. But I can't – you know, whatever Tony discussed with Ian Kay, I don't know.²⁵⁷

The letter to Mr Koutsantonis

351. On 7 December 2015 Mr Renshaw supplied a copy of the December 2015 Kelledey Jones advice and Resonant's summary review to EDL and the department.²⁵⁸
352. On this same day, Mayor Provatidis forwarded a copy of both documents to the Minister's office. By accompanying letter addressed to Mr Koutsantonis, Ms Provatidis observed:

²⁵⁵ Interview with G Davies, 8 August 2017, transcript at 21:30.

²⁵⁶ Interview with G Davies, 8 August 2017, transcript at 22:7.

²⁵⁷ Interview with G Davies, 8 August 2017, transcript at 22:36.

²⁵⁸ Email from A Renshaw to EDL and N Smith dated 7 December 2015.

It is disappointing that at this late hour in negotiations, discovery and due diligence has revealed the findings set out in these reports, that in the normal course may have been settled previously.

In summary the commentaries suggest the South Australian Government and its taxpayers have a tangible and tactile increased risk in proceeding with the EDL opportunity.

This increased risk is directly linked to the RAES funding agreement between the Government and the Council.

This risk is further extended through EDL having no experience in renewable energy whatsoever, with their business being solely focussed on fossil fuel resources to generate electricity.

Further proceeding with the project exposes the South Australian Government and the Council to public scrutiny of the market competitiveness and competitive tension in the procurement of the EDL services.

The ARENA funding assessment will not survive any procurement assessment nor is its reliance sustainable.

[...]

In terms of market competitive tension the Council's recent activities have identified up to 8 equivalent and or superior service providers, all with domestic and international experience in renewable energy, who have suggested alternative models, with a lower demand for capital and lower generation costs.

These outcomes are attractive for the Australian and South Australian Government and for taxpayers, Australian [sic] wide.

Should the Council determine to proceed to test these alternatives, we welcome your government's participation and membership of a Tender Panel and Tender Review Panel.

This Tender panel will at all times satisfy the adopted international standards of Public Procurement and be recognised as best practice.

Independent external auditors will be engaged to oversee the process.

Importantly the Council welcomes, appreciates and understands the South Australian Government's enthusiasm and appetite for the EDL opportunity and in crystallising the appetite the Government may;

1. Provide a 100% performance guarantee of the EDL contract by way of a RAES funding Deed of Grant for the life of the EDL contract, and or
2. Be a co signature [sic] with the Council to the EDL contact, [sic] and or
3. Be the sole signature [sic] to the EDL contact, [sic] and or
4. Take over the electricity generation function and service delivery in Coober Pedy, where by [sic] the Council will gift all of the assets of the electricity generation function to the South Australian Government.²⁵⁹

353. Ms Provatidis closed with an invitation to Mr Koutsantonis to meet with the council to discuss a 'mutually rewarding pathway to there being a Hybrid Renewable Energy Scheme in Coober Pedy'.

354. Mr Renshaw acknowledged drafting this letter.²⁶⁰

²⁵⁹ Letter from M Provatidis dated 7 December 2015.

²⁶⁰ Interview with A Renshaw, 23 May 2017, transcript at 65:41 ('Q. I note it is signed by the Acting Mayor. A. Yes. Q. Do you recall who drafted it? A. Me.')

355. The records supplied to my investigation suggest that the letter was circulated to the elected members of the council in draft form.²⁶¹

356. Mr Renshaw was asked to comment on the letter:

Q. If you just turn perhaps to the second page, about halfway down the Acting Mayor – or you – have said: “In terms of market competitive tension, the council's recent activities have identified up to eight equivalent and/or superior service providers.”

A. I think that is probably a bit of commercial puffery.

Q. That wasn't the case?

A. I don't know. But I think maybe Graham could have said to me in common language “Tony, there's a plethora of other people”, and I might have plugged in eight. Yeah.

Q. Returning to that letter: “These outcomes are attractive to the Australian and South Australian government and for the taxpayers Australian wide. Should the council determine to proceed to test these alternatives, we welcome your government's participation and membership on the tender panel and tender review panel. This tender panel will at all times satisfy the adopted international standards of public procurement and be recognised as best practice. Independent external auditors will be engaged to oversee the process.” Again, was the council seriously contemplating such a tender process at this time?

A. As I have said previously that the matter of procurement was dealt with, so we are taking the [Minister] on a journey here. So we've identified a raft of things that we are concerned about, such as on the first paragraph on page 2: “After setting any liquidated damages for non-performance” et cetera et cetera, we are flagging, we are highlighting with him issues that he wasn't aware of and -- so we are taking him on a journey and we have said “This is where we are, [Minister], and we think that the best way to proceed here is for you to sign the agreement and if you don't want to help”, I think we have said here “provide 100% performance guarantee then otherwise be a co-signature or be the sole signature”.

Q. So how were those options developed, can you recall? How were they developed?

A. Yeah, I can recall: in my head.

Q. Who did you speak to and I mean how was the decision made to put these four points?

A. We certainly would have discussed them with the councillors as options, and I won't use the language one of the councillors said about item three, words to the effect of “that's a good idea”. [...] But certainly these whole -- these scenarios here are summarising the council's position at that time, and we were concerned about our exposure and our risk and we were asking or seeking some form of alternative or comfort or safety for the Coober Pedy community from the [Minister].

Q. Can you recall did the [Minister], himself, ever discuss this letter with you, or the contents of the letter?

A. I don't recall. I don't know even whether we got a reply.²⁶²

357. During interview with my investigation, Mr Davies was asked about the content of this letter:

A. Co-signing [the PPA] was something I'd suggested. If they want it that much, you sign it.

Q. Can you recall any specific discussions about these four proposed alternatives at the time that -

²⁶¹ Email from A Renshaw to P Athanasiadis et al. dated 4 December 2015 (‘Attached are draft letters to the South Australian Government Treasurer as a follow up to the meeting yesterday.’)

²⁶² Interview with A Renshaw, 23 May 2017, transcript at 66:21.

A. Yes, I discussed that, I can't remember whether a teleconference or in what manner, is – if you sign something you're responsible for it. So, therefore, if the government want it, let them co-sign it.

[...]

Q. The council refers to “up to eight equivalent and/or superior service providers” who the council suggests have suggested alternative models with lower demand and lower generation costs. Was the council here referring to those eight providers that you had identified?

A. Yes.

Q. Had they actually provided an indication - or had they suggested alternative models, as the council appears to have claimed in this letter?

A. I'm not sure what they mean with alternative models in terms of the configuration of the technology or whether they mean – just really alternative quotes would have been the better terminology rather than models.

Q. And just to clarify, you obtained those quotes at this time; is that right?

A. No. [...] I never got these quotes. I listed eight companies and it was – look, it was a quick brain drop. I said there would probably be others and there may be some I take off the list when it came down to – so that at number 8 stuck as we would (*Indecipherable*) with more experience, you should be able to tender. Each tender would have been – would have come up as different. Up to them to how would you structure it to get the best price for electricity.²⁶³

358. Mr Davies was asked to comment on Mr Renshaw's evidence to my investigation:

Q. We've spoken to Mr Renshaw and he suggested to us that the council's references to alternatives to the EDL proposal and the testing of the market in this letter was really centred around trying to improve what EDL and the State Government were offering, rather than being reflective of a genuine desire within the council to go to market. Does that perhaps conflict with your recollection of this time?

A. That he was looking at improvements to EDL with these eight companies involved?

Q. No, sorry. That the reference in this letter to the council potentially pursuing other providers was really a tactical – I suppose a tactical decision in order to, as he put it, convince the State Government to offer a better deal with EDL?

A. He did at some stage later on mention it. But it was - and I wouldn't have - that would have sent a warning bell. So I don't like the concept of going out to tender if you're not genuine about it, and I would not have allowed that. So had the outcome meant that EDL came with a better deal, that's a tender. [...] He spoke in circles. Clearly, at that stage he wanted to tender. And, in fact as proof, he said “How are we going to tender without EDL knowing?” Well, actually it's not proof: that is one of the things he said. So maybe in his mind he was using this as leverage to get a better deal. That's why he didn't want EDL to know. And I said “Well, if you go to the market, when people get prices, they sometimes go to the same place, there's no way I can guarantee this won't get out”. [...] So, to answer your question, I'm not really sure, kind of, where you're coming from with that.

Q. Mr Renshaw has put to us that the council was never seriously contemplating going to market. Do you have any comment in response to that?

A. No, he certainly didn't make that clear to me. Yeah. He made it clear to me – so if he wasn't, he didn't give me that impression “Oh, we'll just give it bit of leverage”.

[...]

Q. Is it possible that Mr Renshaw was telling you one thing and the elected members something else?

²⁶³ Interview with G Davies, 8 August 2017, transcript at 24:34.

A. Absolutely. Is it possible? It's absolutely possible. I wouldn't say it's a fact. But I'd say more than likely that there were different messages going different places. [...]

Q. And can I just clarify, what you said was up until this stage your understanding was that there was a genuine intention to stop the process with EDL?

A. Yeah. [...] He had every intention of dropping EDL and going to something else, which looked like perhaps a better profile for him – my words. So at that stage I was – you know, he was very clear on that. The meeting with council was about tender and they were there and the same thing, they didn't need to tender. But then afterwards something seemed to switch. So when he said earlier on, what he felt earlier on and what he was doing later on, was when the inconsistencies started appearing.²⁶⁴

359. On 11 December 2015 a representative of the Minister's office wrote to Mayor Provatidis to acknowledge receipt of the 7 December 2015. The council was advised that a response would 'be forwarded at the earliest opportunity'.²⁶⁵

360. It appears that a substantive response to the various matters raised in Ms Provatidis' letter was initially contemplated by the department. My investigation was provided with a briefing minute prepared by Mr Smith and endorsed by the department's Acting Executive Director, Energy Markets and Programs dated 22 December 2015 recommending such a course.

361. During interview with my investigation, Mr Smith was asked whether he could recall if this briefing was ever submitted to the Minister's office. Mr Smith submitted:

A. I'm not sure whether this one did actually go across. Where things were at during this period was I was almost updating letters to EDL and the Mayor on a weekly basis and trying to draft briefings to go with them and then they would fall by the wayside because they suddenly became no longer relevant because everything had changed. So I'm not sure whether we ended up sending this through to the Minister or not.²⁶⁶

362. Mr Koutsantonis advised my investigation that he did not personally receive or review this briefing minute or the enclosed draft letter. It appears that a formal response was not ultimately issued to the council.

Further discussions

363. On 9 December 2015 Mr Barker of EDL emailed Mr Smith:

Following Board discussion EDL still wants to try to get this project over the line but looking to do this in very short space of time. First step is to try to get Greg [of EDL] in front of Minister.²⁶⁷

364. On this same day, a representative of EDL wrote to the Premier (copied to the Minister's office), observing in part:

EDL thanks the South Australian Government for its ongoing support of the project and guidance to facilitate the necessary state approvals.

Unfortunately, final approval from [the council] has been delayed since September 2015 and [the council] has not provided the project with a clear path to approval.

On Monday [the council] provided a negative consultant's report regarding the project. The report is factually incorrect and makes broad statements that we strongly disagree with. At no point has [the council's] consultant engaged with EDL despite our attempts to

²⁶⁴ Interview with G Davies, 8 August 2017, transcript at 26:8.

²⁶⁵ Letter dated 11 December 2015.

²⁶⁶ Interview with N Smith, 2 June 2017, transcript at 52:14.

²⁶⁷ Email from EDL to N Smith dated 9 December 2015.

do so. EDL notes that detailed technical studies have been undertaken for this project, which have been considered acceptable by both the South Australian Government and by ARENA.

It has become apparent to EDL that despite the support of the South Australian Government, the project cannot proceed without the engagement and support of [the council].

EDL has a Board meeting today where the delays and lack of support from [the council] will be considered and a decision made on our continued support for the project.

I would be grateful for an opportunity to speak with yourself or [the Minister] to at the earliest convenience discuss the future of what we consider a project of significance, both for South Australia and nationally.

Given the support and facilitation the Government has provided over the last two and a half years, EDL and its Board wants to ensure any decision that may be taken is done so with a full appreciation of all the implications to relevant stakeholders.²⁶⁸

365. On 10 December 2015 Mr Smith emailed Mr Duffy, together with Mr Antonopoulos and Mr Carrick-Smith of the Minister's office to raise the possibility of the State Government formally committing to a 20-year Deed of Grant 'to put the ball firmly in Councils [sic] court and EDL's on a final decision.'²⁶⁹
366. Mr Smith proceeded to raise this suggestion during a telephone call with Mr Renshaw later that same day. This telephone call prompted further email correspondence between Mr Renshaw and Mr Smith.
367. Mr Renshaw emailed Mr Smith to 'emphatically' deny the suggestion that the council's 'intention to not proceed' with the EDL project had been raised with Mr Koutsantonis at the 3 December 2015 meeting. Mr Renshaw's email went on to state:

[T]he Council's aspirations and commitment to resolve the identified defects in the agreements and advancing discussions to a position of common ground is demonstrated by the Council's correspondence to the Treasurer dated Monday 7 December 2015.

[...]

[T]he Council has invited EDL to provide further information to resolve the identified defects and the Council has been in regular communication with [ARENA] to keep this agency informed of the progress in the deliberations.

Lastly, it is clear and transparent that the Council has not resolved and or reached any determination to not proceed with the project and therefore I have not been empowered to convey any details of this nature to any party, at any time, whatsoever.

[...]

During our telephone conversation today it was suggested that the Council proceed to complete negotiations with EDL directly and that we agreed to advise you of these outcomes. Today we will instruction [sic] KelledyJones to commence these discussions.

[...]

During our telephone conversation today it was suggested that the South Australian Government will provide a Deed of Grant for a period of 20 years and the determination of the RAES funding would remain on an annual basis. It was also discussed that these details would be confirmed in writing to the Council.²⁷⁰

²⁶⁸ Letter from EDL to Premier dated 9 December 2015.

²⁶⁹ Email from N Smith to Mr Duffy et al. dated 10 December 2015.

²⁷⁰ Email from A Renshaw to N Smith et al. dated 10 December 2015.

368. During interview with my investigation, Mr Renshaw explained the council's decision to 'complete negotiations' with EDL directly:

A. [W]e just weren't progressing as well as we could. We were trying to resolve some particular matters with EDL. What were those matters? I can't recall, but there were some matters that we could have dealt with directly, so that is what we did.²⁷¹

369. My investigation asked Mr Renshaw how this position squared with the advice coming from Resonant and KelledyJones:

Q. We have just seen that the council has received [Resonant's summary review], I think in early December, which was critical of the proposal and suggested an open market alternative, and then on 6 or 7 December the council has received the legal advice from KelledyJones which, again, was suggesting the possibility of going to market and then we have this email from you to Mr Smith on 10 December in which you are saying "we'll instruct" -- it was suggested that council proceed to complete negotiations with EDL directly, and "we agree to advise of these outcomes"; "we'll instruct KelledyJones to commence these discussions". Why wasn't the council following the advice to go to market?

A. I have -- I don't mind you asking again, [...] but that -- that matter had been dealt with in terms of what I have described to you previously.

Q. This is going back to the probity review that had been done [by the State]?

A. Yes [...] I don't know whether there's some communication from KelledyJones back to the council saying that the Coordinator-General's advice is satisfactory or not. But in terms of, you know -- in terms of the meetings that we had with Nick, quite often we would be in an office with a whiteboard, we'd have 10 points up there and we'd just tick them off. I hear what you are saying, [...] I sense that there's a consistent pattern of advice to go over it this way, but the council didn't seem to do that. So I say again, that the council didn't, doesn't look like it's done that because of the advice from the State around the Coordinator-General and also there was no -- there was no substance to Graham Davies' advice that any of these alternatives were going to work.²⁷²

370. Mr Renshaw otherwise agreed with the proposition that the proposed 20-year Deed of Grant constituted a shift in the State Government's position.²⁷³

371. Regarding his telephone call with Mr Renshaw, Mr Smith submitted to my investigation:

A. When I put [Mr Duffy's] assertions [regarding the meeting with the Minister] to Tony, he just emphatically rejected it. He didn't put it in an email. What I was told happened at that meeting versus what Tony told me were completely different things.²⁷⁴

372. Mr Smith later elaborated:

A. I can't remember the exact conversation except that I was, you know, disappointed that he hadn't spoken to me about the fact that he was going to speak to the Minister and, you know, hadn't apprised me of what the conversation was about and then I suddenly find out that they are going to go -- you know, going to dial out three to six months through my boss when I'm up at Umuwa, and I just felt that it was, you know, lacking integrity from my perspective.²⁷⁵

²⁷¹ Interview with A Renshaw, 23 May 2017, transcript at 69:14.

²⁷² Interview with A Renshaw, 23 May 2017, transcript at 69:22.

²⁷³ Interview with A Renshaw, 23 May 2017, transcript at 70:39 ('Yes. So this -- the issue around the Deed of Grant for 20 years had been something that we had put to the State and it was sort of being not rejected but not talked about. I'm a bit surprised as we go through these docs that this hasn't come up earlier. So my sense of that was as a result of the meetings and communication with the Treasurer to say "We need to do something to satisfy the concerns of the council and the way that we can deal with that is to provide them with a deed of grant for 20 years".')

²⁷⁴ Interview with N Smith, 2 June 2017, transcript at 50:16.

²⁷⁵ Interview with N Smith, 2 June 2017, transcript at 51:37.

373. Mr Davies was asked to comment on the position expressed by Mr Renshaw in this email:

Q. In this email Mr Renshaw appears to be denying that the council was considering abandoning the EDL deal.

A. Yeah.

Q. Can you recall this specific point in the negotiations?

A. If I had to map it out, to start with, it had the EDL deal. I'm going just in the simplified form. I got involved and said "This is really bad". Then it was going to be all out tender, even at the risk of EDL finding out. And then it seemed to slip into this "Well, we want to keep EDL on side while we'll try and get a tender process going". Why, I'm not sure. But, look, you can understand, three years' worth of negotiations. And in defence maybe the good reason would be "If Graham's got it wrong, we don't want to annoy our potential client or relationship if this is wrong". So, fair enough. Keep it going while you look at alternatives; that's not uncommon. That wouldn't have been – that, in itself, does not alert me to anything being dodgy here.

Q. Your impression at this time was that the council was still serious about potentially exploring other options? [...]

A. 10 December, yeah, around that time I was still sure they are looking at other options, yes. [...] There was discussion around this [email] and [Mr Renshaw's] thing was to me was "Look, I have to keep them on side because, you know, they are the incumbent and we don't want" – you know, various things. So I saw this as a – starting to get into a little bit of dangerous territory but "keep them happy while we're looking at other options".²⁷⁶

374. By email that same day, Mr Smith took issue with Mr Renshaw's characterisation of the council's position, advising:

I have relied on the feedback from a number of people present at that meeting which included that [the council] were looking to delay the decision by 3-6 months.

[...]

The letter provided to the [Minister] provided a range of options which Council may consider and none of these indicated any real commitment from council toward the project aside from continued communication and discussion around options and detailing a significant number of risks.²⁷⁷

375. Mr Smith went on to address Mr Renshaw's comments regarding completing the negotiations and the proposed Deed of Grant in turn, before concluding:

We have always reinforced the need for council to undertake their own due diligence on this project and have over the previous 6-9 months worked with council to assist them and their advisors to understand the project further. I am happy to continue to provide my support for the project however reinforce that ultimately the decision to proceed is the responsibility of Council's.²⁷⁸

376. Mr Renshaw responded:

It is agreed that we sought the South Australian Government's support to delay a decision for between 3 to 6 months and reaffirm once again, at no time was it ever discussed that we were not proceeding with the project.

²⁷⁶ Interview with G Davies, 8 August 2017, transcript at 29:33.

²⁷⁷ Email from N Smith to A Renshaw et al. dated 10 December 2015.

²⁷⁸ Email from N Smith to A Renshaw et al. dated 10 December 2015.

As proposed we have already instructed KelledyJones to proceed with discussions with EDL in relation to the PPA.²⁷⁹

The 11 December 2015 email

377. On 11 December 2015 Mr Renshaw emailed Ms Provatidis and the elected members:

There was [sic] very intensive [sic] discussions with the Treasurer's Office through Adrian Tisato from 9pm last night and again early this morning.

Essentially;

1. Our message has got [sic] through to the Treasures [sic] office that much more work needs to be done
2. The Treasures [sic] has agreed for us to do this work and to keep him informed
3. With the Treasures [sic] agreement we commenced negotiating the PPA directly with EDL yesterday
4. We have received informal advice that the S A G with [sic] provide a 20 year Deed of Grant. This is a progressive step and the next stage is to secure this formally and to ensure that it captures the RAES funding for 20 years
5. ARENA have agreed to stay in the project and to facilitate a workshop between EDL : S A G : [the council] as soon as possible.
6. S A G suggestion [sic] is that we delay the community meeting in Coober Pedy until we are closer to what the final negotiation looks like
7. Key challenge is to think through how we test the market without alarming E D L[.]²⁸⁰

378. During interview with my investigation, Mr Renshaw struggled to explain the seventh item in this email:

A. Yeah, as I said before I'm a little surprised by that. I can't offer any more than that.

Q. So the council again, it wasn't seriously contemplating testing the market?

A. Look, as I said, I'm a bit surprised by that, yeah.²⁸¹

379. Mr Renshaw later submitted:

A. I have said, you know, up until prior to [this email] that the matter around the probity of the procurement process has been dealt with. I'm a bit surprised at item number 7 in terms of this timeline. [...] I can't offer any commentary around that but to say I'm surprised by it.²⁸²

380. My investigation asked Mr Davies to comment about this correspondence:

Q. Was this email consistent with your understanding as to what the council was contemplating at this time?

A. Yeah.

Q. When do you understand the council to have ultimately determined not to test the market. When did that happen?

A. In January the key indication was – I can't even – January the 16th [sic] was a meeting in Adelaide, a really critical one.

[...]

²⁷⁹ Email from A Renshaw to N Smith et al. dated 10 December 2015.

²⁸⁰ Email from A Renshaw to M Provatidis et al. dated 11 December 2015.

²⁸¹ Interview with A Renshaw, 23 May 2017, transcript at 71:21.

²⁸² Interview with A Renshaw, 23 May 2017, transcript at 72:26.

- Q. Mr Renshaw has suggested to us that, notwithstanding this email, the council wasn't considering testing the market at this stage. Do you have any response or comment to that?
- A. I believe the councillors thought they were going to test the market. Absolutely. And I believed that. If I knew it wasn't, I would have behaved very differently. So at this stage, this was his view of "Look, you don't understand all the things but we've got to just keep them on side." Okay, it's not inconsistent, we don't want to alarm your current incumbent.²⁸³

EDL's response to Resonant's summary review

381. On 11 December 2015 EDL wrote to Mr Renshaw to respond to the various matters raised in Resonant's summary review.
382. The EDL response purported to identify and address various factual assumptions made by Resonant which EDL suggested were incorrect or misleading. Similarly, EDL responded to Resonant's various criticisms of the project's technical characteristics; suggesting that EDL's proposed model would deliver greater certainty than other, unproven models that promised greater renewable penetration.
383. Concerning Resonant's commercial criticism, EDL stated:
1. EDL has worked closely with ARENA in determining the scope of the Project. EDL considers that high penetration hybrids are not currently competitive with the marginal cost of diesel, and we disagree with the report in this regard. Balancing the competing priorities of increasing renewable penetration whilst maintaining power quality and reliability depends upon the willingness of funding authorities such as ARENA or the customer to accept higher cost, or accept lower power quality and/or reliability.
 2. In the very unlikely event that an alternative project could be delivered at a lower capital cost and a similar diesel displacement, EDL considers that the savings achieved would simply reduce the ARENA subsidy leaving the PPA tariffs unchanged. EDL notes that this is how the ARENA funding support process works.
 3. EDL will be making a significant investment in this project and therefore requires an appropriate term to earn a return on its investment. The project would not be commercially viable if [the council] could easily exit the PPA during the 20 year term.
 4. Grid defection is always a risk for a network operator. The Project is expected to provide lower volatility and lower increases to electricity prices over the long term, therefore reducing the likelihood of grid defection for economic reasons. In addition, load growth could be easily accommodated under the Project at a relatively low marginal cost to [the council].
 5. EDL does not agree with the statement that the capital cost is excessive. EDL has undertaken detailed tender and contract negotiations to determine the capital cost budget for the project in the current market. The capital cost has been independently verified by ARENA and Ernst & Young under the ARENA Funding Agreement process, and subject to detailed review by [the department] and its consultants.
384. The EDL response closed by asserting that the project was 'shovel-ready', observing:
- To contemplate requesting further Expressions of Interest, as seems to be suggested in the report, would materially delay a shovel-ready renewable project and EDL is concerned that it would set [the council] back by at least 2 years.

²⁸³ Interview with G Davies, 8 August 2017, transcript at 34:47.

385. The EDL response was forwarded to the department and the Minister's office by email dated 14 December 2015.²⁸⁴

Resonant's reply

386. Resonant replied to EDL's comments by correspondence forwarded to the council on 17 December 2015. In a covering letter, Mr Davies stated:

It is understood, that EDL and Resonant may have in their possession, certain information to which the other party is not privy, which may have a bearing on some conclusions. Nevertheless, Resonant remains convinced that the current PPA presents a substantial risk to [the council] that would require a 20 year underwriting guarantee from [the department] of the 'gap' between the tariffs received and the charges incurred by [EnGen]. This underwriting would need to cover all costs specified in the PPA and in the highly probable event that residents defect from the grid by installing their own renewable hybrid systems.

Resonant believe that unless tariffs to residents reduce to a level that makes it more economical for residents to remain on the local grid, defection is inevitable. Resonant remains of the strong opinion that there are feasible commercial options that can keep residents on the grid.

387. The Resonant response purported to address factual and technical assertions made in the EDL response, variously accepting and disagreeing with EDL's characterisation of the agreement and the alternatives potentially available to the council. In this regard, Resonant observed:

[The EDL response] mentions that [the department] and ARENA have done extensive due diligence, however [EDL] does not refer to anyone having done an holistic due diligence on behalf of [the council], who are the key signatory to the PPA agreement [sic].

388. Addressing the five commercial considerations identified in the EDL response in turn, Resonant asserted:

EDL states they have worked closely with ARENA, and thus the Project appears more aligned with ARENA's programmes, rather than the 'best' solution for the client. Resonant maintains that renewables are competitive with diesel with the right project configuration.

[...]

[Regarding the possibility of a reduced ARENA subsidy] Resonant completely disagrees and believes that it is highly likely an alternative project would be more economical. Resonant again notes the emphasis on what suits ARENA's process rather than the client.

[...]

It is understood that EDL require a long term commitment to justify investment, but according to AGL CEO [sic], PPAs with a life of 15 years (let alone 20) need reconsidering. [The council] would be signing up to a commitment of at least \$130M, and have no feasible exit path, as its [sic] highly improbable that a financial institution would accept the extremely excessive costs for transfer.

[...]

It appears that the PPA has only been tested against a diesel only scenario for 20 years. In this respect, tariffs would likely be lower, however even this is based on CPI

²⁸⁴ Email from EDL to N Smith et al. dated 14 December 2015.

assumptions. With current diesel prices, the PPA would mean [the council] would pay more than if they stayed as is.

[...]

Grid defection is so crucial to the discussion, that this single item requires a full risk assessment. Numerous reports (CSIRO, BREE, Utilities, Generators) all point to the 'death spiral' as a likely outcome unless the operators adapt accordingly. To compare the proposed PPA only to the current PPA completely misses the point about the economics of renewables, and may reflect that EDL has not been operating in the renewable space. It is not only likely, but is the most probable outcome, that unless the electricity provider find [sic] a way of working with the community and allowing PV/battery systems on houses, grid defection will occur. The only reasonable way to circumvent this is to ensure it is always more economical to be grid connected.

[...]

Without knowing the details, discussions and terms of reference of the submissions to ARENA, [Ernst & Young], [the department] nor their financial reports, Resonant cannot comment on [the impact of the tender and contract negotiation process on the capital cost budget]. Resonant maintain that the capital required to deliver reliable electricity to Coober Pedy is excessive.

389. Resonant concluded:

In summary, Resonant maintains its position that:

- [The council] is locked into a 20 year contract where exiting is untenable. It thus would be signing up to an [sic] commitment of around \$130M, with an exit transfer liability of \$50M;
- That given the 20 year commitment, the proposed electricity charge rates in the PPA are excessive;
- The current PPA would lead to grid defection in 5-10 years, and leave [the council] with an excessive fixed charge rate with the risk of insolvency without State Government support;
- The contract is impractical for [the council] to effect any Beneficial Change;
- The proposed [Diesel Uninterruptable Power Supply] is unique compared to the much larger market of battery/inverter control;
- There is project [sic] solution that would result in decreasing electricity prices, reliable power and an iconic renewable project.

The above is an intermediate response for discussion purposes due to the haste with which resolution is required. The purpose is to highlight why Resonant is extremely concerned with the proposed PPA, and allow EDL to understand these concerns and consider what can be done.

390. When asked to comment on Resonant's suggestion that the project lacked a 'holistic due diligence on behalf of the council', Mr Renshaw observed:

- A. I made mention of Graham being a particularly difficult person and sometimes he wouldn't let some things go, so yeah I think this commentary here around that second point is consistent with that sort of point, I suppose.²⁸⁵

²⁸⁵ Interview with A Renshaw, 23 May 2017, transcript at 72:35.

Further discussions – December 2015 to January 2016

391. I understand that in the week that followed Mr Renshaw continued to discuss aspects of the project with EDL and ARENA.²⁸⁶ The council advised my investigation that it is unable to locate any records within its system concerning these discussions.²⁸⁷

392. The council held an ordinary meeting on 15 December 2015. The public version of the minutes concerning this meeting record that two items were considered in confidence. The council advised my investigation that it is unable to locate any record pertaining to these matters.²⁸⁸ From the surrounding information, it appears unlikely that the hybrid renewable project was a topic of discussion.²⁸⁹

393. On 16 December 2015 Mr Davies emailed Mr Renshaw:

I'm not sure if you are wanting to get an EOI out to potential candidates by Friday. I would suggest that most of the potential candidates mentioned would be able to work on it over the Christmas holidays as long as they get it prior to Friday, so that they can make plans.²⁹⁰

394. On 19 December 2015 Mr Renshaw emailed the elected members of the council:

We have previously provided various oral reports and written reports from Kelledy Jones and Graham Davies.

Accordingly it is timely to provide further updates.

1 Australian Government ARENA Funding \$18m

At 5.30 pm yesterday, Friday 18 December 2015 Ian Kay advised that ARENA will retain support for the project up to 29 February 2016.

2 EDL

EDL have not formally identified an end date however Ian Kay suggested that 29 February 2016 is likely to be the end date for them as well. More significantly EDL mentioned in discussions this week, that the vast majority of the matters we have recently identified had previously been discussed and satisfied by the South Australian Government (Nick Smith) stating we'll cover these, we'll guarantee these through the Deed of Grant (RAES Funding) and that [the council] should not be concerned with them[.]

These statements have been put to the South Australian Government Treasurer through our direct communication channels and we are waiting [sic] further information[.]

Keith Barker has advised that if the ILU [Indigenous Land Use Agreement] is the last remaining item Greg Pritchard will come to the table with a solution.

3 Kelledy Jones (Power Purchase Agreement)

²⁸⁶ See email from A Renshaw to T Carrick-Smith dated 24 December 2015.

²⁸⁷ Letter dated 8 May 2017.

²⁸⁸ Email from F Hogan dated 31 January 2018.

²⁸⁹ The minutes concerning item C214-15 record that the council deemed it necessary and appropriate to act in a meeting closed to the public 'in order to receive, discuss or consider in confidence information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person living or dead. The minutes concerning item C216-15 record that the council deemed it necessary and appropriate to act in a meeting closed to the public 'in order to receive, discuss or consider in confidence information the disclosure of which would reasonably be expected to prejudice the maintenance of law, including by affecting (or potentially affecting) the prevention, detection or investigation of a criminal offence, or the right to a fair trial.'

²⁹⁰ Email from Resonant to A Renshaw dated 16 December 2015.

Essentially satisfied with progress and negotiations and believe we will have a satisfying agreement to execute.

4 **Graham Davies**

Graham believes the project will work but is 'sub optimal'. Industry feedback is that Grahams [sic] suggestions and alternatives are real and realisable but not today. It may be 5 to 10 years before they are universally adopted in significant projects of the nature proposed for Coober Pedy.

5 **South Australian Government Treasurer**

Has heard and listed [sic] to our briefing and after some time it has now resonated with him. It appears the information from [the department] (Nick Smith and Vince Duffy) to the Treasurer is inconsistent with the information DSD has provide [sic] to the Council. Current position is a Deed of Grant for 5 years with RAES funding to be determined yearly. Oral offer of a 20 year Deed of Grant has been made and we have asked for this to be committed to writing. The next stage is to negotiate RAES funding for 20 years as well[.]

6 **Preparations for recommendation to Proceed to Community Consultation and Executing Agreements**

On the basis that we have in final form, actual documents and agreements including a PPA, a Deed of Grant with the RAES funding secured and an EDL funded Community Development program, it is proposed that we agree to proceed to community consultation with the intention of executing the necessary agreements.²⁹¹

395. My investigation questioned Mr Renshaw about this correspondence:

Q. You have said: "Graham believes that the project will work but is sub optimal, industry feedback is that Graham's suggestions and alternatives are real and realisable but not today. It may be five to six years before they are universally adopted in significant projects of the nature proposed for Coober Pedy." Just pausing there, what industry feedback were you referring to?

A. I can't recall who we had spoken to, but we had certainly spoken to a lot of people, a number of people and as I said before, that the issues put to the State and to ARENA by Graham were wholeheartedly and unanimously just rejected, and that was a pretty consistent view of other players in the marketplace as well. Yeah.

Q. [...] Under item 6 you have said: "On the basis that we had in final form actual documents and agreements including a PPA, a deed of grant with the RAES funding secured, and an EDL funded community development program it is proposed that we agree to proceed to community consultation with the intention of executing the necessary agreements." Was that the position of the elected members at the time, do you recall?

A. Of course. There are a number of steps in there though. On the basis that we have it in final form.

Q. It's qualified?

A. Absolutely.²⁹²

396. On 24 December 2015 Mr Renshaw emailed Mr Carrick-Smith of the Minister's office:

In a series of telephone conversations [with EDL] during the week of 14 December through to Friday 18 December 2015 the discussions were reduced to 3 key elements being (1) the Pricing Formula and likely outcome of increased costs for energy

²⁹¹ Email from A Renshaw to P Athanasiadis et al. dated 19 December 2015.

²⁹² Interview with A Renshaw, 23 May 2017, transcript at 74:25.

production, (2) the quantum of the Liquid Dated [sic] Damages and (3) the Transfer Price and the exposure of the Council to the amount of up to \$50m.

Towards the end of these discussions EDL expressed their confusion at the Council's focus on these matters and advised that 'these matters have been resolved through the State Government, in meetings with previous delegates of the Council and EDL, stating that these amounts will be covered and or paid and or guaranteed by the State Government through the RAES Funding Deed of Grant'.

Importantly, should this be the case and these matters are confirmed in writing, for the 20 year period of the PPA, we pleased [sic] to advise the Council is positioned to execute a PPA with EDL.

Lastly we have built and maintained a working dialogue with ARENA. In discussions this week ARENA advised they are able to continue supporting the project up to 29 February 2016.²⁹³

397. Mr Renshaw also forwarded this email to Mr Smith, who in response attempted to clarify the nature of the Transfer Price within the draft PPA and the respective obligations of the council and the State Government under the various agreements.²⁹⁴
398. On 29 December 2015 Mr Renshaw emailed Mr Smith, together with various officers of the department and the Minister's office, to observe that the council was 'not seeking any form of guarantee and warranty' from the State Government with respect to 'the operation of the power and electricity generation nor any of [the council's] liabilities and or operating costs.'²⁹⁵
399. Mr Renshaw went on to observe: 'sadly and frustratingly the remarks [of the State Government] do not remediate nor remedy the defects that exist in the financial structure of the project', submitting:

These defects, as acknowledged and agreed by EDL, include increased costs and charges for power and electricity generation.

We understand these matters are also understood by the State, who have stated on previous occasions that these increased costs, the defects liability costs and transfer pricing, will be satisfied by the State in a Deed of Grant.

[...]

More importantly we ask that you specifically note the Council is positioned and poised to execute the PPA with EDL. We note that we require the State's permission to proceed and we are seeking your immediate instructions in relation to this matter.²⁹⁶

400. Concerning the proposed Deed of Grant and Letter of Comfort, Mr Renshaw went on to state:

In executing the PPA the Council is fully aware that it will breach the Local Government Act and commit the offences of Mal-practice and Mal-administration by creating recurring operating expenses that are beyond the financial operating capacity of the Council and will crystallise a contingent liability, of up to \$50m that is beyond the foreseeable capacity of the Council.

The Council's legal remedy to this Mal-practice [sic] and Mal-administration [sic] is a reliance on the State's Deed of Grant (RAES Funding).

²⁹³ Email from A Renshaw to T Carrick-Smith dated 24 December 2015.

²⁹⁴ Email from N Smith to A Renshaw et al. dated 24 December 2015.

²⁹⁵ Email from A Renshaw to N Smith et al. dated 29 December 2015.

²⁹⁶ Email from A Renshaw to N Smith et al. dated 29 December 2015.

The Council is fully aware that the State's suggested Letter of Comfort proposes to relieve the Council of any concern for the financial defects created by the PPA.

It is universally understood that the proposed Letter of Comfort has no currency nor offers any reliance for the Council what so ever [sic].

As mentioned previously we understand the State has a rich appetite and enthusiasm for the project to proceed and accordingly the Council encourages the State to confirm this rich appetite and enthusiasm in a Deed of Grant.

The Council acknowledges that State has commenced developing this commitment and has indicated that it will provide a Deed of Grant for the 20 year term as set out in the PPA. However the Council understands this commitment includes a provision for the actual amount of the RAES funding to be determined each year.

Accordingly the proposed Deed of Grant can only, in any legal, pragmatic and logical form, be seen as a 1 year agreement.²⁹⁷

401. Mr Renshaw concluded:

As previously mentioned, the Council welcomes the State's commitment to the project through a 20 year Deed of Grant that includes RAES funding, and or the State being a joint party to the PPA with EDL and or taking over the generation on power and electricity in Coober Pedy.

Further, it has been mentioned that the decision to proceed with the execution of the PPA with EDL is a decision for the Council and for the Council alone.

As advised the Council is poised and positioned to execute the PPA with EDL, again the Council requires the State's permission to proceed and we are seeking your immediate instructions in relation to this matter.

[...]

Effectively the Council is applying all its resources to position the project for documentary completion.

As a time line for the execution of the various agreements has been identified, we are pleased to advise that Mayor Provatidis and I are in Adelaide this week, and welcome the opportunity to meet with you from Wednesday 30 December 2015 through to Sunday 3 January 2016.²⁹⁸

402. My investigation questioned Mr Renshaw regarding his observation that the council in signing the PPA would 'breach the Local Government Act and commit the offences of Mal-practice and Mal-administration' and the perceived 'remedy' afforded by the instruments offered by the State Government:

Q. What did you mean by that?

A. Well if we had proceeded without the government's documents we would have created a liability to the council of up to \$50 million; simple as that.

Q. And so with the State government providing a legally binding Letter of Comfort that would avert that?

A. Yep.²⁹⁹

²⁹⁷ Email from A Renshaw to N Smith et al. dated 29 December 2015.

²⁹⁸ Email from A Renshaw to N Smith et al. dated 29 December 2015.

²⁹⁹ Interview with A Renshaw, 23 May 2017, transcript at 76:2.

403. By email dated 31 December 2015 Mr Smith sought to clarify Mr Renshaw's comments in respect of the 'financial defects' and 'increased costs and charges' alluded to in the 29 December 2015 correspondence.³⁰⁰

404. By email dated 1 January 2016, Mr Renshaw responded:

EDL have freely acknowledged that generation costs will be higher through the arrangements and structure of the proposed PPA.

With Graham Davies, we worked extensively on the project yesterday morning prior to the recent communications and had agreed to meet again on Sunday 3 January 2016.

To help us understand the projected savings of \$5.4m over twenty years we would appreciate any advice, information, methodology and calculus around this amount.

Further, in relation to the financial elements of the project, during detailed discussions ARENA have advised, even in the very first discussions, that the project is a very attractive proposition for EDL.³⁰¹

405. This was followed by another email from Mr Renshaw to Mr Smith on 3 January 2016 which, after again raising concerns regarding the maximum liquidated damages payable by EDL under the agreement, went on to state:

Strong message of support

We are pleased to reaffirm with you the strong message of support and commitment for a Hybrid Renewable Energy Project in Coober Pedy and once again affirm our appreciation for the support your Government provides to Coober Pedy and regional South Australia.

As already mentioned we appreciate your leadership, vision and enthusiasm for this Hybrid Renewable Energy Project, that has the capacity to revitalise regional communities in South Australia and may well become an international icon for community development and economic sustainability through the application of contemporary science and technology.

Equally the project has the capacity to be the beacon in the States [sic] pursuit of a clean, green, energy efficient environment for all South Australians.

We look forward to working closely with you, the Australian Government and Ian Kay at ARENA and the EDL team to deliver a project that is in the best interests of all Australian, South Australian and Coober Pedy taxpayers.³⁰²

406. By email dated 6 January 2016, Mr Smith provided a comprehensive response to various matters raised in Mr Renshaw's correspondence. Mr Smith advised, *inter alia*:

- the Government of South Australia could not agree to underwrite the council's compliance with its own contractual obligations under the proposed PPA or otherwise become a party to the PPA
- the Government was prepared to enter into a legally binding 20-year Letter of Comfort in relation to the project
- the department was in discussion with the Essential Services Commission of South Australian (**ESCOSA**) concerning the potential for ESCOSA to independently review disputes concerning annual tariffs set by the Minister under the RAES scheme
- it was acknowledged by the parties that the project had the potential to increase costs to the council (which would in turn be absorbed by the RAES subsidy) for

³⁰⁰ Email from N Smith to A Renshaw et al. dated 31 December 2015.

³⁰¹ Email from A Renshaw to N Smith et al. dated 1 January 2016.

³⁰² Email from A Renshaw to N Smith et al. dated 3 January 2016.

- approximately the first two years of the agreement, and this had been factored in to the projected savings
- the Transfer Charge under the agreement was consistent with commercial agreements of this type.³⁰³
407. On 7 January 2016 Mr Renshaw emailed Mr Smith to take issue with a copy of the project's financial modelling that had been provided by Mr Smith in his previous email:
- Once again we are unsure of the source of these reports.
- Unless we have missed something, the reports do not appear to be formatted, are virtually illegible and it is impossible to track any patterns and or strategic outcomes.
- Once again unless we have missed something, the reports do not appear to have been reviewed by any one [sic], as these findings would have been apparent immediately.³⁰⁴
408. On 12 January 2016 the department received advice from ESCOSA to the effect that EDL, rather than the council, would be required to hold a generation licence issued under the *Electricity Act 1996*.

The ARENA workshop

409. On 2 January 2016 Mr Renshaw emailed the elected members of the council to provide an update on the negotiations concerning the project:
- The new proposed PPA expired on 31 December 2015.
- EDL have been saying this PPA is the only option and there is no negotiation. We have been thinking about how to deal with this and now that it has expired, feel that we are suitably positioned to push back to EDL alternatives for consideration.
- As Graham mentioned this morning at the most recent auction Wind Energy was sold for 8c kw phr [sic] and Solar at 12c kw phr [sic].
- With these facts there is a sense that we can now have a more assertive position with EDL.
- [...]
- From a planning perspective and the opportunity to go to Tender for alternatives we feel there will be no need to proceed with this until we have a definitive response from the State about the RAES funding.³⁰⁵
410. Mr Davies was not copied in to this email.
411. On 4 January 2016 Mr Smith emailed representatives of the council, EDL, the department and ARENA to suggest a meeting the next week 'to see if we can finalise the project detail to enable Tony [Renshaw] to present Council with formal documentation to allow them to vote on the project.'³⁰⁶
412. Later that same day, Mr Renshaw emailed the elected members of the council, together with Mr Crichton and Mr Davies to advise of the planned meeting, stating:

³⁰³ Email from N Smith to A Renshaw et al. dated 6 January 2016.

³⁰⁴ Email from A Renshaw to N Smith et al. dated 7 January 2016.

³⁰⁵ Email from A Renshaw to P Athanasiadis et al. dated 2 January 2016.

³⁰⁶ Email from N Smith to A Renshaw et al. dated 4 January 2016.

We will need to role play all the scenario's [sic] before the meeting and be prepared for any rebuttals and objections.³⁰⁷

413. On 7 January 2016 Mr Barker of EDL emailed Mr Smith to discuss the agenda of the proposed meeting:

You mentioned that it was intended to include an agenda item to cover Graham [Davies'] views on the technical matters which I do not think would be a productive use of time. We had several discussions with Graham and Tony [Renshaw] together and separately with Tony and of course we circulated our response to Graham's summary report. We have made it clear that the project is what it is and is what ARENA has agreed to support. Tony's latest position to us was that he/Council has accepted that the EDL project is the only one on the table and the focus is getting commitment from all parties to proceed. I think going over technical alternatives would be a distraction and would prefer we do not include this in the agenda.³⁰⁸

414. By separate email to all attendees dated 8 January 2016, Mr Barker also advised:

With regards to the timing of getting this to [Final Investment Decision] we are looking to meet ARENA's requirement that the project is committed by its February Board meeting which I understand is on the 18th.

Working back from that we would need the PPA to be in executable form and [the council] to have agreed to commit to the project by 22nd January to enable EDL to finalise other documentation and other processes relating to Supply Contracts; Leases and Licences and commitment to FID prior to 18th Feb.³⁰⁹

415. Mr Barker's email also circulated a revised agenda for the meeting, the effect of which was to remove the proposed discussion of 'technical alternatives' from the topics to be covered.³¹⁰

416. During interview with my investigation, Mr Smith was asked about the changes made to the meeting agenda:

Q. Do you think it was appropriate to remove any discussion of the technical alternatives to the proposal at this point?

A. Well I just thought that that was covered off under the ARENA proposal and process, because they did the significant rigorous technical review of the project before they actually supported it financially. So given the quality of Graham's previous advice, and the communications we'd had with him, I didn't think that reviewing whether there was a technical alternative to this was going to add a lot of value. The intent of this meeting was to determine whether this was a solid project or not, or whether -- and if council wanted to support it or if they didn't want to support it. It was designed with ARENA, EDL, council, KelliedyJones were there, the Mayor was there, Tony was there, Graham Davies was there. You know, the intent of this meeting was to make a final decision; either you support it or you don't or what other advice do you need to take to council. You know, what do you need from government? What do you need if you want to support this? Or, if you are not comfortable with it, don't go ahead. But everyone -- you know, EDL at that stage had been tipping money into this and they wanted to know "Do we have a financially viable project. If not, we'll go and divert our resources into something that will make us money".³¹¹

417. On 10 January 2016 Mr Renshaw emailed Mayor Provatidis, Mr Crichton and Mr Davies a draft copy of a statement to be presented by the council at the forthcoming workshop. The substance of this statement was that the council desired the project to

³⁰⁷ Email from A Renshaw to M Provatidis et al. dated 4 January 2016.

³⁰⁸ Email from EDL to N Smith dated 7 January 2016.

³⁰⁹ Email from EDL to N Smith et al. dated 8 January 2016.

³¹⁰ Attachment to email from EDL to N Smith et al. dated 8 January 2016.

³¹¹ Interview with N Smith, 2 June 2017, transcript at 53:28.

'proceed at the earliest opportunity'. The State Government was again invited to sign the PPA with EDL, cosign the PPA with the council or provide a Deed of Grant 'for the life of the PPA that satisfies all of the obligations, terms and conditions of [the] PPA'. EDL was invited to provide a community development program 'equivalent to' the value of the Indigenous Land Use Agreement between EDL and the traditional owners.

418. The statement concluded:

We understand the project is ready, the land is ready, Coober Pedy is ready for hybrid renewable energy, please proceed.³¹²

419. There are no records before my investigation to confirm that Mr Renshaw's statement was formally endorsed by the council's elected body.

420. Mr Renshaw's accompanying email relevantly observed:

I think we should be ready for the proposition 'what needs to be done to put the PPA in a position for the Council to sign'[.]

The obvious answer is a complete re-write and we know, in the telephone conference EDL said the Defects Liability Charges and Transfer Price were not negotiable, so it seems a little extreme to think we could ever get to a position where the PPA was satisfactory to the Council, without the Deed of Grant.³¹³

421. It appears that on 10 January 2016 Mr Renshaw also emailed the elected members of the council to advise of the forthcoming workshop and the criteria outlined in the statement to be presented by the council.³¹⁴

422. As agreed, on 13 January 2016 representatives of the department, EDL and the council met in Adelaide to discuss the council's commitment to the project (**the ARENA workshop**). It was common ground between the parties who gave evidence to my investigation that this meeting was something of a watershed moment for the project.

423. Mr Renshaw described the meeting in following terms:

A. It was a great meeting actually. [...] [It was] in DSD's offices, from memory, so Ian Kay and someone else from ARENA came over, the Mayor and myself and Graham Davies were there, Nick Smith was there, one of his colleagues, a lady, I can't recall her name, was there. I don't think Vince Duffy was there. And there was a group of people from EDL, Keith Barker and one or two people there as well. We really had another long meeting that -- I don't know if it went all day, but it certainly went into mid-afternoon, late afternoon, and everyone -- really it was a chance for everyone to have their say and also to summarise things and give their point of view and, yeah.

Q. Was any progress made?

A. Absolutely. At that meeting it was made very clear to us that the State would provide a 20-year guarantee to the project. That is the only reason why we agreed to proceed. Yep.³¹⁵

424. Mr Renshaw later elaborated:

A. They all overviewed the project and we articulated and Graham got most of the time setting fire to these people. All of us sitting there with the fire extinguisher. And then they set fire to Graham which was great, but anyway. I think the things that -- when I said we didn't have our say -- the things that we articulated, we would have articulated

³¹² Email from A Renshaw to M Provatidis et al. dated 10 January 2016.

³¹³ Email from A Renshaw to M Provatidis et al. dated 10 January 2016.

³¹⁴ Email from A Renshaw dated 10 January 2016. The copy of this email provided to my Office does not identify the original recipients.

³¹⁵ Interview with A Renshaw, 23 May 2017, transcript at 76:33.

whether in that meeting or directly with Nick on that day and then coming back into the meeting were the RAES funding, the letter of comfort and the 20-year guarantee and from your point of view if those things were ticked off it was a done deal. Snap. And that at that meeting, either privately or in the meeting Nick agreed. That's why it went from [...] "we are thinking about doing a whole lot of different things" to suddenly "we are doing this deal".³¹⁶

425. Mr Smith described the meeting in the following terms:

- A. Council, you know, council listened. Graham had his opinions. So EDL spoke to them. ARENA spoke to their -- any concerns that the council may have. We spoke around our due diligence and our comfort that the numbers were fair and reasonable from that perspective. After having an extensive, you know, discussion period council, Tony, Michelle, Adam and Graham left; they went and got a coffee for 20 minutes. They came back and said "We think that the project has legs, and we are going to recommend to council that we support it".³¹⁷

426. Mr Davies described the meeting in different terms:

- A. It was an atrocious meeting in the sense of Tony set myself and the lawyer up, where he was waffling. It was an embarrassment. You know, when you look around the table about all the costs and affordability and you've got all these people here, get to the point. And then [Mr Renshaw] says "Okay, can we have a break?" So we have a break. Myself and Crichton. He says "Okay, so what are your thoughts on the project?" So I said "Much the same. It's a bad project". That's it. He goes back in the room and says "We have a deal". Now, then my brain's racing because I thought "What's going on here? There's something that I" -- and I then realised he's setting us up. He made it look like we'd negotiated all of this, which we most definitely didn't. I said "This is as bad as ever". Adam, kind of, said the same. You know, he still wasn't supportive; Adam was not really committed. [...] And I still remember Michelle's expression then was just like "Wow!" She was flabbergasted. So we were all set up by Tony who had already made up his mind to make this look like it was a unanimous deal.

[..]

Q. Do you recall any discussion with Adam Crichton or Mayor Provatidis after this meeting as to what it occurred? I mean, did you sort of share --

A. Between the two of them?

Q. Between yourselves in the sense that you've said that those parties were also similarly dismayed by what had happened?

A. Michelle was. Adam was -- just kept quiet. He showed his dismay. He didn't want to say too much. We didn't have the opportunity because we kind of went down the stairs and there was everybody else there, so we never really had time to talk about it. So Michelle made it clear she was dismayed with that. Adam went with the flow, if you like.

[...]

Q. Is it possible that Mr Renshaw, Mayor Provatidis and Mr Crichton had had discussions before this meeting together not involving you?

A. Maybe with Crichton. I doubt Michelle. Michelle's expression was she was flabbergasted. I could read her when she was totally taken by surprise. And we'd prepared a few days before what we actually wanted. So it was only two or three days before we want low prices, etcetera. She'd written a letter to that effect. She hadn't quite got it right, but be that as it may. And Tony cut her short when she was reading that out in any event.³¹⁸

³¹⁶ Interview with A Renshaw, 23 May 2017, transcript at 94:1.

³¹⁷ Interview with N Smith, 2 June 2017, transcript at 54:22.

³¹⁸ Interview with G Davies, 8 August 2017, transcript at 42:41.

427. My investigation asked Mr Davies if he could recall the State Government modifying its position with respect to the proposed Letter of Comfort:

Q. Mr Renshaw has said to us that one of the key factors that informed the council's decision to proceed with the EDL deal was the State Government at this meeting finally agreeing to underwrite the project for a 20-year period?

A. They'd always said they would. They weren't actually any different to that. That was what was so funny, is that Nick – we were wasting half an hour while he waffled. The State Government always said they would have, through the RAES scheme, would underpin it. So there was nothing different to what I said before and afterwards.

Q. I note here that in the email he refers to a legally binding Letter of Comfort. Was that a different situation to before?

A. But that – they'd basically written a Letter of Comfort before. The question of whether it's legally binding is up for discussion between lawyers. You know, it's a legal - any letter is legal in that sense. Is it legally binding and what is it binding to, is my issue. So it wasn't as though this was a sudden breakthrough in any way at all. They'd always said "We'll cover it for 20 years".³¹⁹

428. My investigation asked Mr Davies whether he could recall Mr Renshaw qualifying the council's acceptance of the proposal during the meeting:

Q. When Mr Renshaw said "We have a deal" was that on the basis that it was subject to approval by the elected members or was he authorised by the elected members to –

A. No, he just said that. [...] It wasn't Michelle's authorisation and it wasn't authorised by the council. He was out of line in saying that as a CEO at that stage to say "We have a deal". I didn't know necessarily what brief he had got from the council. So I can't say whether he - so he didn't qualify that "The council authorised me to make this deal" or anything. He definitely just said "We have a deal. That's it".³²⁰

429. Mr Smith's notes concerning this meeting refer to the 18 February 2016 'deadline for ARENA capital / funding', the council's need for a statement 'ensuring compliance with LGA requirements' and the provision of a 'legally binding' draft letter of comfort to the council and KelledyJones. The notes conclude:

DCCP to write to NS
 - financial hurdles, guarantees
 - letter to be sent this week

Tues 19th Council Meeting[.]

430. Shortly after the meeting Mr Renshaw emailed the elected members of the council:

Dear Councillors

As mentioned the Council meet [sic] with ARENA : EDL : SAG today.

[...]

In brief terms SAG agreed to underwrite the PPA that the Council is required to sign with EDL through a legal [sic] binding Letter of Comfort for a 20 year period and 4 x 5 Deed of Grants [sic].

Further EDL agreed to provide a Community Development Program, in general terms equivalent, to the ILUA.

³¹⁹ Interview with G Davies, 8 August 2017, transcript at 46:46.

³²⁰ Interview with G Davies, 8 August 2017, transcript at 47:1.

During the meeting the Council advised the parties that the Council's agreement is conditional on the State developing actual documents (Letter of Comfort and Deed of Grant) that satisfy the Council and that the Council determines to agree and accept the States [sic] offer.

Further the Council will write to the State to advise the risks and costs associated with the PPA to ensure the State appreciates and understands the long term impacts of the PPA for all taxpayers.

Lastly through the persistent [sic] of Mayor Provatidis EDL agreed to make lower costs a focus of the project after installation and commissioning.

A more formal report and documentation from KelledyJones will be distributed and considered at the meeting next Tuesday.³²¹

431. The council advised my investigation that it is unable to locate any other records within its system concerning the ARENA workshop discussions.³²²

432. That evening, Mr Barker of EDL emailed Mr Renshaw and Ms Provatidis:

We felt that significant progress was made today and we look forward to finalising the outstanding issues and commencing the project.³²³

433. This sentiment appears to have been echoed by Mr Smith in an email to the CSO:

We have just finished a meeting with [the council], EDL, ARENA and ourselves where we have addressed the majority of issues associated with the Coober Pedy Hybrid Renewable Project.

There are some key dates that need to be met to ensure that all parties can achieve sign off from their respective bodies to ensure that the project moves ahead.

A critical issue is the provision of the legally binding Letter of Comfort for [the council] to review, hopefully prior to a council meeting on Tuesday 19th January.³²⁴

Resonant's 13 January letter

434. This same day, Mr Davies of Resonant forwarded a letter to Mr Smith, purportedly at the request of Mr Renshaw, 'to assist [the department] in providing a suitable Deed of Grant'. In this letter Resonant again criticised the nature of the project:

The concern is that Resonant and [the council] believe that the Project will in fact increase the costs of electricity. Resonant is firmly of the opinion that renewable energy is able to reduce [...] electricity prices, but this Project is not configured to allow this to occur. EDL/[the department] acknowledge that charges will be higher for at least the first 5 years.

[...]

It is surprising that the project has not gone to the market to consider companies that have better experience than EDL (who have no wind/solar experience), nor for that matter any DUPs experience. Although the Project is feasible, Resonant would consider it sub-optimal and not a good project for the site of Coober Pedy.

³²¹ Email from A Renshaw dated 13 January 2016. The copy of this email provided to my Office does not identify the original recipients.

³²² Letter dated 8 May 2017.

³²³ Email from EDL to A Renshaw et al. dated 13 January 2016.

³²⁴ Email from N Smith to C Gray and S Bye dated 13 January 2016.

435. Resonant later went on address the perceived risk to the council in the event that it declined to enter into the agreement (emphasis in original):

There is the concern that should [the council] not sign the PPA, the current RAES subsidy is at risk. On the other hand, there is a greater risk that should [the council] sign, then they commit to EDL charges of between \$130 to \$200M at present day value over the 20 year contract life.

[...]

Resonant are of the strong opinion that it is possible to achieve prices substantially better if the project were tendered out (even if no ARENA funding were forthcoming). Resonant believe that electricity prices could be steadily decreased and within 5-10 years be below that of Adelaide Metro.

436. Resonant went on to identify ‘the key issues that [the department] need[s] to underwrite for [the council] to be able to substantially demonstrate due diligence in signing the PPA.’ This included the total project costs, any difference between the capped liquidated damages and the fixed cost in the event that EDL failed to generate electricity over a whole year and any loss in revenue occasioned by residents going ‘off-grid’.

437. Resonant concluded:

It is fairly clear from the above, that Resonant believe the PPA is substantially flawed, biased and if enacted would lead to insolvency of [the council] unless [the Government of South Australia] underwrite[s] all aspects of the contract for 20 years. [The department] have to consider that they are using public money, and need to carefully consider the risks in the interests of the tax payer.

Given the above, [the council] would appreciate a Deed of Grant that is legally binding for 20 year [sic] to cover the above eventualities. Without this, [the council] would be forced to default on payment and become insolvent.

438. My investigation sought Mr Renshaw’s comment on the position expressed by Resonant in this correspondence:

Q. “Although the project is feasible Resonant would consider it sub optimal and not a good project for the site of Coober Pedy.” What was your reaction to that, can you recall?

A. Yes, if I go -- I'm just going to repeat something. Graham was a difficult customer and during that workshop[.] [...] So it would be reasonable to say that the State government and EDL and ARENA at that workshop put Graham down with its -- from my point of view, clear that they all said “Graham, they might be good ideas, they might work, but we don't know and they are not going to work right now”. They had no -- I'm of the view that Graham had little or no currency for his comments at all. [...] And this is the response to that. He was actually -- he -- I know, you know, I talked to you before about being surprised by some of the language from others, I was pretty surprised by the language of both the State and ARENA about Graham's projects. I think EDL were a bit more circumspect but the same message, yeah.³²⁵

439. During interview with my investigation, Mr Smith was asked about Resonant’s correspondence:

Q. Can you recall, what was the issue here? Was there a disagreement between the council and its own consultant at this stage?

A. Well at the end of -- at the end of the workshop with ARENA and EDL and council and ourselves, the -- my clear recognition was that KelledyJones would write to DSD and

³²⁵ Interview with A Renshaw, 23 May 2017, transcript at 78:6.

EDL stating what they required and the way forward. That was KelledyJones' recognition of it, or recall of it, [that] was Tony Renshaw's recall of it. Graham Davies decided that night that he go would home and he would write a letter that was in complete contradiction of everything that we had discussed that day and, you know, came out with a whole heap of assertions around why this project should not go ahead and took it upon himself to respond on the council's behalf. Now we have a relationship with the council, we don't have a relationship with Graham. He's their consultant. I just -- I was flabbergasted actually to receive it because it was just so -- it was the polar opposite of everything that had just been agreed at that meeting.³²⁶

440. On 14 January 2016 Mr Smith provided KelledyJones and the council with a draft Letter of Comfort.³²⁷ This document provided that the State Government would continue to enter into further Deeds of Grant with the council 'on the same or substantially the same terms for the duration of the Power Purchase Agreement up to 20 years from commissioning' of the PPA. The terms of the document provided that it would be legally binding and executed by Mr Koutsantonis as a Deed Poll.

441. Mr Smith requested that KelledyJones 'confirm your satisfaction that this would alleviate the concerns of council around the potential for them to breach their obligations under the LG Act.'³²⁸

442. Mr Smith later emailed Mr Renshaw to discuss Resonant's letter:

I am very concerned that this does not reflect the discussions from yesterday and represents a number of statements and assumptions that cannot be backed up with any facts or evidence.

I have provided a copy of the Draft Letter of Comfort to Adam this morning for his review, however, given this response I am struggling to understand a way forward.

Many of the comments appear to be inconsistent with the legal advice being provided by KelledyJones to [the council] and again are at odds with the discussions held between ARENA, EDL and [the council] yesterday in our offices.

I am concerned that the commercial realities of the proposed PPA are being misconstrued by this response and the lack of understanding of the legal requirements of parties is resulting in flawed commentary.³²⁹

443. Mr Renshaw emailed Mr Smith later that day:

As mentioned yesterday, reaffirmed orally with you earlier today and to be confirmed in writing from [KelledyJones] on instructions from the Council, based on the confidence demonstrated by the State in various correspondence today, the Council will at its next meeting (Tuesday 19 January 2016) determine and resolve to execute the PPA with EDL.³³⁰

444. My investigation questioned Mr Renshaw about this statement:

Q. At this stage how were you certain or confident that the council would vote to execute the agreement?

A. Through the discussions that the council had had and that, as I say here, that virtually -- as I say here things had happened, that if all the dominos fall over, then the council will agree to proceed. [...]

Q. So the council's own consultant just the previous day has described the project as sub optimal and not a good project for the site of the Coober Pedy and then a day later, in

³²⁶ Interview with N Smith, 2 June 2017, transcript at 56:2.

³²⁷ Email from N Smith to A Crichton et al. dated 14 January 2016.

³²⁸ Email from N Smith to A Crichton et al. dated 14 January 2016.

³²⁹ Email from N Smith to A Renshaw et al. dated 14 January 2016.

³³⁰ Email from A Renshaw to N Smith et al. dated 14 January 2016.

an email, you are saying that the council will determine to resolve to execute the PPA with EDL and I understand you probably answered this question already, but I'm just curious, why was Graham Davies still working for the council at this point if the council wasn't inclined to follow his advice?

- A. I don't know when we resolved to terminate Graham's engagement and you just have to get other correspondence to that effect. So whether it was around about Christmas time, whether it was early January, I don't know. Certainly after Graham had been notified of his termination, he continued to prepare reports. In fact, he even sent a bill or two and I think if you -- if you were to read all of Graham's reports, they are all pretty much the same. They're -- and not being a scientist or an alternative energy engineer, they all had a pretty consistent theme and we were comfortable that, with the support of ARENA, EDL and the State and all of those dominos, all of those documents were generated that the council would be safeguarded.³³¹

445. Shortly after Mr Renshaw's email, Mr Crichton of KelledyJones wrote to the department to confirm his approval of the terms of the proposed Letter of Comfort.³³²

446. That evening, Mr Smith emailed Mr Renshaw:

It was [...] pleasing to hear from you today that the advice provided by Resonant last night does not reflect [the council's] position and that the letter I received from [KelledyJones] this afternoon via email (following instruction from Council) is a more accurate representation of the councils [sic] position.

[...]

[The department] appreciates that [the council] has substantial concerns about the commercial terms of the PPA and that [the council] must weigh those concerns against the benefits of the project. It is proper and reasonable that [the council] seek[s] advice on matters, however they are not matters which are the responsibility of the Government, which will not be party to the PPA. Accordingly, [the council] needs to make its own decision, based on its own independent advice, about whether or not to proceed with the PPA. [The council] must itself be accountable to its own stakeholders for its decision.

As we discussed today, I will try and seek a copy of the Coordinator General's negative response to EDL on the need for submission of an unsolicited bid to include in [the council's] prudential report, however, having given this some thought EDL may have a copy of this.³³³

447. My investigation questioned Mr Renshaw about this correspondence:

- Q. Mr Smith here says: "As we discussed today, I will try and seek a copy of the Coordinator-General's negative response to EDL on the need for submission of an unsolicited bid to include in the council prudential report. Having given this some thought EDL may have a copy of this." What discussion is Mr Smith referring to there?
- A. I think, once again from a prudentiality [sic] standpoint we asked the State to provide us with a copy of the Coordinator-General's advice and that's his commentary around that.³³⁴

448. My investigation asked Mr Smith about this aspect of his correspondence:

- Q. What was the nature of your discussion with Mr Renshaw concerning the State Coordinator-General's response to the EDL proposal, can you recall?
- A. They were just looking to incorporate that into the prudential report to say that, you know, the leases and everything had been done, is my understanding.³³⁵

³³¹ Interview with A Renshaw, 23 May 2017, transcript at 78:47.

³³² Letter from KelledyJones to N Smith dated 14 January 2016.

³³³ Email from N Smith to A Renshaw et al. dated 14 January 2016.

³³⁴ Interview with A Renshaw, 23 May 2017, transcript at 80:10.

³³⁵ Interview with N Smith, 2 June 2017, transcript at 56:34.

The 19 January 2016 council meeting

449. A confidential meeting of the council was held on 19 January 2016. The agenda for this included a report on the following terms:

5 Hybrid Renewable Energy Project

5.1 Update on negotiations and final position

Item	Previous Position	Current and Final Position
EDL Community Grant	\$10,000 per annum	\$25,000 per annum plus adjustment for CPI for the period of engagement with EDL
State Government	Non-binding letter of comfort and 1 x 5 year Deed of Grant for RAES Funding RAES funding determined by the state	Legal binding [sic] Letter of Comfort that guarantees RAES Funding for the period of the Power Purchase Agreement (20 years) and 4 x 5 year Deeds of Grant for RAES funding Annual RAES funding agreed by mutual consent and if agreement is not reached then data is to be presented to an independent arbitrator (ESCOSA) for consideration
Explosive Storage Area		Remains fully operational and functional during the installation, construction and operation of the project
Off Grid Generation		Off Grid Generation is provided for and fully available to the Coober Pedy community
Partial Alternative Energy Generation	To be controlled and regulated	To be controlled and regulated

450. This report concluded with a recommendation that the council resolve to execute 'a Power Purchase Agreement' with EDL.

451. The agenda does not suggest that a copy of the PPA or the instruments offered by the State Government were tabled before the meeting. Similarly, it does not appear that a copy of either the April 2014 or December 2015 KelliedyJones advice, the BESTEC report or any of Resonant's various reports to the council were tabled at the meeting.

452. The minutes concerning the meeting record the attendance of Crs Kylie Hay, Boro Rapaic, Peter Pantelis and Paul Reynolds, with Mayor Provatidis presiding. Mr Renshaw is identified as the only other attendee.

453. The minutes concerning the meeting record the following resolutions:

6.1 Execution of the Power Purchase Agreement

Recommendation

Cr Boro Rapaic moved and Cr Paul Reynolds seconded that ;

The Council execute a Power Purchase Agreement between the District Council of Coober Pedy and Energy Generation Pty Ltd for the provision, installation and operation of a Hybrid Renewable Energy electricity generation plant in Coober Pedy and that the agreement be for a term of twenty (20) years

Carried

6.2 Use of Council Seal

Recommendation

Cr Boro Rapaic moved and Cr Peter Pantelis seconded that ;

The Principal Member and Interim Chief Executive Officer be authorised to affix the seal of the District Council of Coober Pedy to the Power Purchase Agreement between the District Council of Coober Pedy and Energy Generation Pty Ltd

Carried

6.3 Provision of Confidentiality

Recommendation

Cr Peter Pantelis moved and Cr Kyle [sic] Hay seconded that ;

The determination of the Council shall remain confidential until a joint announced [sic] between the South Australian Government, District Council of Coober Pedy and EDL is developed and agreed that includes a photograph of the South Australian Government Treasurer and the Principal Member of the Council and supporting story in [sic] published in the Adelaide Advertiser, the Australian and The Coober Pedy Times newspapers

Carried³³⁶

454. According to Mr Renshaw:

- A. It was a meeting of the council. But it was a confidential meeting. The -- and yeah, I'm a bit surprised that the -- that the recommendation is not conditional. I would have thought at that stage that we didn't have a -- I would have thought that we didn't have a final PPA, but we might have, or all of the other documents as well. I'm a bit surprised at that, yeah.
- Q. Can you recall was there any angst within the elected members as to whether they should proceed or not?
- A. No.
- Q. Did you have to do any real convincing with them?
- A. I wouldn't do that. It's not for me to do that. No. This is not a decision for me; this is a decision for the council. [...] There would have been quite a journey of documents and emails and other meetings -- and meetings to get to this point, so the journey -- I'm of the view the journey was quite consistent. I'm of the view today though that I would have thought that this recommendation should have ever been a bit more conditional unless, of course, we had a final PPA and a final deed of grant et cetera. And, yeah, I'm a bit surprised. But, once again it's 18 months ago, or thereabouts and I'm not aware -- sitting here today, I'm not aware of the other documents that we had sitting on the table.³³⁷

455. My investigation sought information from each of the elected members of the council present at this meeting. There was considerable divergence in the responses received.

³³⁶ Meeting minutes, p. 2.

³³⁷ Interview with A Renshaw, 23 May 2017, transcript at 83:21.

456. Mayor Provatidis submitted that she had little recollection of what was discussed at the meeting, save for:

[Mr Renshaw] basically bullying the members into agreeing to pass the resolution [to execute the PPA], on the basis that if they failed to do so they would be held personally liable as Councillors for any losses Council suffered by them not agreeing to proceed with the new PPA and it would potentially have an serious [sic] economic impact for Council, its residents and businesses.

457. Ms Provatidis indicated that the elected members were not provided with a copy of the PPA to review. She submitted that she 'felt uncomfortable about how Council was being pushed into this but felt the Members had no option but to vote for the resolution.'

458. Cr Hay indicated that the elected members did not substantively discuss the PPA during the meeting, observing:

Tony Renshaw said we had to make a decision [that night]. Boro [Rapaic] asked what if we don't make one. Tony said we get fined a lot per day can't [sic] remeber [sic] the amount. Then Tony said we have to agree or we loose [sic] all our subsidies and we don't have a choice about anything we need to vote and put it through.

So we voted. Boro moved, Paul [Reynolds] second [sic]. Then we (Bundi [Pantelis] and myself) agreed.

Boro said we should of [sic] waited until we had a full council.

Bundi ask [sic] questions about the paperwork and Tony said it has been done and in order.

459. Cr Rapaic's description of the meeting was generally consistent with Cr Hay's. He indicated that he could recall an elected member requesting that the decision be postponed until the full elected body was available. He submitted that to his belief 'all councillors had reservations about the PPA', submitting:

We were told by the CEO that the decision had to be made that night or ARENA may withdraw funding. He also said that [the State Government] would more than likely withdraw our RAES subsidy for our electricity and EDL could sue [the council] for fifty million dollars.

460. Cr Rapaic indicated that the elected members were not provided with a copy of the PPA or the associated instruments at the meeting. He submitted that the council did not discuss the concerns expressed by Resonant or the need to comply with the council's Procurement Policy.

461. Mr Pantelis³³⁸ provided a considerably different description of the meeting:

[T]o the best of my recollection a teleconference [occurred] with Councillor Athanasiadis who was in Melbourne at that time.

Under section 90. CEO Renshaw said that the Power deal was still in negotiations and finalising the PPA was at least 2 years away. I asked what this was about, I remember that CEO Renshaw produced a document where he recommended all the Councillors to sign, I do not recall exactly what was on the document but CEO Renshaw said it was not the contract but it was to get the letter of comfort from the Government. I was not given a copy of this document.

I was not comfortable with what was happening, if I remember correctly Councillor Reynolds squirmed in his seat and said he wasn't happy about this as well. CEO

³³⁸ Mr Pantelis is no longer an elected member of the council.

Renshaw then teleconferenced in with Councillor Athanasiadis. CEO Renshaw told Councillor Athanasiadis what the document was and that CEO Renshaw wanted Council to sign. Councillor Athanasiadis said that if the other Councillors were happy with signing it then he was to [sic].³³⁹ So I asked again if this was the contract as I was concerned about the report from Resonant Solutions recommending council to walk away from the deal, and I was told by the CEO Renshaw that it wasn't the contract. He insisted that it was a document that the state government required for them to give council a letter of comfort regarding the RAES subsidy, and that the final negotiations were still pending and there is still another 2 years left on the contract. I remember that Councillor Hay said something like this as well.

Deputy Mayor Rapaic moved the motion and Councillor Reynolds seconded it. [...] [B]ecause I was led to believe that this was not the final agreement and that negotiations were still ongoing, I reluctantly agreed to what was happening although I was not happy and felt pressured. I do not recall that there was any discussion about Tenders and the Procurement Policy. As mentioned above that is all I can recall about meeting. I was not happy with what happened and felt that I could not do anything about it.

462. Cr Reynolds also provided a substantially different description of the meeting:

I specifically remember verbalising I desired the price per kw [under the agreement] to be the same as Adelaide to the people of Coober Pedy. [...] All present expressed they wanted same [sic] price as Adelaide per kw for residents of CP.

463. When asked if he could recall any discussion of the concerns expressed by Resonant, Cr Reynolds submitted:

Yes. Tony Renshaw relayed to those present to disregard the views expressed by Resonant Solutions. Michelle Provatidis implied by her demeanour and by nodding her head that she was also in agreeance with this statement. Tony Renshaw paraphrased: Resonant Solutions were unreliable and he and DSD (Mr Smith) didn't believe report [sic] was accurate. Information within the report could not be supported.

464. Cr Reynolds submitted that there were 'no discussions of competitive tenders' at this meeting or of the council's need to comply with its Procurement Policy.

465. Cr Reynolds otherwise submitted:

This was my 2nd meeting [since being elected to the council] and I was told by Tony Renshaw that a commitment had to be made. I was under the impression Arena Grant monies would not be available if DCCP did not commit. Tony Renshaw stated that the Grant money had a use by date.

[...]

The contract was presented for Acceptance on 19 Jan 2016. There were no other discussions of other tenders. I felt under duress about forfeiting the Arena Grant and also the possibility of losing the RAE [sic] subsidy.

Developing the agreement – January to February 2016

466. On 20 January 2016 Mr Barker of EDL emailed the department to advise of the council's decision to execute the agreement.³⁴⁰

³³⁹ During discussions with my Office, Cr Athanasiadis (now the Acting Mayor of the council) confirmed that he was telephoned by Mr Renshaw during the course of the meeting and was requested to comment on the PPA. According to Cr Athanasiadis, he declined to express a view in respect of the merits of the agreement: *See notes of meeting between Acting Mayor Athanasiadis and Ombudsman SA dated 23 March 2018* ('[Mr Renshaw] said "Paul, we're going to execute this document; can you tell the councillors it's a good deal?" I said, "I'm not there" [...] I didn't comment one way or the other.')

³⁴⁰ Email from EDL to N Smith and C Way dated 20 January 2016.

467. Mr Renshaw similarly emailed Mr Smith, Mr Barker, ARENA and KelledyJones:

We are writing this morning to formally advise that [the council] during the confidential elements of an Ordinary Council meeting held Tuesday 19 January 2016 determined to proceed with the execution of the Power Purchase Agreement between EDL and the Council and various agreements between [the council] and the South Australian Government.

The determination was made on a confidential basis to allow for the actual execution of the various documents and to develop and agree a formal and public announcement[.]³⁴¹

468. Mr Smith in turn forwarded Mr Renshaw's announcement to various officers of the department and the Minister's office.³⁴²

469. On 23 January 2016 Mr Davies emailed Mr Renshaw and the elected members (emphasis in original):

As discussed, herewith a checklist of things to consider prior to signing the PPA. There is no question that the PPA is a bad deal*, however I understand [the department] are applying pressure to sign and have stated they will underwrite the project. Ultimately, [the council] have to make the decision to sign or not – both options of which carry risk. This PPA has the potential to go seriously wrong [...] which would attract scrutiny, and thus each council member needs to be able to demonstrate due diligence. In this regard, herewith a 'checklist' for consideration:

- 1) Be sure that the decision can withstand a transparency and probity review. Is [sic] has a probity auditor been appointed given that there has been no competitive process (tender)
- 2) Understand the essence of the PPA – due diligence/reports;
- 3) Ensure a prudential report has been undertaken – Bestec did a report, but it appears lacking in conviction;
- 4) Ensure there is a public forum to discuss the PPA;
- 5) Undertake a Risk Analysis – probably a 1 day workshop – do identify and mitigate risks using ISO/AS standards to determine probability/consequence; [...]
- 6) The advice of lawyers that [the department] Deed of Transfer/Letter of comfort covers the full 'gap' - ie the difference between gazette prices and EDL charges (including the financial risks). THIS IS CRITICAL.

[...]

* A \$130M (present day value) commitment with no way out; My estimate is that reliable electricity could easily be provided for half of that!³⁴³

470. On 1 February 2016 Mr Renshaw wrote to EDL:

On behalf of [the council] I am very pleased to confirm the Council has resolved to proceed with the Hybrid Renewable Energy project proposed by [EDL] that is to be supported by the South Australian Government and [ARENA].

The Council's decision to proceed has been made on a STRICTLY CONFIDENTIAL basis to allow for any final negotiations and subsequent execution of the agreements and deeds between EDL, the Council and the State Government.

³⁴¹ Email from A Renshaw to N Smith et al. dated 20 January 2016.

³⁴² Email from N Smith to P Heithersay et al. dated 21 January 2016.

³⁴³ Email from Resonant to A Renshaw et al. dated 23 January 2016.

The Council's determination to proceed is based on:

1. Acceptance and agreement of a Power Purchase Agreement [...] between the EDL [sic] and [the council] that is supported by the South Australian Government
2. The provision and establishment by EDL of an acceptable Community Development fund to be administered by the Council and for the benefit of the whole Coober Pedy community for the life of the PPA
3. The provision by the South Australian Government of a legally binding Letter of Comfort in favour of the Council that supports the continuous provision of a [RAES subsidy] by the South Australian Government to the Coober Pedy community via the Council for the life of the PPA
4. The provision by the South Australian Government of a Deed of Grant and or Deeds of Grant in terms the Council deems satisfactory that subsidises the Council's costs of purchasing and distributing electricity and the revenue it collects through retailing electricity to the community, for the life of the PPA.³⁴⁴

471. On 3 February 2016 Mr Renshaw wrote to Mr Smith on the same terms.³⁴⁵

472. On 2 February 2016 Mr Crichton of KelledyJones forwarded to Mr Smith a copy of the 'latest track changed version' of the PPA.³⁴⁶ This version of the PPA was dated 24 November 2015. The metadata suggests that it was last modified on 14 December 2015. It incorporated changes to the construction and commissioning timetable and various amendments to reflect that EDL would hold the generation licence associated with the project.

473. Although the records supplied by the council are insufficient to confirm this, it is reasonable to infer that this was the version of the PPA in the council's possession on 19 January 2016, when the elected body resolved to execute the agreement.

474. On 3 February 2016 Mr Smith forwarded a final draft of the proposed Deed of Grant to KelledyJones and the council.³⁴⁷ On 11 February 2016 Mr Crichton of KelledyJones provided comments on the council's behalf.³⁴⁸ The document appears to have then been revised again by the department on 16 February 2016.³⁴⁹

475. It appears that on this date Mr Davies may have forwarded to Mr Renshaw a copy of a vendor comparison table prepared by Resonant. I have been unable to locate a copy of this document in the records provided by the council, although I infer that its contents were likely similar to a commercial analysis included in Resonant's final report. That analysis compared indicative proposals from Siemens, Epuron and ZEN and concluded that there were potential savings of \$85 million available to the council on the open market.

476. On 4 February 2016 Mr Renshaw emailed the elected members of the council:

Dear Councillors

Attached is a spreadsheet received from Graham Davies yesterday.

It described alternatives to the EDL project.

Set out below is the South Australian Government's review of the information.

³⁴⁴ Letter from A Renshaw to EDL dated 1 February 2016.

³⁴⁵ Letter from A Renshaw to N Smith dated 3 February 2016.

³⁴⁶ Email from KelledyJones to N Smith dated 2 February 2016.

³⁴⁷ Email from N Smith to KelledyJones et al. dated 3 February 2016.

³⁴⁸ Email from KelledyJones to N Smith dated 11 February 2016.

³⁴⁹ Email from T Finlay to N Smith et al. dated 16 February 2016.

Hi Tony

Thanks for the call just now. As we discussed I am unsure how Graham has developed up these comparative cases as he has provided no information on the alternative cases.

I can reassure you that the cost of generation in off-grid situations, in my experience, is well in excess of the proposed cost of generation Graham has expressed.

In particular I would be keen to understand the ZEN capex component as based on the original proposition put to council the capex investment from ZEN was \$18 million yet required an additional \$19.5 million investment from the Coober Pedy community and had not [sic] detail on how this could be delivered.

My team has been looking at a range of more cost effective generation options for the remainder of the RAES sites and we have not seen any reasonable business case or modelling that suggests these figures are achievable with renewables as yet.

Whilst I appreciate Graham's input into the discussion, given council have now determined to support the project subject to [finalisation] of the documentation and formal approvals I am unsure what Graham is seeking to achieve.

*Thanks
Nick*

[...]

It also [sic] worthy to note the commentary offered by the Australian Government (ARENA) during the workshop in Adelaide attend [sic] by the Council was that;

- The EDL project was the best project ARENA had ever considered and that they fully supported it whilst noting the Government issues, and
- There are no projects being established and or already established that support these concepts developed by Graham and that whilst Graham's ideas are conceptually feasible the industry, the technology and the market place will not see the take up of these concepts in the foreseeable future.

The project documentation is proceeding in a timely manner and it is expected there will be a full set of documents ready for execution available next week.³⁵⁰

477. My investigation questioned Mr Renshaw about this correspondence:

Q. Can you recall, was that put to you by ARENA?

A. Absolutely.

Q. Do you recall who at ARENA said that?

A. Ian Kay. At that workshop. As I said here, so I have said that when we talked about some documents previously around that workshop, I made it very clear that ARENA, the State, EDL, I suppose EDL was always going to talk favourably about their project, but the State and ARENA made it very clear this was a fantastic project, yeah.

Q. And this was the 13 January workshop, is that --

A. Yeah, yeah.

Q. And was that the exact language that they used, that it was the best project?

³⁵⁰ Email from A Renshaw dated 4 February 2016. The copy of this email provided to my Office does not identify the original recipients.

A. I don't know. [...] That was what Ian Kay said he said [sic].³⁵¹

Resonant's final report

478. On 8 February 2016 Resonant provided its final report to Mr Renshaw and the elected members of the council (**Resonant's final report**). By accompanying email, Mr Davies advised:

In a nutshell, my conclusion is that the EDL proposal is extremely expensive and contains very high [risks]. As such, I strongly recommend 'walking away' from the EDL proposal, or at the very least obtaining an absolute watertight underwriting of all aspects of the project by the [the department].

Please feel free to phone me on my mobile at no charge to discuss any aspects of the report.³⁵²

479. The Executive Summary provided:

In the opinion of Resonant Solutions [EnGen] has presented a proposal that:

- a) Is significantly more expensive to [the council] than other available commercial options;
 - b) Would significantly increase [the council's] reliance on the [the department] for 20 years;
 - c) Could lead to grid defection within 5-10 years and a doubling of the kWh rate;
 - d) Places numerous other risks on [the council];
- and,
- e) Has had minimal or no Transparency, Probity and Competitive Tension;
 - f) Appears to be sub-optimal.

Resonant recommends that the Council not accept the new proposed PPA from [EnGen] and instead put its requirements for electricity supply out to a commercial tender process. Resonant considers the proposal to be exceedingly expensive, highly risky to [the council] and damaging to the renewable energy reputation.

480. The report went on to expound upon many of the concerns expressed by Resonant in its previous reports to the council. More notably, the report also considered and compared the EDL project to budget proposals submitted to the council by three competing suppliers (emphasis in original):

EDL is significantly more expensive than other available commercial options

- Budget proposals have been presented to [the council] from three reputable suppliers (Siemens, Epuron and ZEN) that suggest the commercial supply rate from a Hybrid Power Grid in Coober Pedy could halve the average c/kWh rate based on the table below from Appendix 2.
- These other supplier options could represent an annual savings of \$3.1m to \$5.1m p.a. to [the council] This equates to a forecast saving of \$85,000,000.00 over the 20 year life of the EDL contract (present day value), without an ARENA subsidy.

	EDL (EG)	[xxxxxx]	[xxxxxx]	[xxxxxx]	
Total Capital	[xxxx]	[xxxx]	[xxxx]	[xxxx]	Million AUD

³⁵¹ Interview with A Renshaw, 23 May 2017, transcript at 88:43.

³⁵² Email from Resonant to A Renshaw et al. dated 8 February 2016.

Ave sell rate	[xxxx]	[xxxx]	[xxxx]	[xxxx]	c/kWh
Total PPA cost p.a.	[xxxx]	[xxxx]	[xxxx]	[xxxx]	M\$/a
SAVINGS PA	-	[xxxx]	[xxxx]	[xxxx]	M\$/a
TOTAL SAVINGS - 20yrs	-	62.0	88.9	101.1	M\$ Note 1
Maximum liability	[xxxx]	TBD	TBD	TBD	M\$ Note 2

[...]

- The significant saving potential envisaged would substantially reduce [the department's] RAES subsidy, and would benefit the Stage [sic] Government finances substantially.

481. The Executive Summary later observed (emphasis in original):

Transparency, Probity and Competitive Tension

Resonant is particularly concerned, that there appears to have been minimal probity, transparency or competitive tension that would be expected of a project of this size and magnitude. As an example, at the request of [the council], Resonant drafted Expression of Interest (EOI) documents to go out to 8 possible suppliers. However, an open EOI was not pursued. Although EDL may have competed against other ARENA submissions, and they themselves had a commercial tender to outsource the solar, wind and enabling technologies (DUPS and control), **no tender or competitive process was undertaken by [the council]**. EDL did take the initiative and install wind monitoring and make a submission to ARENA, which would provide some basis for sole sourcing, however Resonant is not aware, prior to being engaged, of any independent detailed review of the PPA commensurate with the magnitude of the Project. EDL have not been forthcoming with basic information such as project plans, technical specifications, layouts, organisation charts.

482. The Executive Summary concluded:

There are risks associated with not signing the PPA and going to the market. These include:

- The potential loss of ARENA funding;
- A delay to the project of perhaps 6 months – the time for a tender;
- Straining relationships with [the department] and ARENA both of whom clearly articulated their full support for the EDL proposed Project and PPA to be implemented;
- EDL are the incumbent diesel supplier; and this may strain relationships;
- The appearance that Coober Pedy 'cannot make up its mind', and the potential for initial 'bad press';
- Aspects of which Resonant are not aware which may influence the decision.

Resonant is fully aware of the numerous bodies cited as having independently reviewed the project including [the department], ARENA, Ernst & Young, Parsons Brinckerhoff, Bestec, and KelliedyJones. Resonant cannot comment on the terms under which these reviews were undertaken but it is understood that they may not have included a holistic review of the technical, commercial and contractual aspects of the Project including the PPA. Nevertheless, Resonant has considered its opinion carefully in light of the above reviews, and remains of the firm opinion that the fundamental assertions contained herein are materially accurate.

[...]

Our key recommendations are that [the council] undertake the following prior to signing the PPA:

- 1) Carefully consider the proposals from Siemens, Epuron and Zen;
- 2) Persuade the State Government to sign the PPA directly either solely or as cosignatories;
- 3) Ensure that [the department] provide[s] a complete underwriting of the Project and all its associated risks, without which [the council] should 'walk away';
- 4) Hold a workshop to undertake full risk assessment of the Project in accordance with appropriate AS, ISO, in-house or other standard;
- 5) Hold a community forum to explain the project and all the ramifications;
- 6) Obtain an independent commercial assessment of the PPA that addresses many of the questions raised in this report;
- 7) Assuming [the department] provide[s] a suitable underwriting, insist that EDL (as a minimum), undertake to provide full transparency with designs, specifications, costing, ARENA funding, project schedules, commissioning criteria prior to signing the PPA;
- 8) Obtain quotes and initiate installing 100kW of distributed solar PV directly into the 240V feeder under '13.6 Beneficial Charge' of the current PPA contract. The payback for such a scheme is estimated as 1 to 2 years – using Simple Payback. This option can be initiated ASAP in order to maximise [sic] returns, regardless of the decision on the PPA;
- 9) Discuss with ARENA the opportunity for funding to undertake a 100% Renewable Energy Project with integrated control and demand management with storage options including batteries, hydrogen, compressed air, bio-diesel backup.

483. The report appended a 'Commercial Analysis' prepared by Resonant:

Vendor Comparisons

	EDL (EG)	[xxxxxx]	[xxxxxx]	[xxxxxx]	
Total Capital	[xxxx]	[xxxx]	[xxxx]	[xxxx]	Million AUD
Ave sell rate	[xxxx]	[xxxx]	[xxxx]	[xxxx]	c/kWh
Total PPA cost p.a.	[xxxx]	[xxxx]	[xxxx]	[xxxx]	M\$/a
SAVINGS PA	-	[xxxx]	[xxxx]	[xxxx]	M\$/a
TOTAL SAVINGS - 20yrs	-	62.0	88.9	101.1	M\$ Note 1
Maximum liability	[xxxx]	TBD	TBD	TBD	M\$ Note 2
Wind experience	No	Yes	Yes	No	
Solar PV experience	No	Yes	Yes	Yes	
Battery experience	Yes	Yes	Yes	Yes	
Renewable integration experience	No	Yes	Yes	No	Note 3
Developer experience	Yes	Yes	Yes	Some	
Diesel generation experience	Yes	Some	Some	No	
SA Office	No	Yes	No	Yes	
Use of surplus energy	No	Yes	No	Some	Note 4
Upgradeable	Difficult	Yes	Yes	Yes	
Diesel capacity increase	44%	0	0	0	Note 5

[...]

Resonant's Estimate of total project savings is \$85M over the project life

This is based on:

It is considered that Zen Energy, are still moving into the integrated renewable space. Siemens are renowned for being conservative and their offer is considered upper bound. This is a 30% +/- estimate which has been tested against other typical market values. It is also a rough average of the 3 proposals.

484. The report also appended the Siemens and Epuron proposals for consideration.³⁵³

485. During interview with my investigation, Mr Renshaw commented:

A. At this time we had run out of time with Graham Davies and there was nothing new coming out of the reports. He -- you know, my understanding is if you speak to Adam Crichton, there'd been an exchange, a series of exchanges between ourselves, or between KelledyJones and Graham to say that his agreement had been terminated. He kept on sending bills. He kept on trying to contact us.

486. My investigation queried whether the savings forecasted by Resonant based on the Siemens, Epuron and ZEN budget proposals constituted new information to the council:

Q. Was that new information to the council at this time?

A. I don't ever recall. [...] Graham had a whole series of meetings. Graham articulated all these different points of view and, I say again, the State -- I'm being a bit cautious but words like the State is the biggest energy procurer in South Australia, so the State has its handle on, or its finger on the pulse in relation to what things cost and Graham doesn't have any substance.

Q. Who was saying that, in particular?

A. Nick Smith. If Nick says "I never said that to Tony", that is okay. I say, again, that in this period you know if you went back and searched the telephone records we could easily have had 100 telephone conversations. I wouldn't have thought we had 2 or 300. We had a lot.³⁵⁴

487. Mr Renshaw submitted that he provided a copy of Resonant's final report to the elected members of the council.³⁵⁵

488. Regarding Resonant's final report, Mr Davies informed my investigation:

A. I don't always say the right thing, but I could not see this Coober Pedy community being ripped apart, which is what I think will happen. I have -- I'm very concerned for them. And so when I see dishonesty and lack of transparency it really irks me. [...] So with those names [Siemens and Epuron] I really expected there be a discussion point. But at that stage Tony didn't even want to know. I said "Have you tabled the report?" I phoned him. He delayed it, he delayed it, he wouldn't do it, etcetera, etcetera.

Q. Did he give you an explanation for that?

A. "I know what I'm doing" and you ask him again "Have you tabled it?"; "I know what I'm doing." "Have you tabled it?"; "I know what I'm doing", you know those type of discussions where you get nowhere. So no, no rational discussion for why he hadn't put this forward. Was it being discussed? "Can we get together and have a meeting, this is really critical information? Can I share this with the State Government?" All of that, just all "I know what I'm doing". I can't remember his words, you know, it was just brushed off.³⁵⁶

489. When presented with a copy of the report, Mr Smith submitted to my investigation:

A. I have never seen [the report] in full. I saw a redacted version of it, which was provided by Tony in January or February of this year prior to cessations with council.

Q. This year, not 2016?

³⁵³ I understand the ZEN proposal referred to in this report to be substantially the same as that which was submitted to the council in mid-2015.

³⁵⁴ Interview with A Renshaw, 23 May 2017, transcript at 89:31.

³⁵⁵ Interview with A Renshaw, 23 May 2017, transcript at 91:41 ('Q. Did the council members get a copy of this report? A. The council got everything that I received.').

³⁵⁶ Interview with G Davies, 8 August 2017, transcript at 51:34.

A. 2017, yeah. But it's the first time -- you know I did ask for a copy of it. I never received it.³⁵⁷

490. Mr Davies appeared to confirm this during interview with my investigation:

A. I would have loved to have sent it to [Mr Smith] but I couldn't under confidentiality. So I sent it just to Tony Renshaw and the councillors.³⁵⁸

Termination of Resonant's engagement

491. I understand that Resonant was formally directed to stop work on the project sometime prior to 11 February 2017.³⁵⁹

492. Mr Renshaw submitted to my investigation that this direction had the full knowledge and support of the elected members of the council.³⁶⁰

493. My investigation asked Mr Renshaw what caused the council to give the direction to Resonant:

Q. Was there anything in particular that prompted Mr Davies' contract being terminated?

A. He's very difficult.

Q. Apart from that, was there any particular incident or --

A. No, oh no, this varied. He wouldn't give up on the -- so go back to -- once again, we identified the dates of this, a very difficult meeting at KelladyJones where Graham articulated that we went alone, and, you know, the risks to the council of going it alone was massive and he simply wouldn't understand that. You know, if -- if -- so in terms of this is where -- where, you know. We were frustrated, there was evidence from the State that they could, in my language, withdraw the RAES funding. They had done it [before]. The catastrophic effect upon the community by them doing that, people's power bills went from \$1 to \$10 or \$10,000 to \$100,000; catastrophic impact on the community.³⁶¹

494. On 12 February 2016 Mr Davies emailed Mr Renshaw, copying the correspondence to Mayor Provatidis and each individual council member:

I am concerned that you mentioned [yesterday] that you still have not read the report, given the significant conclusions and recommendations contained therein. In particular there is a potential saving of \$85M (over 20 years) by going to the market.

I was also concerned that you mentioned that the Councillors would receive the papers on Tuesday. Each Councillor has to ensure they make a fully informed decision, and receipt and understanding of the report would be essential in making an informed decision.

[...]

As requested, I have "stopped work" until otherwise instructed. However I am available to explain the contents of the report to any Councillor individually, or to the Coober Pedy Council, or to the community at large at a public forum for which there will be no charge.

³⁵⁷ Interview with N Smith, 2 June 2017, transcript at 59:12.

³⁵⁸ Interview with G Davies, 8 August 2017, transcript at 50:8.

³⁵⁹ Email from Resonant to A Renshaw et al. dated 12 February 2016.

³⁶⁰ Interview with A Renshaw, 23 May 2017, transcript at 90:13 ('Q. Was that request communicated by you for him to stop work. A. Absolutely. In fact, many times. Yes. Q. Did that have the support of the elected members? A. Absolutely. Yes. In fact, there's -- once again in terms of the communications there will be -- there will be an enormous array of emails to the council saying "This is where we are, this is what is happening, and we need to move on from Graham". It's inarguable once again.')

³⁶¹ Interview with A Renshaw, 23 May 2017, transcript at 90:40.

I put Resonant at risk of not being on the project for the next 2 years, but am personally concerned at the negative impact the proposed PPA with EDL will have on the community through grid defection (leaving the remainder of the community with a higher bill) as a result of the community not being allowed to connect to the grid. In addition, the project would have limited tourism appeal, compared to solutions as per the 'Energy Vision' contained in the report.

Of course, I understand there are potentially other factors at play and that you may be between a rock and a hard place. I would suggest that any Letter of Comfort fully underwrites all circumstances of the Project, that it acknowledges the complexities in the PPA and that you also engage Senior Counsel (QC) with large PPA experience to assist.³⁶²

495. During interview with my investigation Mr Renshaw denied saying to Mr Davies at this time that he had yet to read Resonant's final report.³⁶³ Mr Renshaw submitted that he reviewed the report at the time it was provided to him:

A. [It] might have been something like I hadn't finished it yet or "Look I've started it Graham", so, the -- I say again, and I'm sorry to repeat myself, but you know, not on day one but early on in the process Graham was a difficult person. He had a point of view and it wouldn't have mattered what -- what you expressed he simply wouldn't accept it.³⁶⁴

496. When asked whether the elected members expressed any concern about the statements made in Mr Davies' email, Mr Renshaw submitted: 'We had known all along. His point of view hadn't changed.'³⁶⁵

497. On 14 February 2016 Mr Davies emailed Mr Smith to inform him of the submission of Resonant's final report to the council, stating:

In a nutshell, Resonant present a potential **saving of \$85M** (over 20 years) without the ARENA funding – based on proposals presented to [the council] from Siemens, Epuron and ZEN and with reduced risk.

[...]

Clearly, going to an open market indicates a huge substantial [sic] financial benefit to both [the department] and [the council] depending on how funding is distributed.³⁶⁶

498. On 15 February 2016 Mr Smith responded:

I understand that council have resolved at their meeting on 19th January to proceed with the EDL project, As [the council] have resolved this issue, I am unsure of what your email is hoping to achieve.

The SA Government has agreed to continue to support the council to enter into contracts through the provision of a legally binding Letter of Comfort and 4x5 year Deed of Grants [sic] to enable them to enter into the contract with EDL, on the basis that the project would not cost any more than existing diesel generation. ARENA have agreed to commit up to \$18.5 million to enable the project to go ahead and have publicly stated that the project will be the first in Australia to 70% renewable penetration over the life of the project.

I have over the last 12 months been to the marketplace in an open market tender for provision of generation, distribution, meter reading and retail services to the remainder of the [RAES] scheme in South Australia. I am unable to discuss the final outcomes with you

³⁶² Email from Resonant to A Renshaw et al. dated 12 February 2016.

³⁶³ Interview with A Renshaw, 23 May 2017, transcript at 95:40 ('Can you recall saying to Mr Davies that you hadn't read his report? A. No.')

³⁶⁴ Interview with A Renshaw, 23 May 2017, transcript at 95:44.

³⁶⁵ Interview with A Renshaw, 23 May 2017, transcript at 96:23..

³⁶⁶ Email from Resonant to N Smith et al. dated 14 February 2016.

due to probity requirements, however, I can assure you that I have a very good understanding of the options that were presented by the open market in the tender process and the costs associated with these. I can only assume that the savings you have suggested are not NPV costs as this is expected to be the total NPV cost of the project over the 20 years, so to suggest that the savings will be in full would also suggest free electricity. It also suggests that the cost of electricity is significantly below that of the current rates available in the National Electricity Market where competitive tension is much greater.

I am aware of the Siemens technology (and have also seen ZEN proposal to [the council]) and I will be meeting with them soon to discuss this technology and it's [sic] potential. It is largely still conceptual an Australian market although I do consider this to have some potential in the future if they are able to prove the German trial project in Mainz [sic]. My advice is that there are still a lot of challenges associated with the technology and it's [sic] operating efficiency and equipment that need to be overcome to meet Australian standards and conditions.³⁶⁷

499. Mr Davies responded that same day (emphasis in original):

As yet, my understanding is that there is only an in principle decision. Until the PPA is signed, there is still time for consideration.

Your statement [regarding the Letter of Comfort and Deeds of Grant] exposes [the council] to severe risks particularly the likelihood of grid defection (ie residents go it alone with PV, storage and possible backup) in 5 to 10 years would mean that electricity charges could exceed an effective **90c/kWh and cost considerably more than staying with the current PPA**. Thus the Project will in all likelihood **cost far more than staying with existing diesel**, so using this as a basis for the RAES gap is erroneous. What then? Who carries the extra financial burden?

You suggest that \$85M is the NPV cost over the 20 year project[.] [...] **This is definitely NOT the case.**

The total Hybrid NPV (or actually NPC) cost over 20 years as per EDL financial modelling is **\$192 million**. Staying with diesel would be **\$207 million** (based on EDL's model using diesel increase of 5%). As per our meeting on 24th November, it was clear that numerically, Resonant's and EDL's financial analysis correlated closely. Resonant used Present Day Value, to demonstrate in simple terms the excessive value and for ease of comparison of different scenarios, but there is no dispute in the calculations. I do however have issues with EDL's modelling in that it is not of the required standard for a project of this magnitude (its [sic] not 'bankable'), its assumptions on CPI, real increases were not subject to any range or sensitivity analysis, it does not consider grid defection (Assuming 12GWh of 100% diesel for 20 years is a false comparison) as per CSIRO, AGL, all utilities etc.

Resonant reiterate that:

1. **There is a likely saving of \$85M;**
2. **No tender or competitive bid for Coober Pedy has been openly sought;**
3. **Coober Pedy, could easily exceed 70% renewables given its wind/solar at much lower cost;**
4. **A 4x5 year Deed is not equal to a 20 year non-alterable Deed;**
5. **The Deed has to be a watertight, underwriting any eventualities with the EDL PPA, without which [the council] is exposed to considerable risk. If you are confident EDL can deliver, demonstrate this by co-signing the PPA or providing a full gap guarantee (which is not subject to any conditions or basis);**
6. **EDL Performance guarantees are wholly inadequate;**

³⁶⁷ Email from N Smith to Resonant et al. dated 15 February 2016.

7. EDL have no experience in solar, wind or enabling technologies associated with these renewables;
8. The DUPS system is a greater risk than options suggested, though it is acknowledge that Siemens, Epuron, ABB, Juwi, ComAp etc solutions would entail risk as well;
9. There are numerous other ambiguities, risks, inconsistencies (30+) that each in themselves are significant.

I can understand that this Project has gone on for 2 years+, and that there appears to have been much analysis and that you 'want to get on with it'. Its [sic] just that I believe it is so bad that it needs a revisit. As always I am open to robust discussion and to assist in finding the best outcome for Coober Pedy, and indeed the State Government.

[...]

I thus would be available to attend a meeting, where these issues can be discussed in detail. To date, I do not believe that this has occurred with the rigour a project of this size requires.³⁶⁸

500. This appears to have prompted Mr Smith to then email Mr Renshaw and Ms Provatidis:

I am afraid I find it increasingly difficult to communicate with Graham [Davies] the same case over and over again with little impact on his understanding or willingness to listen.

Adam [Crichton] has extensively discussed the level of risk for [the council] and I understand has provided legal advice on this to you and acted on your behalf in negotiations with us and EDL. The documents we are currently finalising will provide financial certain to cover the associated risk and enable [the council] to enter into contracts appropriately.

Graham's issues [...] have been dealt with repeatedly and addressed to the satisfaction of all parties ([the council], [the department], ARENA, KelledyJones), except it would appear Graham.

Fundamentally Graham has an alternate opinion which is inconsistent with other expert opinions which we have sought over the development of the project.

I do not intend to respond nor meet with Graham to discuss this any further unless requested by you.

I will however be sending him a response advising of the above.³⁶⁹

501. Consistent with Crown advice,³⁷⁰ Mr Smith later emailed Mr Davies:

Thank you for your email Graham in which you express a number of opinions. Those opinions are at odds with the views held by the project's various stakeholders. However, as Resonant is not in any way an advisor to the Department and nor is it a project stakeholder (Resonant is simply a contracted advisor to the Council) it is not appropriate that the Department continue to engage in correspondence with Resonant. If Resonant wishes to engage in further correspondence, it will need to do so with its client, the Council.³⁷¹

502. Mr Davies then responded by email:

To my knowledge, I am not aware of any other person or organisation that has reviewed the PPA and proposed technology, and who has the suitable engineering, contractual and commercial experience required to do this.

³⁶⁸ Email from Resonant to N Smith et al. dated 15 February 2016.

³⁶⁹ Email from N Smith to A Renshaw et al. dated 15 February 2016.

³⁷⁰ Email from CSO to N Smith dated 15 February 2016.

³⁷¹ Email from N Smith to Resonant et al. dated 15 February 2016.

Please don't dismiss facts as opinion. Eg. NPV total is \$192m (not around \$85 as you suggested); Siemens and Epuron's bids are approximately half of EDLs [sic]; EDL have no experience of wind, solar or integration thereof. Based on these and other facts, I (and the Resonant team) then provided an opinion, and could accept (if presented) other alternative opinions based on the facts.³⁷²

503. During interview with my investigation, Mr Smith commented on this exchange:

A. [This] was about the time that he was trying to engage with us and, you know, it's clearly not right for him to engage with us, he needs to engage with council and through council. He's their contractor. He's their consultant. Our relationship is with council. And in the end I took legal advice from Crown as to how I managed this because I was just concerned that he was just making stuff up.³⁷³

504. On 16 February 2016 Mr Crichton of KelledyJones wrote to Mr Davies:

We are instructed to write to you on behalf of the Council to confirm that your engagement with the Council in relation to the Power Purchase Agreement between the Council and [EnGen] has concluded.³⁷⁴

Execution of the PPA and Letter of Comfort

505. On 18 February 2016 a representative of EDL forwarded a copy of the PPA and the associated Site License and Deed of Termination to the council and the department for final review. This email advised of various minor amendments to the PPA in light of feedback from the council and the delays in finalising the agreement.³⁷⁵

506. Mr Renshaw's employment contract was terminated by resolution of the council on 15 March 2016. The reasons for Mr Renshaw's termination are not relevant to my investigation.

507. At this same meeting the council appointed Mr David Hitchcock as Acting Chief Executive Officer 'on a temporary basis' pending the recruitment of a Chief Executive Officer by the council.³⁷⁶

508. At the time, Mr Hitchcock was Director Infrastructure for the Local Government Association (LGA). He had previously held a number of roles in local government. He held the position of Chief Executive Officer of the District Council of Elliston for the period 1988 to 2003.³⁷⁷

509. Mr Hitchcock advised my investigation that he attended a meeting at the offices of KelledyJones shortly after notification of his secondment to the council. Mr Hitchcock submitted:

I was told that the PPA was one of the important issues that [the council] was dealing with at the time. I recall being told that matters were well advanced in relation to the documentation of the PPA in its final form. I specifically recall asking whether I would be required to negotiate any of the terms of the contract and was told that that would not be necessary as the contract was at the stage of final documentation which involved "tidying up" the language.

³⁷² Email from Resonant to N Smith et al. dated 15 February 2016.

³⁷³ Interview with N Smith, 2 June 2017, transcript at 62:23.

³⁷⁴ Letter to Resonant dated 16 February 2016.

³⁷⁵ Email from EDL to A Renshaw et al. dated 18 February 2016.

³⁷⁶ Minutes of council meeting dated 15 March 2016.

³⁷⁷ Letter from D Hitchcock dated 30 January 2018.

My best recollection at this time was that I was told, and provided a copy, at the meeting at Kelledy Jones that a resolution had been passed by DCCP to execute the contract but that this was yet to occur.

The clear impression which I had as a result of the meeting [...] was that the substance of the contract had been agreed and that it was in its final stages of documentation.³⁷⁸

510. According to Mr Hitchcock, shortly after his arrival at Coober Pedy he reviewed a copy of the PPA which he understood to be the version of the document the subject of the 19 January 2016 resolution.³⁷⁹

511. On 16 March 2016 Mr Smith emailed various officers within the department and Mr Antonopoulos of the Minister's office to discuss Mr Renshaw's departure from the council:

I have been advised by [the council's] lawyers that this should not be an issue for execution of the PPA with EDL as the Mayor has been involved in the discussions, [the council] resolved in January to proceed with the project and the Mayor can sign with the Council seal along with the interim CEO who is yet to be appointed. I expect that the documentation will be forwarded in final form this week enabling us to provide the Letter of Comfort from the Minister and also the Deed of Grant in support of the project for the next 20 years.

I understand that ARENA are expected to provide approval to EDL today on the project which will allow it to move ahead.

There remains the potential for council to change their position through rescinding their January decision, however, I expect that this would open them up to other risks.³⁸⁰

512. On 21 March 2016 KelledyJones provided a final revision of the PPA to the department.³⁸¹ This version of the document incorporated changes to the construction and commissioning timetable and other miscellaneous amendments. This appears to be the version of the document that was executed by the parties.

513. Mr Hitchcock advised my investigation:

I [...] recall being provided with a list of changes which had been made to the earlier iteration of the contract however I was assured that the execution copy was not materially different from the agreement which Council had approved in January 2016 but that the language had been tidied up.

In light of that assurance I did not undertake the task of comparing the contract which I had initially read with the execution copy which was provided subsequently. Given that [the council] had retained solicitors to advise it in relation to the negotiation and completion of the PPA it would have been an unnecessary duplication of effort for me to have done so.³⁸²

514. On 22 March 2016, following an earlier conversation between the two individuals, Mr Barker of EDL emailed Mr Hitchcock of the council:

I reiterate that we are at the "1 minute to midnight" point of this project and while I appreciate the position you are in being less than 24 hours into the role I request that you consider this matter with utmost urgency and you and or the Mayor execute the PPA immediately.³⁸³

³⁷⁸ Letter from D Hitchcock dated 30 January 2018.

³⁷⁹ Letter from D Hitchcock dated 30 January 2018.

³⁸⁰ Email from N Smith to V Duffy et al. dated 16 March 2016.

³⁸¹ Email from KelledyJones to N Smith et al. dated 21 March 2016.

³⁸² Letter from D Hitchcock dated 30 January 2018.

³⁸³ Email from EDL to D Hitchcock and N Smith dated 22 March 2016.

515. Shortly afterwards, Mr Smith emailed Mr Hitchcock:

I am happy to discuss the project with you if you like from [the department's] perspective.

I received from your lawyer Adam Crichton (KelliedyJones) the final version of the PPA yesterday and subject to Adam's confirmation on the Deed of Grant [terms and conditions] being acceptable to [the council] we will be seeking signatures from the Minister hopefully prior to Easter on the Letter of Comfort providing consent for [the council] to enter into the PPA with EDL in the knowledge that [the council] will be financially supported for the period of the PPA (up to 20 years). This is required under the current Deed of Grant and the future version.³⁸⁴

516. Mr Hitchcock advised my investigation that around this time he was contacted by Mr Davies:

[He] informed me that he had undertaken work for DCCP in assessing the deal with EDL and expressed the view that that [sic] the deal should not proceed because it involved the wrong approach to power delivery and would be too costly.

Mr Davies put it to me in emails and in phone calls that I was under an obligation to meet with him to hear what he had to say. Mr Davies was critical of the decision of DCCP to execute the PPA[.]³⁸⁵

517. My investigation was supplied with a copy of Mr Davies' emails to Mr Hitchcock relating to this period. These records confirm that Mr Davies sought to persuade Mr Hitchcock against executing the agreement on 22 March 2016 and again on 24 March and 29 March 2016, advertent to Resonant's criticisms of the project and the potential for substantial savings presented by alternative suppliers. It appears from these emails that Mr Hitchcock was supplied with a copy of Resonant's final report on 24 March 2016.

518. In an email dated 22 March 2016 Mr Hitchcock responded to Mr Davies to advise that he had been briefed in respect of the project and the contents of Resonant's draft review, stating:

The advice received is that the project has now reached the point of commitment by all parties and at this stage and while your report has been considered within the mix of other project matters there is no intention to revisit your report.³⁸⁶

519. Mr Hitchcock submitted to my investigation that he also had 'a number of conversations' with Mr Smith concerning the project and the concerns expressed by Mr Davies:

Mr Smith told me that whilst the proposal by EDL for the equipment and technology that it would provide to Coober Pedy might not have been the most technologically advanced, it had been looked at very closely and it did involve the current most robust and fit for purpose technology and equipment that would best suit the needs of Coober Pedy. Mr Smith emphasised to me that the PPA was supported by a \$18M grant from the Federal Government as well as a guarantee from the State Government that any shortfall between what [the council] had to pay for power from EDL under the PPA and what it was able to recover from selling that power to consumers in Coober Pedy would be met by the State Government.

Mr Smith also told me that the deal had effectively been put together some time ago and had been ready to go for a while. He indicated to me that the State Government considered this to be a good deal for all concerned and that if Council did not proceed to

³⁸⁴ Email from N Smith to D Hitchcock et al. dated 22 March 2016.

³⁸⁵ Letter from D Hitchcock dated 30 January 2018.

³⁸⁶ Email from D Hitchcock to Resonant dated 22 March 2016.

execute the PPA then its chances of obtaining similar funding from the Federal Government would be low as would its chances of obtaining a long-term guarantee from the State Government as was presently on offer.

Mr Smith also told me that alternative proposals (including that which Mr Davies was putting forward) were nowhere near as beneficial to the community and [the council] as the PPA. I recall being told by Mr Smith that Mr Davies had an interest in the PPA not proceeding and his proposal replacing it. The nature of that interest was not specified.

In the end I did not meet with Mr Davies personally. I recall that I sent him an email to the effect that in light of the fact that [the council] had made a decision in relation to the matter, my role was as an instrument of the Council to give effect to that decision. In those circumstances I indicated to him that it would not be appropriate for me to be meeting with him for the purpose of progressing some alternative deal when the fact of the matter was that [the council] had already made its decision on the matter.

I was reinforced in that view by my conversations with Mr Smith which gave me to understand that the process of evaluating alternative methods and costs of delivering power to Coober Pedy had already been considered and the resolution of [the council] of 19 January 2016 was the end point of that process.³⁸⁷

520. Mr Hitchcock initially advised my investigation that he did not receive a copy of any of the reports prepared by Resonant, nor was he made aware of the existence of these documents.³⁸⁸
521. On being presented with a copy of his March 2016 emails with Mr Davies, Mr Hitchcock sought to clarify his evidence in respect of this issue. Mr Hitchcock now submits that he was 'not made aware of any reports relating to Resonant Solutions until contacted by Mr Davies.'³⁸⁹

522. Later in the evening of 22 March 2016 Mr Barker of EDL emailed Mr Smith:

David [Hitchcock] rang me this evening and said he have [sic] become comfortable that the project had the support of stakeholders and he had no reason to hold the process up so once he had the [Letter of Comfort] executed by Minister and [Deed of Grant] he would proceed with the mayor to execute the PPA.³⁹⁰

523. On 22 March 2016 a briefing minute endorsed by both Mr Smith and Mr Duffy was forwarded to the Minister's office. This briefing minute recommended:

- That you note the latest progress on the Coober Pedy Hybrid Renewable project; and
- That you sign the attached letter of comfort relating to the ongoing provision of the Remote Areas Energy Supplies (RAES) scheme subsidy for Coober Pedy.

524. The briefing minute went on to advise:

- [The council] is considering entering into a new PPA with its incumbent energy supplier Energy Developments Limited (EDL), based on the development and commissioning of a new 5 MW Hybrid Power Generation Facility in Coober Pedy, featuring a combination of diesel generation (DG), Solar Photovoltaic (Solar PV) and wind turbines
- The Australian Government's Australian Renewable Energy Agency (ARENA) has following a rigorous technical and financial due diligence process, committed up to \$18.5 million to EDL as an infrastructure subsidy for the development and commissioning this [sic] new facility. EDL require [the council] to commit to a 20 year Power Purchase Agreement (PPA) as part of this project.

³⁸⁷ Letter from D Hitchcock dated 30 January 2018.

³⁸⁸ Letter from D Hitchcock dated 30 January 2018.

³⁸⁹ Email from D Hitchcock dated 30 May 2018.

³⁹⁰ Email from EDL to N Smith dated 22 March 2016.

- The project is estimated to cost between \$30-40 million and deliver savings of \$5.4 million whilst reducing emissions by 33,000 tonnes (National Greenhouse Account Factors, December 2014 update) over the 20 year period of the PPA against a business as usual diesel generation base case.
- This project is consistent with the Low Carbon Investment Plan for South Australia released on the 1st [sic] December 2015.

525. Noting that there was existing Cabinet approval for Mr Koutsantonis to enter into a Letter of Comfort 'on similar terms' to the existing subsidy arrangements, the briefing minute also advised:

- [The department] has led commercial negotiations on behalf of [the council] given the financial support provided through the Deed of Grant to [the council] and the energy expertise within the Department.
- [The] Crown Solicitors Office have been engaged to review the PPA, develop the Deed of Grant and Letter of Comfort on behalf of the Minister.
- [The Council] resolved at a confidential session of their council meeting on the 19th January 2016 to proceed with the EDL proposed project on the basis of SA Government support for the PPA and provision of a legally binding Letter of Comfort to enter into 4x5 year Deed of Grants [sic] for financial support of the project through the provision of the RAES subsidy.

526. The briefing otherwise observed that the PPA had been 'extensively reviewed' on behalf of the State.

527. The briefing did not refer to the concerns expressed by Resonant or the existence of the indicative proposals from competing suppliers. Mr Smith was invited to comment about this during interview with my investigation:

Q. Before signing the letter of comfort should the Minister have been briefed on those issues, do you think?

A. Well you know, I make the comment here that DCCP resolved at a confidential session of the council meeting on 19 January to proceed with the project. So, you know, one person's advice doesn't necessarily make it accurate. Graham's advice was contradictory to many other people's advice. Council considered that advice. They resolved they were ready to execute. They were asking us for a Letter of Comfort. We had done our due diligence. You know, I'm sure that Tony Renshaw would have made the Minister aware of it. Well I'm not sure but I'm assuming that Tony Renshaw would have, you know. There are alternative options absolutely, there's always alternative options out there. You know for the purposes of this briefing it was about signing the Letter of Comfort to enable EDL to enter into the Coober Pedy hybrid renewable project.

Q. Would the Minister have been aware that the project hadn't gone to open market, do you know?

A. I think we'd made that clear in all of our discussions. I don't think we ever held that back from anyone around the fact that this wasn't going to the open marketplace. However, you know, we were able to rely on ARENA's due diligence, the capital costs side of things. We'd done our own due diligence. We knew -- we had Renewables SA providing input around, you know, existing costs for wind farms and stuff like that. We'd been doing our own modelling around the Marree hybrid renewable scheme. So we had done the expression of interest to that. We had had 28 companies respond to it. We'd done a deep dive on eight of those through IT Power. You know, we had our existing Remote Areas Energy Supply scheme running costs. We knew how much it cost to run stuff out there. It's not like we didn't have visibility over the marketplace and what it was at. So I think it's fair to suggest that, yes, there are alternatives out there, but we understood what those were around that. Testing the market place is not necessarily the only way of understanding and obtaining the best value for money.

Q. Touching on that, should the briefing have recorded the department's reasons for being satisfied the project didn't need to be opened up to a competitive tender process, do you think?

A. I think that was addressed in the cabinet submission.³⁹¹

528. On 29 March 2016 Mr Koutsantonis signed a Letter of Comfort (executed as a Deed Poll for the benefit of the council) addressed to Ms Provatidis (**the Letter of Comfort**). Noting that the PPA was expected to 'give fair and reasonable outcomes for the provision of safe reliable electricity to Coober Pedy', the Letter of Comfort provided:

I advise that if [the council] enters into both the Power Purchase Agreement and the Deed of Grant it can do so in the comfort that the State will continue to provide the RAES subsidy under the Deed of Grant, and in the comfort that upon the expiry of the Deed of Grant the State will enter into further Deed(s) of Grant with [the council] on the same or substantially the same terms for the duration of the Power Purchase Agreement up to 20 years from commissioning under that Agreement (Expression of Comfort).

The Expression of Comfort is provided on the understanding that the long term electricity generation costs are expected to be lower than previously allowed and that ARENA commit to fund the Coober Pedy Hybrid Generation project for between \$16.2-18.5 million with the Power Purchase Agreement being consistent with the financial analysis undertaken by both ARENA and [the department].

529. The Letter of Comfort concluded:

Finally, I confirm that notwithstanding the review by [the department] of various financial and technical aspects of the contract, the Council needs to ensure its satisfaction and take responsibility for all aspects of the Power Purchase Agreement.

530. On 30 March 2016 Mr Hitchcock and Mayor Provatidis executed the PPA.³⁹² It appears Mr Hitchcock executed the Deed of Grant on behalf of the council on this same date.³⁹³ The circumstances in which Mr Hitchcock and Ms Provatidis came to execute the documents are a matter of some dispute between the two individuals.

531. According to Mr Hitchcock:

I recall that some time prior to the execution of the PPA by [the council] on 30 March 2016 Mayor Provatidis made a statement to me to the effect that the council meeting at which the 19 January 2016 resolution was passed had in fact never taken place because she had not ever attended such a meeting. As a result of this statement I contacted Kelledy Jones and was assured that there had indeed been a validly constituted meeting of [the council] and that the resolution of 19 January 2016 was valid. I accepted this advice.

[...]

I recall that I sent an email to Elected Members of [the council] advising them that we were at the final point before execution of the PPA of awaiting receipt of the letter of guarantee from the Treasurer and that it was then my intention to arrange for the execution of the PPA as per the Council resolution. I also had conversations with some (but not all) Elected Members to the same effect. My recollection is that I indicated that this was going to occur within the next few days to a week although without being able to reference the email I am relying on my memory alone as to its contents.

In the conversations which I had with Elected Members no one said to me that the PPA should not be signed and the effect of what was said to me was that the process needed to be concluded by the execution of the PPA. I believe that there would have been time between the sending of the email and the execution of the PPA for any Elected Member

³⁹¹ Interview with N Smith, 2 June 2017, transcript at 69:37.

³⁹² Letter from council to Ombudsman SA dated 16 December 2016.

³⁹³ Briefing minute to Minister dated 10 November 2016.

to have put on an urgent notice of motion to have the 19 January 2016 resolution rescinded by Council if there was opposition to the execution of the PPA. This did not occur.

When the time came to arrange for the execution of the PPA I contacted the Mayor who told me that she was unable to sign the agreement because she had a broken wrist or similar physical impairment. I did not observe any such physical impairment. I said words to her to the effect that the decision to enter the contract had already been made by Council and that the process of us applying the seal and signing the documents was not us making the decision. I said words to the effect that she and I were instruments of Council and that we were under a duty to give effect to the resolution of the Council that the PPA be executed. That was my view at the time and remains my view. We then proceeded to execute multiple copies of the PPA and apply the seal to them.³⁹⁴

532. Mr Hitchcock submitted that it was his understanding that Mayor Provatidis was reluctant to execute the documents in light of concerns she held about solar panel allowances under the terms of the PPA.³⁹⁵

533. According to Ms Provatidis, she ‘never wanted to sign the 30 March PPA but was in effect forced to do so’ by Mr Hitchcock:

[I] did not even want to attend at the Council offices when he rang [my] business which is just around the corner in Coober Pedy and told [me] that [I] had to come in and sign on behalf of Council. [I] told him [I] was not happy to sign the PPA and did not want to do so. [I remember] saying to Mr Hitchcock that [I] had a broken arm and therefore could not sign.

[...]

Mr Hitchcock stated unequivocally that [I] had to sign the new PPA as there was the resolution of Council of 19 January 2016 that required [me] to do so. [Mr Hitchcock said] “*If you don’t sign we will get your signature on it one way or another.*”³⁹⁶

Execution of the Deed of Grant by Mr Koutsantonis

534. On 7 April 2016 the department provided a briefing minute to Mr Koutsantonis recommending that the Deed of Grant be executed.

535. On 11 April 2016 Mr Davies emailed Mr Antonopoulos of the Minister’s office (emphasis in original):

Thank you for the discussion on the Coober Pedy project. As mentioned, and apologies for the delay, I am of the opinion that the PPA is not good for South Australians (high cost and few local jobs), Coober Pedy (high cost and risks) nor Renewable Energy (high cost, sub optimal solution).

Based on budget estimates from Siemens, Epuron and Zen Energy, if an open tender were undertaken, a **saving of \$85m** could be achieved without an ARENA grant.

Due to confidentiality, I am unable to forward Resonant Solutions’ independent report on governance, technical, contractual and commercial matters. From my perspective, [the council] are free to pass on the report.³⁹⁷

536. I understand that this correspondence was not brought to Mr Koutsantonis’ attention.

³⁹⁴ Letter from D Hitchcock dated 30 January 2018.

³⁹⁵ Letter from D Hitchcock dated 30 January 2018.

³⁹⁶ Letter from Griffins Lawyers dated 31 July 2017.

³⁹⁷ Email from Resonant to N Antonopoulos dated 11 April 2016.

537. On 15 April 2016 Mr Pritchard of EDL wrote to the Premier and Mr Koutsantonis to advise that EDL had reached a financial investment decision to proceed with the project.³⁹⁸
538. The Deed of Grant was ultimately executed by Mr Koutsantonis on 29 April 2016.³⁹⁹ On this same day, Mr Koutsantonis wrote to Mr Pritchard of EDL to congratulate EDL on its 'investment decision and patience in bringing the project to this stage.'⁴⁰⁰

Evidence from ARENA

539. My investigation sought clarification from ARENA as to the extent to which its consideration of proposals submitted under the Regional Australia's Renewable Industry Program (**I-RAR Program**) incorporated a 'value for money' assessment or similar.
540. By letter dated 6 April 2017 ARENA responded:

All EOIs were reviewed and assessed by the ARENA I-RAR Project Assessment Panel [...] against six merit criteria, including:

- (a) financial viability of the proposal;
- (b) objectives of the proposal, including its demonstration value as a renewable energy project
- (c) project readiness
- (d) applicant capability;
- (e) technical feasibility; and
- (f) overall risk, including compliance, technical, planning and financial risks.

At the conclusion of stage 1 the Assessment Panel made recommendations as to which applicants should be invited to progress to stage 2 of the application process and submit a full application.

ARENA undertook detailed technical, legal and financial due diligence of each application submitted in stage 2, and entered negotiations with selected applicants regarding the contractual terms on which grant funding may be extended under the I-RAR Program. It is important to recognise this is a competitive process in that there is only a limited amount of grant funding available for the I-RAR program.

[...]

It is important to understand the statutory remit under which ARENA operates [the *Australian Renewable Energy Agency Act 2011* (Cth)]. The concepts of value for money and / or best value for money are not express statutory requirements. Rather, they may be matters that ARENA may have regard to as part of an overall assessment of a project eligible for funding under the I-RAR Program. [...] It follows, therefore, that whilst there may be some consideration of the value for money or so called best value for money aspect of a proposal it is an intangible component and at best is caught up in the entire overall amount and deliberative process followed by ARENA and the ARENA Board.⁴⁰¹

541. ARENA confirmed to my investigation that the EDL proposal 'was the only application submitted for funding under the I-RAR Program concerning the Coober Pedy township.'

³⁹⁸ Letter from EDL to J Weatherill et al. dated 15 April 2016.

³⁹⁹ Briefing minute to Minister dated 10 November 2016.

⁴⁰⁰ Letter from Minister to EDL dated 29 April 2016.

⁴⁰¹ Letter dated 6 April 2017.

542. ARENA supplied my investigation with a copy of a 'Technical Due Diligence Report' prepared by Parsons Brinckerhoff for the purposes of the ARENA board's evaluation of the proposal.
543. At the request of ARENA, I have not reproduced elements of the Parsons Brinckerhoff report below. However, I note for the purposes of this investigation that the report appears to have largely affirmed the validity of the financial modelling, technical design and risk management plan supplied by EDL to ARENA.
544. ARENA advised my investigation that it was 'unable to comment on the correctness or otherwise' of EDL's statement, made by way of its 11 December 2015 response to Resonant's summary review, that any savings under an alternative project 'would simply reduce the ARENA subsidy leaving the PPA tariffs unchanged.' In this regard, ARENA advised:
- The amount of grant funding ARENA is willing to contribute to a particular project is dependent upon a range of factors, including, but not limited to, the amount of financial support ARENA considers necessary to ensure the financial sustainability of a project, the knowledge sharing aspects and other matters referred to [...] in the ARENA Act and the I-RAR guidelines.⁴⁰²
545. With respect to Resonant's statement, made by way of Resonant's summary review, that a 'reconfigured less costly more profitable project with 100% renewables would very likely succeed in ARENA granting funds', ARENA advised my investigation that it was 'unable to comment on the likelihood of any project receiving funding without a project first being submitted for assessment in accordance with the I-RAR Program requirements.'
546. ARENA otherwise advised my investigation that it has not entered into a funding agreement with respect to a 100% renewable energy project elsewhere in Australia.

Evidence from the council's administration

547. On 8 November 2016 my investigation wrote to the council's then-Chief Executive Officer, Ms Fiona Hogan, to seek a response to the issues raised by the referral.
548. The council responded by letter of its legal representative dated 16 December 2016. In this letter, it was submitted on behalf of the council's current administration that, owing to staff and elected member turnover within the council, 'a great deal of corporate knowledge has been lost' in respect of the project. I understand the submissions that follow to be reflective of the view of the council's current administration, based on conversations with the elected members and an interrogation of the council's records concerning the project.
549. The council conceded that its resolution to execute the PPA did not comply with the terms of its Procurement Policy. In this regard, the council submitted:

The Council did not comply with provisions regarding the obtaining of a competitive tender process given that it only ran a limited expressions of interest process with 3 other parties outside of EDL. This process was overseen by Resonant. This EOI process was not discussed in great detail by Council and appears not to have been presented to Council by the then CEO.

[...]

⁴⁰² Letter dated 6 April 2017.

Given the impending timelines placed on the Council to agree the [sic] documents to obtain the benefits of subsidies, it appears that these expressions of interest may not have been as thoroughly investigated as they may otherwise should [sic] have been.

550. In respect of this issue the council further referred to the terms of the 2014 KelledyJones advice. The council submitted that '[t]o the extent that the Council has waived application of the Procurement Policy, it did so in reliance on advice from its legal advisors[.]'
551. The council submitted that it determined not to undertake a market procurement process 'based on advice from its legal advisors and impending deadlines proposed by other stakeholders in the project.'
552. The council also referred to the 'appearance of a thorough process undertaken by other key stakeholders'. The council observed that it was advised that 'the advice sought by these other stakeholders was from the highest calibre advisors and placed reliance on the process undertaken.' The council further submitted:

The Council believed that a thorough review was undertaken by other stakeholders acting in the Council's interests. The Council has neither the skillset, funds or [sic] understanding of all aspects of energy projects and sought to rely on those who did and were purporting to act in the Council's best interest.

The advice provided was that the PPA represented best value for money based on other recent hybrid projects in Australia, albeit that there is only one that may [sic] be accurately compared to. The Council sought to rely on this advice, especially as the project is pioneering and cannot be easily price-benchmarked.

553. The council indicated that it did not know if the PPA, Deed of Grant or Letter of Comfort were amended in light of the concerns expressed by Resonant.
554. Concerning the extent to which it had regard to Resonant's concerns, the council submitted:

The Council felt it was subject to pressure to conclude arrangements with EDL and the State or fear that key subsidies would not be provided to underpin the provision of electricity.

These time pressures drove the Council to act according to what would ensure this end would be met. Given Resonant's late involvement in advising and a reliance on work undertaken by other key stakeholders that was contrary to Resonant's advice, the Council was not in a position to act in a way that would put the needed financial assistance in jeopardy.

[...]

The Council placed great emphasis and reliance on the assessments made by ARENA and [the department] particularly from a financial viability perspective. The Council believed that significant expenditure was spent on procuring energy and finance experts to determine the viability of the project.

This greatly influenced the Council's decision to proceed without a selected or open tender. When an open tender was considered [sic] and a restricted expressions of interest process undertaken by Resonant it quickly became clear that the Council did not have sufficient time to undertake such a process for fear of having subsidies removed or reduced.

555. When asked to describe its own due diligence in respect of the project, the council submitted:

The Council undertook its own due diligence by engaging legal advisors, Kelledy Jones, for the majority of the negotiation period and the period leading up to that.

The Council spent large amounts in legal fees associated with the negotiation of the suite of agreements.

Whilst the Resonant engagement was only for a short period and late in the project, the Council were clear throughout the process that entry into the PPA and associated agreements was predicated on the third party advice.

In hindsight, greater due diligence could have been undertaken on the underlying project to determine the real capital costs and how these would be recovered under the PPA.

556. The council indicated that, contrary to Resonant's advice, it did not engage a probity auditor in respect of the project. The council observed that its basis for not doing so is 'unclear'.

557. When asked to identify why it terminated Resonant's engagement, the council submitted:

It is believed that the Council terminated its relationship with Resonant due to time constraints placed on the Council to finalise and execute the agreements and, to a great extent, the conflict between the advice of Resonant and the directions of other key stakeholders.

558. The council otherwise observed that it is:

a little unclear why the Deed of Grant does not operate for 20 years in its own right given it is the strongest form of legal document, but the Letter of Comfort seeks to provide that extended coverage.

Evidence from the elected members

559. My investigation wrote to each of the elected members who participated in the council's 19 January 2016 resolution to execute the PPA.

Ms Provatidis

560. Ms Provatidis was elected as a member of the council in November 2014. She had no previous involvement in local government. She was elected as Mayor of the council by supplementary election in December 2015. She resigned from the council on 16 February 2018. Her response to my investigation was provided by her legal representatives prior to her resignation.

561. Ms Provatidis indicated that, from the council's perspective, an 'essential element' of any new PPA was the continuation of the RAES subsidy from the State Government.

562. Ms Provatidis submitted that the council was 'under a duty to consider the EDL proposal', owing to the nature of the proposal and the prospect of the generation assets eventually being eligible for transfer to the council.

563. Ms Provatidis submitted that during the development stage of the project she:

wanted to have a much better understanding than what was being provided by staff and officers of EDL and the State Government [...] as to what options were available to Council if it chose not to proceed with entering into the new PPA with EDL[.]

564. Ms Provatidis submitted that it was she who first solicited the indicative proposal from ZEN:

[I] attended an LGA conference with former Councillor Berry in March 2015 [...] where Richard Turner, a Senior Executive of Zen Energy was presenting. [I] was impressed with the presentation of Mr Turner and [...] invited Zen Energy to propose an alternative power supply solution for Coober Pedy.

565. According to Ms Provatidis, ZEN presented to the council on 27 April 2015. ZEN's proposal was said to have been 'well received' by those present.

566. Ms Provatidis submitted that she also telephoned the Mayor of King Island (the location of the reference site for the project) to seek more information, 'including the pricing for the plant installed by Hydro Tasmania.'

567. Ms Provatidis submitted:

the people of Coober Pedy were not being given a sufficient say or input into what was looming as one of the most significant contracts that Council would be required to execute for many years.

568. Ms Provatidis submitted that in her estimation the department was 'pushing' for the council to execute the PPA 'or risk losing' the ARENA grant. It was 'consistently represented' to her and the council that the loss of the ARENA grant 'would be in some way financially disastrous for Coober Pedy.'

569. In response to my query as to whether she could recall receiving a copy of any of Resonant's three reports concerning the project, Ms Provatidis submitted that she 'received by email recommendations on the renewable hybrid project from Resonant Solutions on 8 November 2016 [sic].'

570. Ms Provatidis submitted:

[T]he opinions of Mr Davies were not taken well by EDL itself, Mr Smith [...] and some staff in senior positions who strongly and robustly advised her and other members of council that unless they ceased all contact with Mr Davies and Resonant Solutions and agreed to execute the PPA being put to [her] then they all stood to be at personal risk for breaching their duties as Council officers.

571. Ms Provatidis submitted that she was not made aware of the April 2014 KelledyJones advice, although she was generally aware that KelledyJones had been engaged by the council to review the PPA.

572. Ms Provatidis submitted that she was not present at the 3 December 2015 meeting with Mr Koutsantonis.

573. Concerning the 13 January 2016 ARENA workshop, Ms Provatidis submitted that although she is unable to recall 'specific conversations', she can remember a spokesperson for ARENA stating 'that they were not worried about the price of power[,] only that the project was using renewables.'

574. Ms Provatidis submitted:

The outcome of the meeting was that Council was not happy to proceed with the proposed PPA for a further 20 years without State Government supporting the project [...] for the full 20 years of the agreement. At the meeting [...] Nick Smith stated that the State Government had agreed to underwrite the project for the full 20 year term and Council would not be liable for the meeting of the price differential between the costs to council

acquiring the supply of electricity to the town and the amount Council received from customers[.]

575. Ms Provatidis submitted that she 'has held the view for some time now that she and Council were in effect bullied' into agreeing to the PPA 'by a combination of pressure' from EDL, the department and Mr Hitchcock.

Cr Hay

576. Cr Hay provided a brief handwritten response to my investigation. This response failed to meaningfully respond to a number of my queries.
577. Cr Hay was elected to the council in December 2015. I understand that prior to her election Cr Hay worked for the local IGA supermarket.
578. Cr Hay submitted that she had no involvement in the development of the PPA and the surrounding negotiations. She submitted that she did not receive a copy of Resonant's various reports to the council and indicated that she was not made aware of the April 2014 or December 2015 KelledyJones advice.

Cr Rapaic

579. Cr Rapaic has served as an elected member of the council since its formation in 1987. He has operated as an opal miner in the Coober Pedy community since 1961 and participates in various community enterprises.
580. Cr Rapaic submitted that he had no personal involvement in the development of the PPA and the surrounding negotiations.
581. Cr Rapaic confirmed receiving a copy of 15 November 2015 Resonant's draft report by email. He could not recall receiving a copy of Resonant's summary review of the project. He confirmed receiving a copy of Resonant's final report by email on 8 February 2016.
582. Cr Rapaic indicated that he could not recall the elected members receiving a copy of the April 2014 or December 2015 KelledyJones advice.
583. Cr Rapaic submitted that to the best of his knowledge the elected members were not provided with a copy of the PPA or the associated instruments.
584. Cr Rapaic submitted that he moved the motion to execute the PPA as 'we [...] had the RAES scheme taken away from CP before and the community had suffered from the rise in electricity prices.'
585. Concerning the advice from Resonant, Cr Rapaic submitted:
- My understanding of the conclusions and recommendations of [sic] the PPA by Resonant Solutions was that it was an unfair deal for the taxpayers of SA. We were told by the CEO Tony Renshaw not to have any communications with Resonant Solutions as his position had been terminated.
586. Cr Rapaic indicated that he could not recall any discussions around the council's Procurement Policy or the possibility of establishing a competitive tender process.

Mr Pantelis

587. Mr Pantelis served as an elected member of the council from approximately November 2014 to 19 February 2016.
588. Mr Pantelis submitted that he had no personal involvement in the development of the PPA and the surrounding negotiations. He indicated that the information he received about the project came through Mayor Provatidis and Mr Renshaw.
589. Mr Pantelis confirmed that he received a copy of each of Resonant's reports to the council by email. Mr Pantelis submitted:
- It seemed to me that the Mayor, CEO and a couple of Councillors were in a hurry in making this deal go through. I don't remember any action being taken about the reports but I remember that the CEO Renshaw said something like that he and the Mayor were still in negotiations with EDL and that there was a least [sic] another 2 years before the contract would be signed off.
590. Mr Pantelis indicated that he could not recall receiving a copy of the 2014 KelledyJones advice. He confirmed receiving a copy of the December 2015 KelledyJones advice by email.
591. Mr Pantelis submitted that he 'would not feel qualified to make a comment on whether the PPA presents value for money.'

Cr Reynolds

592. Cr Paul Reynolds was elected to the council on 15 December 2015. Cr Reynolds is an independent opal miner and the President of the Cooper Pedy Miners Association.
593. Cr Reynolds indicated that he did not receive a copy of the PPA or associated instruments. He submitted that information about the project was verbally provided to the elected members by Mayor Provatidis and Mr Renshaw.
594. Cr Reynolds indicated that he was not supplied with a copy of the April 2014 or December 2015 KelledyJones advice.
595. Cr Reynolds submitted that he was 'not aware' of the council's Procurement Policy at the time of the 19 January 2016 meeting.
596. Cr Reynolds submitted that he considers the PPA to present value for money to the council '[o]nly while the RAE [sic] subsidy exists.'
597. Cr Reynolds otherwise submitted:

An alternative to the PPA Hybrid Power Station was to connect to the grid at Prominent Hill. This would provide electricity to Coober Pedy residents equal to Adelaide price – but at a cost of \$20 million more. PPA agreed prices to Coober Pedy residents would ultimately be the same price as Adelaide[.]

Evidence from Mr Koutsantonis

598. Mr Koutsantonis responded to my investigation by letters dated 5 December 2016, 25 January 2018 and 2 March 2018. The second and third letters were supplied by Mr Koutsantonis' legal representatives.

599. Mr Koutsantonis submitted that he was not involved in negotiating the PPA.
600. According to Mr Koutsantonis, he entered into the Deed of Grant and Letter of Comfort 'so as to maintain the longstanding energy subsidy provided by the State to the Council.' He submitted that he did so 'on the basis of [the department's] assessment that the Deed of Grant and Letter of Comfort properly protected the State's interests and that the underlying PPA would ensure reliable electricity supply to Coober Pedy.'
601. Mr Koutsantonis advised that his execution of the Letter of Comfort was authorised and approved by Cabinet. He submitted that 'it would have been inappropriate for [him] to proceed differently, disregard the Cabinet decision, and not execute the Letter of Comfort and the associated Deed of Grant'. He submitted that he was required to enter into the Deed of Grant by the terms of the Letter of Comfort.
602. Mr Koutsantonis acknowledged that his Office received Mayor Provatidis' 7 December 2015 letter enclosing a copy of Resonant's summary review of the project. Mr Koutsantonis submitted that this correspondence 'was not brought to my attention, rather it was referred by my staff to [the department] for comment.' Mr Koutsantonis supplied my investigation with a copy of his Office's file movement record concerning the letter, which tends to confirm this.
603. Mr Koutsantonis submitted that had he been made personally aware of Resonant's summary review concerning the project he 'would have referred the same to [the department] for comment.'
604. Concerning the other Resonant reports, Mr Koutsantonis submitted:
- I was not provided with the Resonant reports dated 15 November 2015 and 8 February 2016. I recall that I was advised by [the department] that the Council had engaged a consultant who had raised concerns but that it was [the department's] view that those concerns were unmeritorious.
605. Mr Koutsantonis indicated that he 'was not aware that the project did not go to selected or open tender' nor was he aware 'of any issues concerning compliance with the Council's procurement processes.'
606. In response to my query as to whether he considered the possibility of other prospective tenderers for the project, Mr Koutsantonis submitted:
- I did not understand it to be my role to consider prospective tenderers, and accordingly did not do so.
607. In response to my query as to how he was satisfied that the project and the associated instruments he signed presented value to the State, Mr Koutsantonis submitted:
- I relied on [the department's] assessment of the PPA, and its recommendations that I should enter into the Deed of Grant and sign the Letter of Comfort[.] [...] Based on [the department's] analysis, the Deed of Grant and Letter of Comfort helped to ensure the maintenance of reliable electricity supply in Coober Pedy through funding the Council's performance of the PPA, which in all likelihood reduced the cost of such supply though transitioning away from diesel generation to renewable sources (and achieving the resulting environmental benefits) and did not increase the State's costs exposure under the RAES [scheme].
608. Mr Koutsantonis advised that he was 'not aware' of whether the council or the department had undertaken their own due diligence or risk analysis concerning the project, indicating, however, that he 'expected that such processes would have been undertaken.'

609. Mr Koutsantonis indicated that he did not receive any legal advice from the CSO concerning the PPA, submitting, however, that he was generally aware that the CSO had reviewed the PPA for the department and drafted the Deed of Grant and Letter of Comfort.
610. Mr Koutsantonis submitted that, apart from ‘any statutory and contractual requirements in a public service context’, he is not aware of any express instructions delineating what matters should be brought to his personal attention.
611. Mr Koutsantonis advised that he operated with ‘an expectation that all relevant information’ would be brought to his attention by his staff.
612. Mr Koutsantonis advised that in this instance, and by reference to the above expectation, he is satisfied with the level of information that was supplied to him by the department and his personal staff.
613. Mr Koutsantonis observed that he has ‘oversight over the extent of the State Government’s subsidy payments’ by his annual review and approval of the council’s forecasted energy generation and distribution budget under the Deed of Grant arrangements.
614. Mr Koutsantonis submitted that he required the department to ‘closely review the budgets submitted by the Council to ensure that Council funds are only spent to supply *“quality, safe and reliable electricity to all customers in Coober Pedy”*’ (emphasis in original), in accordance with the stated objectives of the Deed of Grant.
615. Mr Koutsantonis observed that under the Deed of Grant the RAES subsidy is ‘limited to the difference between the tariffs paid by customers and the Council’s *reasonable* costs of purchasing and distributing electricity’ (emphasis in original):

So much is achieved by clause 5.7.1 of the Deed of Grant which, if the Council’s expenditure exceeds the budget previously agreed to with the Minister, limits the Council’s *“Approved Expenditure”*, being expenditure the subject of the subsidy, to expenditure which is, in the Minister’s reasonable opinion, *“necessary and reasonable to achieve”* the Deed of Grant Purpose[.]

616. Mr Koutsantonis submitted that these matters are significant, because:

[i]f it is assumed that the PPA and underlying project does not represent good value for money (although that is not accepted [...]) the State’s exposure is limited to subsidising only those costs necessary for achieving the Deed of Grant Purpose, namely the reasonable costs of supplying quality, safe and reliable electricity.

617. In light of information supplied to my investigation, I invited Mr Koutsantonis to consider seeking authorisation to provide my investigation with any Cabinet submissions relevant to the project and his decision to execute the Letter of Comfort and Deed of Grant.⁴⁰³
618. Mr Koutsantonis declined to seek the requested authorisation. He was entitled to decline the request and I make no criticism of him for doing so.
619. In this report I have criticised Mr Koutsantonis for failing to directly or sufficiently respond to certain of my direct queries. In the course of my investigation I considered

⁴⁰³ Section 21 of the Ombudsman Act establishes that no person is required or authorised under the Ombudsman Act to ‘furnish any information or answer any questions relating to the proceedings of Cabinet’ or to ‘produce or inspect so much of any document as relates to any such proceedings.’

whether to interview Mr Koutsantonis. I ultimately decided not to do so because I did not think such a course was necessary on the information before me.

Evidence from Mr Hitchcock

620. Mr Hitchcock responded to my investigation by way of letter dated 30 January 2018.

621. Mr Hitchcock submitted that at the time of his secondment to the council he did not understand his appointment would be for any significant period of time, 'perhaps a matter of days or weeks'.

622. Mr Hitchcock submitted that he was first briefed on the hybrid renewable project during his meeting with KelledyJones shortly after notification of his secondment. According to Mr Hitchcock, it was his understanding that 'the essential terms of the contract had already been agreed but that the Council resolution to execute the final document was not to be carried into effect until receipt of the [signed Letter of Comfort].

623. Regarding the communications from Mr Davies, Mr Hitchcock submitted:

At no time did anyone ever bring forward a motion to rescind the resolution of 19 January 2016 and as far as I was concerned it was my responsibility to carry that resolution into effect.

624. Mr Hitchcock indicated that he had numerous discussions with a male solicitor (whose name he could not recall) at KelledyJones 'to ascertain the progress of the final documentation of the contract and the provision of the letter of guarantee.'

625. In response to my queries concerning the perceived need for the council's elected body to approve the PPA in its final form, Mr Hitchcock submitted:

I had been assured by solicitors acting for [the council] in relation to the PPA that the execution copy was not materially different from the contract which [the council] resolved to execute by its resolution of 19 January 2016. I had no reason to doubt the accuracy of that advice given that I had been told at my initial briefing meeting that I would not be required to negotiate any terms of the agreement which was in final documentation stage.

626. Mr Hitchcock submitted that he did not consider the issue of whether the 16 January 2016 resolution complied with the Procurement Policy:

By the time that I became involved in the PPA there was already a valid resolution of [the council] to execute it.

[The council] had solicitors acting for it and if there had been any irregularities in relation to the Procurement Policy then I would have expected them to have been raised at a much earlier stage than when I became involved. No such issue was ever raised with me by anyone and given the advanced stage of the matter when I became involved, there was no occasion for me to consider this issue and I did not.

Evidence from Mr Renshaw

627. My investigation interviewed Mr Renshaw under oath on 23 May 2017.

628. Although cooperative with my investigation, Mr Renshaw did not present as an altogether convincing witness. Through his comments he appeared eager to talk up his involvement in progressing the negotiations and minimise any suggested discord or lack of communication within the council. At times, he struggled to reconcile his

recollection of the council's position with that suggested by documents put to him. He suggested that records supplied to my investigation might have been altered by Ms Provatidis or another party.⁴⁰⁴ He was unable to provide convincing examples of this, however.⁴⁰⁵

629. It is perhaps of import to note that the interview took place the day after a segment critical of the project aired on the *Today Tonight* current affairs programme.⁴⁰⁶ In this segment it was suggested that information concerning the project had been withheld from the council's elected body. During interview Mr Renshaw suggested that he was aware of this report.⁴⁰⁷ My investigators very much received the impression that Mr Renshaw's evidence was in some ways calculated to rebut the assertions made in this programme.
630. Mr Renshaw held the role of Interim Chief Executive Officer of the council from approximately 9 September 2015 to 15 March 2016. He previously held the roles of Chief Executive Officer of the District Council of Orroroo Carrieton and Chief Executive Officer of the Southern Mallee Council.⁴⁰⁸
631. Mr Renshaw submitted that he most likely first became aware of the project 'a few days' after commencing work with the council.⁴⁰⁹
632. Mr Renshaw indicated that he could not recall whether he was specifically briefed on the council's negotiating position at the commencement of his role.⁴¹⁰ He did not discuss the project with the council's previous Chief Executive Officer, Mr Rusby. He was somewhat equivocal as to whether he discussed the proposal with Mr Cameron, the council's Chief Executive Officer before Mr Rusby.⁴¹¹
633. Mr Renshaw described his understanding of the council's position on the proposal at the time in the following terms:
- A. I would probably say the elected members didn't have much idea. Yeah. So they had the basics that it was an alternative energy project. I think I'd probably safely say they knew it included wind and solar but it would be reasonable to say that they hadn't -- didn't have a grasp of the technology or the machinations of the technology, you know, the operation of the technology and, you know, it's impact on the community, even though it had been on the agenda for, I would anticipate being three or four-odd years before I got there.⁴¹²
634. Regarding his understanding of the State Government's involvement, Mr Renshaw advised:

⁴⁰⁴ See, e.g. interview with A Renshaw, 23 May 2017, transcript at 9:33 ('A. I'm going to talk about some correspondence, I guess we'll talk about it later, that purports to be mine which I don't think is.');

transcript at 43:21 (concerning Resonant's proposed terms to the council: 'A. I think it's the little things that stick out for me is that the address from here is different to the body of the letter, so that would say to me that is a bit suspicious from my point of view. The -- yeah, so -- that -- Q. Do you have any concerns this might be a false document? A. I just say again that it looks to me like the address details here, the font in the address details here are different to the font in the body of the letter which is a bit unusual for someone to do that.');

transcript at 98:4 ('Q. You touched right at the beginning on the fact that you think the principal member has somehow tampered with documents -- A. Yes. Q. -- or is lying about certain things? A. Yes. Q. What is your basis [for that]? A. I know for a fact she has.')

⁴⁰⁵ Interview with A Renshaw, 23 May 2017, transcript at 98:15.

⁴⁰⁶ 22 May 2017.

⁴⁰⁷ Interview with A Renshaw, 23 May 2017, transcript at 97:6 ('A. Save for the TV show last night, you know, I would have read 100 words about Coober Pedy since I left.')

⁴⁰⁸ Interview with A Renshaw, 23 May 2017, transcript at 7:31.

⁴⁰⁹ Interview with A Renshaw, 23 May 2017, transcript at 6:28 ('A. I would say to you, not with absolute accuracy, but within a few days I became aware of the project.')

⁴¹⁰ Interview with A Renshaw, 23 May 2017, transcript at 7:45.

⁴¹¹ Interview with A Renshaw, 23 May 2017, transcript at 8:23 ('Q. You mentioned Phil Cameron's previous roles as CE, I think Trent Rusby might also have been for a short period -- A. Yes. Q. -- chief executive before you. Did you have a discussion with either of them -- A. No. Q. -- concerning the proposal? A. I might have spoken to Phil Cameron as -- as, you know long-standing local CEOs, local government CEOs, you know each other. So, you know, I might have given him a buzz. You know, if he said I did, I'm happy to say I did. Neither of us remember, yeah.')

⁴¹² Interview with A Renshaw, 23 May 2017, transcript at 8:11.

A. Again, if I say prior to me joining I didn't know anything about the project so, you know, early on, as I mentioned, I think within a few days, I would have got the call from Nick Smith and/or Keith Barker [of EDL]. I know I spoke to them both early on but whether it was in the few days or whether it was in a week I don't know. But, if you think about me being there for roughly six months, that is 26 weeks, I would have had some discussions with them in the first week or two. And it was more -- the initial discussions were more around saying hello, welcome on board, want to have a chat to you, want to talk to you about what we are doing, et cetera et cetera.

Q. And how did you come to understand the State government's role in those negotiations? I mean, what was the State government doing in the mix, as you understood it?

A. Well I -- initially it was just introducing me to the project and overviewing the project, talking about the players in terms of EDL, ARENA, the State government, the council. Yes, so it was just initially -- I'm really, I'm being cautious about saying in depth, I might throw myself under the bus -- but, you know an introduction and overview of the project.⁴¹³

635. Mr Renshaw asserted that he felt comfortable leading the negotiations on behalf of the council from the commencement of his role, submitting:

A. Even if I say in the right context, I'm a well-read person. I have a significant interest in environmental and community sustainabilities [sic]. So I'm by no means an expert in the alternative technologies, but have sufficient knowledge to -- I'm happy to use your words (unclear) to "lead". As you'll see later on, and very early on through my leadership, we procured some independent arms-length experts to support us. So I think so, yeah.⁴¹⁴

636. Mr Renshaw submitted that notwithstanding various financial difficulties within the council at the time, the negotiations surrounding the project received his full attention.⁴¹⁵

637. Mr Renshaw described Mr Davies in the following terms:

A. So if we were sitting here as old English gentlemen we would say that Mr Davies was a difficult person. If I was sitting with my teenage sons, we would probably say he was a terrorist in terms of the different language. Graham was a difficult person. The -- Graham had very firm views on matters and had little capacity or willingness to consider the wider view or the ramifications of those views or, you know, the broader perspective.

Q. Was that your immediate impression of him?

A. Pretty early on.⁴¹⁶

638. Concerning the level of information provided to the council's elected members and the council's wider record management practices during his term, Mr Renshaw submitted:

A. Graham's accused me of not informing the council. Every bit of the correspondence you can see from myself to the council is "you need to be cautious here, we need to pragmatic. Here's all the information we have got. This is where we are up to". [...] What we actually did was put a series of folders in the council chamber and they were labelled, and that with a copy of every document the council had in relation to the

⁴¹³ Interview with A Renshaw, 23 May 2017, transcript at 8:42.

⁴¹⁴ Interview with A Renshaw, 23 May 2017, transcript at 14:23.

⁴¹⁵ Interview with A Renshaw, 23 May 2017, transcript at 16:35 ('Q. Touching on what you have just said, did you feel that the EDL negotiations then had your full attention given the -- A. Absolutely. So if I say, you know, I have been the CEO of an international bank, the investment bank, the -- yeah, I was never particularly stressed or should I -- as I said to you before, you know, I can refer back to correspondence authored by Phil Cameron. So I went about gathering up all of the documents that were in the council and would either stay in my office until very late, or I had a motel suite, a motel room that I would go and read the documents until quite late at night. Yeah, I was never -- yeah.')

⁴¹⁶ Interview with A Renshaw, 23 May 2017, transcript at 34:12.

project, so the councillors could come into the council chamber and read them; sit there quietly and read them. And what we did was, say from a PPA point of view, just by example, if we had PPA version 1 and then we had PPA version 2, we took PPA version 1 out so they were only referring to the current document, or clearly labelled them. This is PPA version 1, this is PPA version 2 and I don't know whether those folders are still there. But I know -- we went to a great deal of trouble to -- to have all of that information available to the council.

Q. Did those folders include the email correspondence that was being sent?

A. Yeah. Sorry, it was a complete reference source, databank, database, library of all of the project from day -- we went back to the earliest correspondence that we happened to find[.]

[...]

Q. Where in the council were those folders kept?

A. They were in the council chamber.

Q. In the chamber?

A. You know, you do things pretty consistently, they were either -- they were lever arch folders and they were either green or blue; either a light blue, sorry, yeah, light blue, sky blue or a light greeny colour. Yeah.

Q. Were they still there when you left the council?

A. Yes.⁴¹⁷

639. Mr Renshaw commented on the council's records management practices prior to his arrival:

A. Having experienced records systems, I thought that the council's was pretty moderate. Yeah. And, in fact, I was quite surprised that some things were in the record system, were stored in the record system very well, and some things weren't. So we have got two glasses that are exactly the same and glass number one is recorded perfectly, glass number two is not in there.⁴¹⁸

640. According to Mr Renshaw, the council placed a significant degree of reliance upon what he understood to be the State Coordinator-General's assessment of the project:

A. [E]arly on in the discussions with the State we identified with them that there seemed to be a discrepancy or there was some concern around the probity of the whole process and that, you know, the State replied to us by saying that they had the comfort or had the assurance of the Coordinator-General that things were, in common language, kosher. I think, once again, somewhere along the lines we probably would have asked to see that commentary. I'd be surprised if I didn't ask to see that.⁴¹⁹

641. Mr Renshaw submitted that he was first made aware of the State Coordinator-General's input concerning the project 'early on' in his involvement with the project:

A. I was -- you know, once again if I started on 9 September, whether I became aware of that on 9 September or, you know, on 10th or 12th or -- very early on in the process, you know, whether I asked the council, whether I asked Nick Smith, whether I asked Graham Davies or Ian Kay but early on in the process, I would have been asking to see the procurement process and see what the outcomes of that were. And if you said to me what date was that, I'm sorry I couldn't tell you, but early on in the process.

Q. Certainly before you received [Resonant's draft review]?

A. Yes.⁴²⁰

⁴¹⁷ Interview with A Renshaw, 23 May 2017, transcript at 35:23.

⁴¹⁸ Interview with A Renshaw, 23 May 2017, transcript at 87:30.

⁴¹⁹ Interview with A Renshaw, 23 May 2017, transcript at 38:6.

⁴²⁰ Interview with A Renshaw, 23 May 2017, transcript at 38:24.

642. Later during the interview, Mr Renshaw returned to the subject:

Q. Can you recall any discussions with the Minister concerning the lack of an open tender process?

A. No, I can't. I'm not saying we didn't but, yeah, I think that that matter was -- was -- go back to the remarks around the Coordinator-General and the letter of advice the department had perceived around that. So in myself, that was back in September/October/November, I felt that that matter was dealt with. What we were alarmed and concerned by it, we weren't placated by it, we weren't placated by the State's response but the matter had been dealt with, there was no part of the negotiations of moving forward.⁴²¹

643. When asked to clarify his understanding of the involvement of the State Coordinator-General in the State Government's review of the project, Mr Renshaw submitted:

A. So I've said a few times, the -- so we'd raised the issue of the -- of the procurement process early on in the -- in the discussion or negotiations with the State and that the State has responded back to the council to say that they were relying upon the advice of the Coordinator-General.⁴²²

644. My investigation presented Mr Renshaw with a copy of the State-Coordinator General's 18 May 2015 letter to EDL. Mr Renshaw was unequivocal as to not having previously seen this document.⁴²³

645. My investigation put to Mr Renshaw the substance of the State Coordinator-General's correspondence with my Office. Mr Renshaw's response was notable:

Q. The State Coordinator-General wrote to this office to advise, and I'll quote: "The unsolicited proposal from Energy Generation Pty Limited only related to the lease of Crown land. Based on advice from the Department of State Development that at least rates it for wind turbines in less remote areas at \$10,000 per turbine and given that there are only three turbines in land for the solar array, the annual value of the lease is small and significantly below the \$1 million threshold under the Unsolicited Proposals Guidelines." Does that change your understanding of what the State Coordinator-General actually looked at in connection with the proposal?

A. Absolutely, yeah.

Q. Was it your understanding before hearing that passage that the State Coordinator-General had reviewed the project as a whole?

A. I go back and say that the challenge, the question we put to -- I'm a bit staggered by that actually -- the -- the question we put to Nick Smith, to the State was we are of the view that it hasn't satisfied what is a reasonable public procurement process and the State's reply was that they'd put that matter to the Coordinator-General and the Coordinator-General advice to the DSD was that it had. And that they were able to rely upon the advice -- rely upon the machinations or the methods or the processes of ARENA to deal with the public procurement process. I'm a bit staggered by that. And I think, if you read very carefully, if you read in detail the correspondence going back and forth between the council and the State, we asked that question many times, quite explicitly around the procurement process. Yeah. Wowie. Is that -- that's like a mistake.

Q. Would that have altered your decision had you known?

⁴²¹ Interview with A Renshaw, 23 May 2017, transcript at 50:39.

⁴²² Interview with A Renshaw, 23 May 2017, transcript at 80:26.

⁴²³ Interview with A Renshaw, 23 May 2017, transcript at 80:1 ('Q. Have you seen that document before? A. No, never Q. Do you think you saw another document -- A. No, I don't. I think what I'm saying here is that -- that I think we were still waiting for that. I think we had received a whole series of email communication and oral advice to say that that document existed and that we would be given a copy of it.')

A. Absolutely, yeah. So if you look -- if you look at a -- I think you have seen in here, you have seen an email from -- well not think, I know you have seen that we asked for a copy of the letter. That's evidence of the theme of our questioning and the theme of the discussions and I think in Nick's -- in Nick's email here I think he -- I think he says again that they relied upon the Coordinator-General's advice. If he doesn't say it in this one, he says it in one just slightly before. [...] Yeah, I'm a bit staggered by that. Has Nick made a mistake?

Q. I can't say that at this point.

A. That is staggering. Yeah.

Q. In retrospect would it have been appropriate for the council to seek a copy of that correspondence earlier to understand what the State Coordinator-General had --

A. In retrospect, yeah. It's reasonable -- once again, you have seen our correspondence to the State, we are asking for things to be provided. Their commentary is that that is coming, this is what we have done, this is what we have got and, you know, it's reasonable. Like I said before, about contract law, the parties have to acknowledge, understand that the parties have authority to contract or power to contract and it's reasonable for the State -- sorry, it's reasonable for the council to rely upon the advice of -- [...] that it's reasonable for the parties that Nick's dealing with to say he has sufficient knowledge, authority and power to provide advice. Yeah.⁴²⁴

646. Mr Renshaw submitted that the council did not discuss seeking State Government support to undertake a market procurement process.⁴²⁵ Mr Renshaw went on to state:

A. My sense is I can recall in the second meeting [with Mr Koutsantonis], maybe even in the first, it was if we didn't do this project, there would be no more funding support for an alternative project.

Q. Who did that come from?

A. The [Minister].

Q. Personally?

A. Yes. Yes. And I'm not sure if I ever had a meeting with Tom, or the [Minister], excuse me, it would have been worth, don't come to us asking for money, or something like that, that's his nature.

[...]

Q. Did you get a sense of what was driving that from the [Minister's] perspective? Is it to do with timing or --

A. I got a sense but whether I'm wrong or right I don't know. I don't know what was in his mind.⁴²⁶

647. Mr Renshaw later returned to this topic:

A. Whether someone had planted the seed in the [Minister's] mind to say "These guys want to go and do something else and they are probably going to come and ask for some money", I don't know whether that happened.

Q. You didn't have any -- did you have any detailed discussions with the [Minister] about - - (Simultaneous speakers)

A. No. I thought, I walked away from that meeting saying "I'm not going to ask him for a grant". Or if I want to get a grant from the government I'm going to go and ask another department. That came as a shock too. It was around -- so you know once again, I think it's inappropriate to say this is what I think he was thinking. You can't say that. But the sense I had was that the State view was ARENA are in bed, EDL are in bed, we are in bed, and that's the deal. And if you want to do something else, see you later.

⁴²⁴ Interview with A Renshaw, 23 May 2017, transcript at 82:23.

⁴²⁵ Interview with A Renshaw, 23 May 2017, transcript at 54:34 ('Q. Was there ever any discussion about seeking State government support for a tender process or -- A. No').

⁴²⁶ Interview with A Renshaw, 23 May 2017, transcript at 54:37.

[...] If all of those parties are in bed together then they have all got milestones around things happening. Whether it was 31 December, whether it was 28 February, you know, I would imagine that the funding arrangements that ARENA had would have milestones on it and if those milestones aren't reached then they go and do something else. There was a milestone for this project's funding that was important to EDL. I go back to the issue around the procurement process that EDL have to go through, that those prices are only valid for a period of time. So I think all of those things were adding up into that sort of picture.⁴²⁷

648. Mr Renshaw acknowledged that he did not make enquiries within the council as to whether it had previously resolved to waive compliance with the procurement process established by the Procurement Policy, submitting:

A. As CEO from time to time I have asked the council to do things that are outside of their procurement process. We would have -- if -- so if I was the CEO back in, I don't know 2012, or 2014, in relation to this, I would have had a report to the council which would have said "In this particular case because of these circumstances, the council is going to set aside its procurement policy and do these things", and then there would have been a recommendation for the council to support that process and do these things. So whether that happened back in 2012 or 2014 -- you know for example that happens on occasion where, you know, there's only one manufacturer of these glasses in the world, so we are going to spend \$100,000 buying these glasses, and your tender process policy says that for over \$50,000 you have to get three quotes or three submissions, request for tender, and if there is only one manufacturer in the world then you can't do that. You understand that kind of process. That happens from time to time.

Q. Did you look into whether or not there had been a resolution, did you make any positive efforts --

A. I'm pretty sure I didn't because, once again, we relied on the commentary of the State around the Coordinator-General.⁴²⁸

649. Of the 19 January 2016 resolution to proceed with the agreement, Mr Renshaw submitted:

A. I was a bit surprised at [the minutes concerning the meeting] because even at that stage my sense was that the decision to proceed was quite conditional and there don't seem to be any of those conditions in the recommendation to proceed which I'm quite surprised at [...] even at that stage, I can't remember, like late in February there was a decision made to proceed. My sense was even at that stage it was still quite conditional[.]⁴²⁹

650. Concerning what he took to be ARENA's position with respect to the project, Mr Renshaw advised:

A. [I]t was very clear from ARENA's perspective [...] [that] this is a fantastic project, that this ticked all the boxes for a sustainable renewable energy project, alternative energy project in a rural community such as Coober Pedy. And that messaging was clear and -- and you know, consistently articulated.⁴³⁰

651. Mr Renshaw asserted that the council received a copy of ARENA's due diligence concerning the project.⁴³¹ I have been unable to confirm this on the information provided by the council.

⁴²⁷ Interview with A Renshaw, 23 May 2017, transcript at 54:34.

⁴²⁸ Interview with A Renshaw, 23 May 2017, transcript at 59:8.

⁴²⁹ Interview with A Renshaw, 23 May 2017, transcript at 63:43.

⁴³⁰ Interview with A Renshaw, 23 May 2017, transcript at 70:18.

⁴³¹ Interview with A Renshaw, 23 May 2017, transcript at 72:44 ('A. We did ultimately get a copy of the ARENA report and [...] I don't know when we received it but it was part of an oversight process that ARENA had.')

652. Concerning the extent to which he considered the council could rely upon ARENA's assessment of the project, Mr Renshaw submitted:

A. [T]he manner of the commentary from the State was that the public, the grant process and the funding process that ARENA went through, which they didn't consider only EDL's application for Coober Pedy, they considered -- my understanding is that they considered a raft of applications for a raft of projects in a raft of different locations, and they were of the view that the EDL project was the best one for ARENA to support on a sort of national scale or something of that nature.⁴³²

653. My investigation put to Mr Renshaw the issue of the council's compliance with its Procurement Policy. When specifically directed to clause 5 of the policy, Mr Renshaw responded:

A. If you are saying the council breached its procurement policy, on the surface of it I would agree with you. But, you know, you can't -- I think it's unreasonable for you, I'm sorry, it's unreasonable for anyone to see this project operating within the isolated context of a procurement policy.

[...]

Q. You'll see it says that: "This policy contains guidelines to be followed by the council in its procurement activities. There may be emergencies for procurements in which a tender process will not necessarily deliver best outcomes for the council and other market approaches may be more appropriate. In certain circumstances the council may" --

A. I know about this, it's a uniform policy. As I said before in -- where I have -- when I say excluded or not applied the policy, I have a recommendation to that effect for those reasons. So I know that, and I can demonstrate for the last 20 years where I have used -- where I have framed recommendations to set aside the council's procurement policy. I'd go back to that, as I have said all along, and the correspondence here evidences that we were aware of that and that we've relied upon the advice of the State in relation to the Coordinator-General.

Q. Should the council still have passed a resolution stating --

A. Yes, it should. I agree with you.

Q. Now, you'll see there is a list of seven criteria as to when it might be appropriate for council to waive its procurement policy: "(a) if the chief executive officer decides that there is only one supplier reasonably available to it;. (b) the chief executive officer decides that a genuine emergency exists." Et cetera.

A. I'm familiar with all of those.

Q. Which of those seven categories do you think the PPA or the agreement might have fit within?

A. I just think that, you know, the complexity of the project, the nature of the suppliers, the nature of the funding arrangements would have satisfied an exemption from the policy.

Q. As I read it, there's a list of exemptions available or grounds to exempt compliance with the policy. Is your interpretation that there were other grounds available to --

A. No, item (c), it satisfies that.⁴³³

654. Mr Renshaw otherwise acknowledged that the council did not record reasons for waiving compliance with the Procurement Policy.⁴³⁴

655. My investigation presented Mr Renshaw with a copy of the April 2014 KelledyJones advice. Mr Renshaw denied having previously seen a copy of this document.⁴³⁵ He could not recall Mr Kelledy or Mr Crichton ever referring him to this document.⁴³⁶

⁴³² Interview with A Renshaw, 23 May 2017, transcript at 73:9.

⁴³³ Interview with A Renshaw, 23 May 2017, transcript at 84:26.

⁴³⁴ Interview with A Renshaw, 23 May 2017, transcript at 86:8 ('A. No, we didn't').

656. Mr Renshaw submitted that the April 2014 KelledyJones advice, had he been aware of it, would not have changed the manner in which the council resolved to execute the PPA.⁴³⁷ Mr Renshaw went on to comment:

A. So in the hurly burly of -- of -- of all of this process, this has been overlooked. It's just a mistake. If you -- I could go to the records of the State government and two councils to say where I have evidenced quite clearly my practice of setting aside the procurement policy for certain circumstances having a recommendation from the council, that's recorded. That's just a mistake, yeah.

Q. Do you know was this document in the folders that the council --

A. I can't recall. I'm not saying it wasn't but I just don't recall.⁴³⁸

657. My investigation queried whether Mr Renshaw considered the council complied with Mr Kelledy's advice to engage a consultant to 'advise if the costs of the services proposed to be embodied in the contract [are] fair and reasonable and unlikely to be improved through market testing':

Q. Did the council ultimately get advice to that effect?

A. Well, Graham Davies.

Q. Was he advising that the services proposed or embodied in the contract were fair and reasonable though?

A. Michael Kelledy's advice, unbeknownst to me, suggested that we get a specialist consultant and we did.

Q. But that consultant didn't, for example, advise that the services provided were unlikely to be improved through market testing though, did he? In fact, he was advising the opposite?

A. I appreciate your point of view[.] [...] So having not seen this, my recommendation to the council was to get arms-length independent expert advice and that is what we did.⁴³⁹

658. Later during the interview Mr Renshaw submitted:

A. I'm happy to receive -- I'm going to say -- criticism that the recommendation on 19 January should have articulated the conditions that were still outstanding and I'm happy to receive the criticism that it should have been a recommendation to set aside the Procurement Policy. [...] We simply overcame -- overlooked it. So you think about this, the council not having any money to pay its bills. I had to use my own credit card to fly elected members to Adelaide and pay for their hotel because the council's credit card didn't have -- was fully extended. We weren't paying our creditors. The people weren't paying their bills. We had a community group in Coober Pedy owe the council, I think, \$120,000 for power and water over five or 10 years.⁴⁴⁰

659. My investigation queried whether there might have been benefits to the council in testing the market:

A. In hindsight, sitting here in -- it's 23 May 2017, you know, maybe so. Does anyone know? Even after 18 months does anyone know that there is a better deal out there? If there were -- if there was a better deal, would have that just come out of the natural

⁴³⁵ Interview with A Renshaw, 23 May 2017, transcript at 86:28 ('A. No, I don't recall seeing this one, yeah.')

⁴³⁶ Interview with A Renshaw, 23 May 2017, transcript at 86:39 ('A. No, I don't recall. [...] I'm not saying it didn't but I don't recall.')

⁴³⁷ Interview with A Renshaw, 23 May 2017, transcript at 87:8 ('Q. Had you seen this advice at the time, would this have changed how the council resolved to execute the PPA? A. No. So from a maladministration standpoint what the council hasn't done is have a recommendation to set aside the policy.')

⁴³⁸ Interview with A Renshaw, 23 May 2017, transcript at 87:16.

⁴³⁹ Interview with A Renshaw, 23 May 2017, transcript at 88:4.

⁴⁴⁰ Interview with A Renshaw, 23 May 2017, transcript at 92:6.

organic process? [...] No-one, to the best of my knowledge, no-one has done that. Siemens has invested their own time like EDL did and to a lesser extent ZEN to come up with a scheme. As far as I know, they might have but I don't know that. The market hasn't come out -- the market hasn't come and said "this is" -- for want of better language -- "a disappointing deal and by the way here's our alternative". [...] Now to my knowledge no-one has come and said "Here's a better deal than what you have got at Coober Pedy". It might not exist and that's the messaging that came out of ARENA and the State, that sure what Graham is saying might work but there's no evidence it's going to work today and here's an opportunity to do something today and that, I say again, that the council's decision was in the best interests of Coober Pedy and the council and generational equity. So the agreement with the State was "here's a guarantee for 20 years that you'll be no worse off".⁴⁴¹

660. Mr Renshaw asserted that in his view the project presented value for money to the council.⁴⁴²

661. My investigation asked Mr Renshaw to reflect on his involvement with the project:

Q. If you were presented the opportunity to revisit your time with the council is there anything you would do differently, knowing what you know now?

A. That's a bit of an unfair question. Well I'd say again I'm quite surprised by the commentary around the Coordinator-General and it's -- I'm surprised that the recommendation to proceed is not more conditional, and I'll actually -- I'll dig it up from the council's website, some minutes of meetings where we have set aside the Procurement Policy. So I know that, and that's an oversight on my part in relation to that matter.⁴⁴³

Evidence from Mr Smith

662. My investigation interviewed Mr Smith under affirmation on 2 June 2017.

663. Mr Smith generally presented as a compelling witness. He answered questions directly and made appropriate concessions.

664. During the period in which he was involved in negotiating the project, Mr Smith held the role of Director, Demand Management and Energy Services in the Energy Markets and Programs Division of the department. He subsequently held the position of Director of Energy Programs and Services for the Department of the Premier and Cabinet.

665. Mr Smith submitted that he commenced work on the hybrid renewable project in or around May 2014.⁴⁴⁴

666. Prior to working for the department, Mr Smith held the role of Regional Manager for South Australia and the Northern Territory for Elgas, a gas supply company. He was the advocate for Gas Energy Australia and the LPG Association of Australia and has sat on the Gas Technical Advisory Committee to the Office of the Technical Regulator (SA).⁴⁴⁵

667. Mr Smith indicated that his work has focused on renewable energy 'in the last three years.'⁴⁴⁶ This has involved work on the Coober Pedy project and 'a number of different

⁴⁴¹ Interview with A Renshaw, 23 May 2017, transcript at 94:28.

⁴⁴² Interview with A Renshaw, 23 May 2017, transcript at 96:37 ('Q. Did the EDL project present value to money for the council, do you think? A. The total project did. The total project.')

⁴⁴³ Interview with A Renshaw, 23 May 2017, transcript at 97:36.

⁴⁴⁴ Interview with N Smith, 2 June 2017, transcript at 7:3 ('Q. I think the first thing I have seen from you is about May 2014, does that sound -- A. Yeah. I think May I went up to -- with Gerry Velaitis up to council to see a presentation from EDL to council on the project.')

⁴⁴⁵ Interview with N Smith, 2 June 2017, transcript at 4:43.

⁴⁴⁶ Interview with N Smith, 2 June 2017, transcript at 5:9.

projects' across the RAES scheme.⁴⁴⁷ He submitted that in '[e]verything that we do, we are looking at renewables to displace diesel.'⁴⁴⁸

668. Mr Smith described his experience in negotiating or developing Power Purchase Agreements:

A. [F]rom a commercial side of things, as the Regional Manager for South Australia and Northern Territory [for Elgas] basically all of our contracts were negotiated contracts for the supply of energy, so we had -- we dealt with residential customers right through to goldmines, large scale mining companies. So I had ultimate oversight of all those contract negotiations and so on, of those details. So I have fairly significant experience on that side of things. I also have significant experience in the construction materials industry developing and negotiating contracts.⁴⁴⁹

669. Mr Smith observed that the EDL project was already in development at the time he commenced his involvement in the negotiations.⁴⁵⁰

670. He provided the following overview of his involvement with the EDL project:

A. So I guess the council has limited resources and limited expertise around energy. They were very aware of the fact that, you know, the subsidy needed to be supported by the department and the government and so, because I have had for the last three years and will continue to have ongoing budget pressures to find savings and efficiency dividends, as part of departmental targets, it was important for me to understand how this project would impact the subsidies that were paid underneath it by the government.⁴⁵¹

671. When asked to provide his overall assessment of the project, Mr Smith commented:

A. Look I think it's very innovative. It offers a lot of opportunities. It's 70% penetration of renewables. It's at the leading edge of integration for this type of thing. I think that the work that has been done and the modelling that has been is very strong. It's robust, it's been rigorously reviewed by ARENA's technical panel. It was reviewed by an independent third party at Ernst & Young for the financial capital costs component of it. It was -- ARENA has tipped in \$18.5 million to make it commercially viable now. I think it's got significant opportunities and upside to capture the excess spill in the future when technology costs come down the cost curve and make it viable to capture that at a reasonable price. So I think it offers up, you know, fantastic opportunities for the council, provides them with reliable, secure power; so reliability, we talk about matching supply and demand. Security, we talk about frequency control on voltage, so the things the actual parts of the electricity, they will have some (*unclear*) electricity supply in Australia.⁴⁵²

672. When asked to describe the State Government's role in the negotiations as he saw it, Mr Smith submitted:

A. Our role was to make sure that we were mitigating any legal and financial and technical risks to the government through the Deed of Grant because we are providing a subsidy. You know, we were looking at this from the perspective of going through it with, you know, going through it and doing your due diligence to ensure that the council was not creating a liability or a risk for the government.⁴⁵³

⁴⁴⁷ Interview with N Smith, 2 June 2017, transcript at 5:14.

⁴⁴⁸ Interview with N Smith, 2 June 2017, transcript at 5:22.

⁴⁴⁹ Interview with N Smith, 2 June 2017, transcript at 5:31.

⁴⁵⁰ Interview with N Smith, 2 June 2017, transcript at 6:3.

⁴⁵¹ Interview with N Smith, 2 June 2017, transcript at 6:9.

⁴⁵² Interview with N Smith, 2 June 2017, transcript at 6:22.

⁴⁵³ Interview with N Smith, 2 June 2017, transcript at 7:12.

673. My investigation questioned Mr Smith about the development of the 20 May 2014 letter from the department, which expressed support for EDL's application for ARENA project funding.
674. Mr Smith accepted that it was clear at the time of this letter that EDL's proposal would have required a new Power Purchase Agreement if it were accepted by the council.⁴⁵⁴ He also accepted that the 2003 Letter of Comfort provided by the State would likely not have applied to any new Power Purchase Agreement between the council and EDL.⁴⁵⁵ He acknowledged that at the time of the department's 20 May 2014 letter of support, there was an expectation that the State would continue subsidising the council's electricity costs into the foreseeable future.⁴⁵⁶ He accepted that it would have been reasonable to expect at this time that a new Deed of Grant and Letter of Comfort might be required from the Minister.⁴⁵⁷
675. Mr Smith acknowledged that it would have been reasonable to expect that the precise amount paid in subsidies under a new Deed of Grant would have turned on the terms of the associated PPA.⁴⁵⁸ He accepted that on this basis, it was in the State Government's direct financial interest to reduce the amount payable by the council under any new PPA.⁴⁵⁹
676. My investigation queried whether it was therefore appropriate for the State Government to express its support for continued development of the project on the terms contained within the 20 May 2014 letter of support:

Q. So if we return to [...] Mr Duffy's letter, [...] do you still think it was appropriate for the department to say it would support further negotiation of the PPA "provided that the project does not adversely affect the subsidy" paid by the State Government?

A. Yes.

Q. Would it not have been more appropriate for the department to have qualified its support on terms that it required any new agreement to reflect value for money to the council and in turn the State Government?

A. I think the value for money thing is more of a council decision. You know, it's their procurement. Right. They were the ones that were procuring this; they were the ones that had the direct contractual relationship with EDL. We were looking at it from a perspective of, you know, how does this impact the subsidy that's going to be paid? Is it fair and reasonable? Is it commercially viable? Based on our experience with what we were doing in other remote locations, what the costs were there, what our cost profile had seen, what we had seen happen to our cost profile, so you can argue about how the wording is, but the basic premise was that we weren't going to support something that was going to cost significantly more. Value for money side of things is an area that the council should be looking at under their procurement guidelines, and given that it is their procurement.

⁴⁵⁴ Interview with N Smith, 2 June 2017, transcript at 11:38 ('Q. Was it clear at the time of Mr Duffy's letter [...] that EDL's proposal, if it was accepted by the council, would require a new PPA? A. Yes.')

⁴⁵⁵ Interview with N Smith, 2 June 2017, transcript at 11:44 ('Q. Do you think that Mr Conlon's letter from 2003 would have applied to that PPA [...]? A. Well, no. Because, you know, I mean we are talking about a deal with StateWest Power. It's a completely different generation profile, it's a completely different legal document. I think it's difficult to say that this would apply to that document.')

⁴⁵⁶ Interview with N Smith, 2 June 2017, transcript at 12:6 ('Q. At the time that Mr Duffy's letter was sent, was it the expectation of the State government that it would continue subsidising the council's electricity costs for the foreseeable future? A. Yes.')

⁴⁵⁷ Interview with N Smith, 2 June 2017, transcript at 12:12 ('Q. So if the State government was to continue subsidising the council in the event of a new PPA, such as the one foreshadowed in Mr Duffy's letter and EDL's proposal, was it reasonable to expect that a new deed of grant and letter of comfort might also need to be executed? A. Yes. I guess. You know, the deed of grant -- when this letter was done, there was no deed of grant. So it was just a handshake agreement effectively.')

⁴⁵⁸ Interview with N Smith, 2 June 2017, transcript at 12:35 ('Q. Was it reasonable to expect that the precise amount paid in subsidies to the council under the deed of grant or letter of comfort executed would depend on the terms of the new PPA in the sense that the more the council committed to pay to the supplier, the greater the amount that would need to be paid to the council by the State government? A. Correct.')

⁴⁵⁹ Interview with N Smith, 2 June 2017, transcript at 12:43 ('Q. So does it follow then that it was in the State Government's direct financial interest to reduce the amount payable by the council under any new PPA? A. Correct.')

Q. Just to clarify that response, is it your position that the State didn't also need to assess whether the proposal presented value for money to the State through the subsidy?

A. Of course, we did. You know, as the people bearing all the financial risk effectively, we did our own due diligence to make sure that this wasn't crystallising any financial liabilities for us or legal liabilities.⁴⁶⁰

677. Mr Smith accepted that the department's assessment of the value of the project might have entailed the consideration of potential alternatives:

Q. Did that also involve determining whether or not there might have been a better agreement available if the project went to market, for example?

A. Yeah, we did a SWOT analysis and presented that to council saying that there is a risk associated with this project, that you haven't done a market approach and that there might be alternatives out there. But based on what we had been seeing through our RAES procurement where we had been asked for alternative generation, we saw the costs coming back on that. The modelling that we had been doing on our Marree hybrid stuff, the EOI costs that had come back, and we did a deep dive on the cost profile particularly because just at the time when they were looking to sign or to negotiate the final PPA with council, the oil price fell through the floor, which is why we wanted to understand the potential impacts of that. So we did extensive modelling and went back and looked at forecasting of diesel prices and historical diesel prices, where they were expected to go. Now as it turns out they have stayed a little bit lower than longer than everyone expected but we did extensive due diligence around that and financial modelling.⁴⁶¹

678. Mr Smith indicated that he was unable to recall when Mr Koutsantonis was first notified of the negotiations concerning the project, submitting:

A. I would have to go and check the records in terms of what was on the agenda of his meetings. Like, you know, we have -- the department has a weekly meeting with the Minister, so it was discussed, you know, over the last three years it has been discussed regularly, but I just -- I can't recall when.⁴⁶²

679. Mr Smith indicated that to his knowledge minutes are not kept of these weekly meetings involving Mr Koutsantonis.⁴⁶³

680. Mr Smith submitted that the Minister's office had little involvement in the negotiations concerning the project:

Q. [W]as the Minister's Office actually involved in the negotiations concerning the Coober Pedy project?

A. No. The only time -- the only time that they had any involvement at all was one day Tony Renshaw and Graham Davies came down to discuss the project and Nick Antonopoulos came along for about 15 minutes to just say that, you know, the government is still supportive of this project if council wants to proceed, they still have the government's support but, you know, "work through the process" as they said.

Q. Were you at that meeting?

A. Yes.

[...]

Q. Was the Minister there?

A. No. No. This was in our offices.⁴⁶⁴

⁴⁶⁰ Interview with N Smith, 2 June 2017, transcript at 13:1.

⁴⁶¹ Interview with N Smith, 2 June 2017, transcript at 13:40.

⁴⁶² Interview with N Smith, 2 June 2017, transcript at 16:24.

⁴⁶³ Interview with N Smith, 2 June 2017, transcript at 16:31 ('Q. Are those meetings minuted at all? A. I don't think so.')

⁴⁶⁴ Interview with N Smith, 2 June 2017, transcript at 16:34. Mr Smith suggested that this meeting may have occurred in September or October 2015, although he could not be certain.

681. When asked if he could recall Mr Koutsantonis ever expressing a position concerning the project, Mr Smith submitted:

A. No. Well I mean he was always supportive of the project based on what we provided him in the information, but he was always very consistent that it's a council project, if they want to go ahead with it, we are happy to support it. If they don't want to go ahead with it, you know, he's not too fussed.⁴⁶⁵

682. My investigation queried whether the department considered if the project as a whole needed to be assessed under the Unsolicited Proposals Guidelines. Mr Smith commented:

A. Well it's not a State Government procurement. So I mean we weren't a part -- we weren't a contractually bound party to that process. It was a council procurement. So they needed to comply with their procurement guidelines. From a government perspective, we are providing a grant and a subsidy, so, you know.

Q. That subsidy would potentially vary depending on the value or the cost of electricity under any new PPA, so there was a financial interest to the State Government in minimising the costs under the contract?

A. Mmm-hmm.

Q. I think we've talked about that already. Did that not mean that the State government had a financial interest in the contract itself; in ensuring that it was value?

A. Well I think we did, you know, we had undertaken our due diligence but whether it's required to -- you know, whether it's required to be an unsolicited bid or not, I don't -- we are not a legal party to the contract. It's a council procurement. I don't think you can put a council procurement through the State Government's unsolicited bid proposal. Whilst we are providing a subsidy we did our due diligence on whether this was commercially viable and, you know, we did a deep dive on it, we did our due diligence, we relied on ARENA's assessment, we relied on Ernst & Young's assessment. Should it have gone through the unsolicited bid proposal? I would argue probably not.⁴⁶⁶

683. My investigation asked Mr Smith to describe his understanding of the Unsolicited Proposals Guidelines:

A. I haven't read them for a while but I've been involved in a number of the, you know, reviewing unsolicited bids.

Q. [...] Did you read them at the time of the EDL negotiations, can you recall?

A. I'm sure I probably did. I'm not -- I'm assuming that I probably have but I can't recall it specifically.

Q. Do those Guidelines in your view only apply to procurement activities?

A. Not necessarily, no.

Q. Would the Deed of Grant and Letter of Comfort that were signed by the Minister, would they not themselves also need to go through the Proposals Guidelines, do you know?

A. I wouldn't have thought so.⁴⁶⁷

684. My investigation asked Mr Smith to describe his understanding of the USPSC's assessment of the project:

A. So I think that related to the land. So when it refers to the Department of State Development, I think it refers to Renewables SA rather than the Energy Markets and

⁴⁶⁵ Interview with N Smith, 2 June 2017, transcript at 17:4.

⁴⁶⁶ Interview with N Smith, 2 June 2017, transcript at 20:13.

⁴⁶⁷ Interview with N Smith, 2 June 2017, transcript at 21:5.

Programs [Division] and the DEWNR side of things was where the leases were being written.⁴⁶⁸

685. My investigation asked Mr Smith if he could recall discussing the State Coordinator-General's correspondence with representatives of the council:

A. [I]t may have come up in conversations that [EDL] had been through an unsolicited bid proposal.

Q. And who were those conversations with, can you recall?

A. No, I couldn't, I would have to go back and trawl through all the information.

Q. We've been told by Mr Renshaw that he was made aware of this review by the Unsolicited Proposals Steering Committee shortly after he started with the council, which I believe was on 9 September 2015. Can you recall any discussions with him at around that time about the determination [of the Committee]?

A. Not specifically. I mean we were having sometimes two and three conversations a day. I don't recall specifically talking to him about that.⁴⁶⁹

686. My investigation asked Mr Smith if he could recall ever suggesting to Mr Renshaw that the State Coordinator-General had assessed the value of the project as a whole:

Q. Can you recall saying anything to him that might have given him that impression?

A. Probably not through this process. I can assure you that I spoke to him at length about us doing our own due diligence within my area of responsibility around the project.⁴⁷⁰

687. Mr Smith was later asked:

Q. Can you recall ever explicitly informing Mr Renshaw that the State Coordinator-General had only looked at the leases to do with the project?

A. No, I don't explicitly recall it. I mean I had never seen the unsolicited until -- you know, well I didn't see it until this year.⁴⁷¹

688. Mr Smith later clarified:

A. Potentially it might have been Catherine Way [of the department] who communicated that through, because she had been working with EDL on developing -- actually that was the other thing that council was concerned about back in June 2015 was whether ILUA had been negotiated between EDL and --

Q. That is the Indigenous Land Use Agreement?

A. Yes. And the local people, and what the potential liability was for council at the end of this 20-year deal. But I've never had any visibility over that. So Catherine Way was facilitating that for EDL, the leases, so whether that came through Catherine or whether it came through me, I may have mentioned it, I'm not sure. I don't recall anything specifically.⁴⁷²

689. My investigation queried the extent to which, if at all, the department considered it could rely upon ARENA's assessment of the project. Mr Smith responded:

A. I think, you know, they are the experts in renewable energy. They have -- they have a rigorous due diligence process. It goes through a technical review panel and it goes -- then it goes through an independent technical review panel. So they do their own internal analysis. This was part of a complete round of funding, so they were looking at

⁴⁶⁸ Interview with N Smith, 2 June 2017, transcript at 21:35.

⁴⁶⁹ Interview with N Smith, 2 June 2017, transcript at 22:8.

⁴⁷⁰ Interview with N Smith, 2 June 2017, transcript at 22:27.

⁴⁷¹ Interview with N Smith, 2 June 2017, transcript at 56:41.

⁴⁷² Interview with N Smith, 2 June 2017, transcript at 57:18.

projects from all over Australia and comparing the costs of this project versus other projects that they were looking to fund. So, they put it through a third-party independent financial analysis. I think we can rely quite closely on the fact ARENA have done a rigorous due diligence on the process.

- Q. Did the ARENA assessment involve an assessment as to the project presented value for money, do you know?
- A. I'm not sure on that, that specific criteria for them. But I'm assuming they wouldn't be tipping in \$18.5 million if they didn't think it was value for money.
- Q. In your view did the ARENA assessment mean that the project was value for money for the South Australian government?
- A. Yes. Well in as much as they were supportive of it. However, I didn't just rely on that, I went and did my own due diligence to make sure that I was comfortable with it as well.⁴⁷³

690. Mr Smith was asked to describe the department's due diligence concerning the project:

- A. [It involved] multiple spread sheets and going through the EDL financial modelling to the point where I was checking formulas to make sure that the formulas were all accurate right through the spreadsheet. You know, comparing, doing sensitivity analysis on different fuel prices, CPI increases, LGC prices, working out what were all the risk factors. You know if we saw this happen, because it is subject to, even though 70% of it is locked away in fixed charges, there's still a significant component that is subject to known unknowns, if you like, a whole heap of variable components: diesel price, CPI, LGC prices, all of those things. And, you know, all you can do is look back at history to get an indication of where the future might be, do a range of assessments and look at the risk profile with that and say "Am I comfortable with this risk profile?" [...] But the sense is -- Graham Davies assessed there was no sensitivity analysis done. There was significant sensitivity analysis done.⁴⁷⁴

691. Mr Smith was asked about the significance of the ARENA funding commitment to the department's assessment of the project:

- A. I mean this is innovative technology. If you put the business case up today, even today, right, without any additional funding, you wouldn't do it, because it needs those government subsidies to get technology like this up and running. If you think about the technology curve, it needs a lot of government support to get to a commercialisation phase and this is one of those commercialisation phases. So, you know, ARENA tipping in \$18.5 million made commercially viable against alternative technologies, such as diesel business case. [...]
- Q. So that kind of feeds into the value for money, does it, or do you see that as a separate issue?
- A. Yeah, absolutely, because I mean it ticks a number of other job criteria around abatement reduction, regional jobs, you know, you know, securing power supplies for an area that has the potential to attract more mining to it, so you know, improves investment opportunities for the -- for the council up there, so there's a number of -- from a holistic perspective, this project offered value for money to the Coober Pedy council. You know, from a commercial perspective we thought that it was fair and reasonable. I went as far as pulling apart their spreadsheet and using my commercial knowledge, putting together a profit and loss statement for what I thought they were going to earn over the next 20 years. [...] I thought that the returns that they were getting were fair and reasonable for what is a risky project. There's a high risk premium associated with a project like this because it is uncertain. And I should add, even though they are using relatively prudent technology based on the King Island [reference site] and they had Hydro [Tasmania's] consultants to mitigate their risk, this is still a relatively risky project and that is what ARENA funding is for.⁴⁷⁵

⁴⁷³ Interview with N Smith, 2 June 2017, transcript at 24:4.

⁴⁷⁴ Interview with N Smith, 2 June 2017, transcript at 24:32.

⁴⁷⁵ Interview with N Smith, 2 June 2017, transcript at 26:26.

692. Mr Smith indicated that he could not specifically recall reviewing the I-RAR Program Guidelines or ARENA's information manual in the course of his involvement with the project. He volunteered that he may have had recourse to these documents in connection with this or another project.⁴⁷⁶
693. My investigation put to Mr Smith ARENA's evidence to my investigation concerning its assessment process:
- Q. Is this consistent with your understanding of ARENA's assessment process at the time?
- A. Well it seems reasonably consistent. I mean, whilst they are not specifically looking at is this the lowest cost, best value for money project, they are looking at innovation, commercialisation and we, you know, given the renewables profile of South Australia, which is wind and solar, we have world-class renewable assets, you know, we see this project as, you know, it's a good one to support if the council wanted to proceed with. We did our due diligence and said "Is this going to cost us more? Look, potentially it's going to save us \$5.4 million, potentially if the oil price stays low, it's going to cost us a little bit less". We looked at the overall, the modelling was showing \$130 million worth of real value over the next 20 years, the net present value or net present cost of \$85 million. You know, it was consistent with where we were going and where we are headed as a -- as a department and organisation, where we are being looking to mitigate our exposure to diesel prices and diesel consumption. That is effectively one-third of my budget; just buying diesel.⁴⁷⁷
694. My investigation queried whether the ZEN proposal suggested that a better deal might have been available if the process had been exposed to competitive tension:
- Q. Talking about the ZEN proposal again, we saw the SWOT analysis [...] suggested that one threat was that the market approach had the potential to yield a more attractive proposal, and here you have a proposal that suggested that it might be possible to eliminate the State government subsidy entirely after five years. I understand that you've expressed your views as to what that proposal really meant, but was it perhaps not a sign that a better deal might be attainable through a competitive tender process?
- A. Absolutely it is. But I mean I had already identified that in the six months earlier to the council, part of the risk of going down this path is that you don't test the market place. Is that something as a government we were prepared to support? Well number one, you know, to me the ZEN proposal was not a viable proposal. It was a request to delay this project and allow them to come up with an alternative proposal which council then had to pay for; spend \$100,000. So if you were going to go and spend \$100,000 with ZEN, why wouldn't you go and spend \$100,000 with Aurecon or GHD, and then say "develop me another proposal", or a market approach. I just saw that as just being trying to prevent this project from being, going ahead and getting signed.
- Q. And what did you think was behind that?
- A. They were looking to try and build their own market presence.
- Q. Did the ZEN proposal at least demonstrate that other companies might be interested in tendering for the project, do you think?
- A. Yeah, absolutely. You know, in recognition of the fact that EDL had a contract until 2019, would they be interested in developing a proposal and then waiting until 2019? You know, there needs to be a bit of reality put around this. You know, our position was it was always a decision for council, whether they wanted to go ahead with this or

⁴⁷⁶ Interview with N Smith, 2 June 2017, transcript at 27:23 ('A. I think I might have looked at [the Program Guidelines] but I can't -- I can't specifically say I looked at them on this stage or at that time, but you know whether it was related to the Maree project or whether it was related to the Coober Pedy project, I don't recall specifically. Q. And does that apply to the information manual published by ARENA as well, can you recall reading that at any point? A. I can't. I can't recall. I remember looking at the ARENA website a number of different times. So I continually refer to the ARENA website, you know, as part of my job.')

⁴⁷⁷ Interview with N Smith, 2 June 2017, transcript at 27:37.

if they didn't. So from a commercial perspective we were happy to support it on the basis that it wasn't going to cost us more going forward, and it ticked a lot of boxes around renewable investment, low carbon, jobs, regional investment, securing opportunities for the government's priorities and carbon abatement.⁴⁷⁸

695. Mr Smith explained the considerations underpinning the department's assessment of the value presented by a project:

Q. If the department's entering into a contract to purchase electricity itself, as a party, in assessing which provider to go with, would the department be looking at "will this cost us any more?", or would it be looking at an assessment as to "well, does this present best value?"

A. Well you would always look it from a holistic perspective and it depends on what your competing priorities are and why you are doing the procurement. For us, sometimes, you know, we're looking at trialling alternative engine models in some very small sites which may not be best value for money, but they may offer commercialisation opportunities for us to then go and scale up in the future. So, you know, it depends -- there's a range of criteria that you would look at.

Q. Are there any other criteria, I guess, that spring to mind?

A. Well I mean any procurement you're looking to try and achieve your objectives. What those objectives are might vary[...] [...] [M]y understanding is that when this was first slated by EDL to council, council was very supportive of it because, number one, they had nearly hit their maximum contract demand, they were worried about Coober Pedy not having enough power for people to come and invest in the mining industry, not having enough power for the locals. They were worried about the escalating cost of power through diesel prices continuing to rise and rise and the fact that the government had previously had a different charging regime. [...] They asked us to do our due diligence, we did our due diligence, we provided them with a Letter of Comfort to enable them to enter into the contract, we said that we would write, underpin it for the next 20 years if they chose to go ahead with it. From our perspective, we did all of our due diligence. The decision was council's. You know, if they had a change of heart and they were concerned about it, don't vote for it.⁴⁷⁹

696. Mr Smith elaborated on the department's assessment of the value presented by the project to the council and the local community:

A. From a value for money perspective the council, what do they get out of this? They get guaranteed supply, security of supply. They get regional jobs. They get what will become a tourist attraction; the existing wind turbine is already a tourist attraction. They get man hours, local construction. One of the things that came out of the construction of this is that there are two guys doing Year 12 and they are doing a TAFE construction certificate. One of the things is they have to have a project to go on and get some education around; there was nothing in Coober Pedy aside from this project. They hadn't been able to deliver. They used to have to send them to Port Augusta to do that sort of stuff. So there's a lot of flow-on benefits to the community.⁴⁸⁰

697. Mr Smith later elaborated on the concept of 'value for money', as he perceives it:

A. From my perspective, you know, value for money is not always the cheapest, lowest cost. And I have -- you know in numerous jobs previously I'm not always -- you know, I've run tenders and I haven't accepted the cheapest price because it doesn't add value for money. You have to consider the ability to deliver, and consistently over 20 years, is a company going to be around for 20 years? There's a whole range of things that you need to take into account when you consider value for money. So from our perspective, we thought that this constituted value or money. We still think it does. We

⁴⁷⁸ Interview with N Smith, 2 June 2017, transcript at 34:14.

⁴⁷⁹ Interview with N Smith, 2 June 2017, transcript at 35:12.

⁴⁸⁰ Interview with N Smith, 2 June 2017, transcript at 58:17.

think it has the ability to deliver more value in the future, and that's something that will play out over the next 20 years.⁴⁸¹

698. Mr Smith described what he understood to be the position of some of the elected members of the council:

A. Their concern was around pricing. That's my understanding. If you go back and you have a look at some of the emails that Damien [Clark] provided to me about council concerns, and I think maybe Trent [Rusby] provided to me, there were four key concerns. Number one was: what is EDL putting into the community? What is the community getting out of this project in terms of jobs and more local construction? Their key concern was about pricing. Now pricing is not linked to this project. Right. Even if this project didn't go ahead the price is set by the Minister for Mineral Resources and Energy on an annual basis and it's aligned to the -- current policy is aligned to the average of the on-grid tariffs in South Australia. I could never quite get that concept through to the council. They could never quite wrap their head around the fact that prices here, generation here. This project is here, prices are over here. They are completely disconnected. If you didn't go ahead with this project and went with another project, you know, it's still not going to impact your price because it's aligned to the prices on the national electricity market.⁴⁸²

699. My investigation queried whether the council was meaningfully incentivised to achieve maximum value under the agreement:

Q. [Y]ou said before that whether or not the project presented value for money was really a consideration for the council to be satisfied of, but you have also said that, in effect, the costs that would be incurred by the council under the PPA would be subsidised by the State government?

A. Correct, and we had done our due diligence on the value for money on it.

Q. So I guess the issue is the council didn't have a huge incentive to reduce what it would be paying if that would be absorbed by the State government, as I see it at least.

A. Well they wouldn't have been able to enter into the PPA without Minister's authority. That's what the Letter of Comfort was for because that enabled them to enter into the agreement.⁴⁸³

700. My investigation asked Mr Smith if subsequent developments in the industry had caused him to reappraise the project:

Q. Does anything that is happening elsewhere in Australia give you second thoughts about the EDL project at all?

A. Does it give me second thoughts? No. Does it make me think that the cost profiles have come down on batteries and solar faster than anyone expected? Yes. So, you know, the Coober Pedy project, the \$18.5 million from ARENA was designed to commercialise a project that wasn't financially viable ahead of technology going down the cost curve. [...] [I]f you said "I'll wait for five years", you'd never invest in anything. You have to make a decision based on the available facts you have at hand and, you know, your appropriate due diligence and forecasting of what people get right.⁴⁸⁴

701. Mr Smith indicated that he had no previous dealings with Mr Davies before his engagement by the council.⁴⁸⁵

702. Mr Smith was generally critical of Mr Davies' capacity to review the commercial aspects of the project:

⁴⁸¹ Interview with N Smith, 2 June 2017, transcript at 77:37.

⁴⁸² Interview with N Smith, 2 June 2017, transcript at 43:19.

⁴⁸³ Interview with N Smith, 2 June 2017, transcript at 58:32.

⁴⁸⁴ Interview with N Smith, 2 June 2017, transcript at 40:18.

⁴⁸⁵ Interview with N Smith, 2 June 2017, transcript at 47:16 ('Q. Had you had any previous dealings with him before this project? A. No.')

A. I think he's basically incompetent in many areas of commercial and contractual knowledge. He may be a very good engineer but from a commercial and legal perspective, I think he has a significant area of vision blindness in his own personal aptitudes. [...] [I]f you look at his paper qualifications you would argue that his paper qualifications, you know, should be suitable from an engineering perspective. From a commercial and legal perspective, it was quite clear that he had very limited understanding of the PPA, and the risks and how they were mitigated within the PPA. [...] [M]y opinion of Graham is that if he came up and formed an opinion that he had developed, then anyone else who disagreed with him was wrong. So in the face of his advice, ARENA responded, we responded, EDL responded. We had Brett Thomas, who had provided us commercial advice. Their legal -- council's own legal advisers were telling him that he was wrong, but everyone else is an idiot. So, you know, it's difficult to have a coherent conversation with somebody who just thinks you are completely inept and wrong and that anything that you're saying is only because you don't understand it.⁴⁸⁶

703. Mr Smith was asked to comment on the potential savings suggested by Resonant's final report:

Q. [D]o these figures here, particularly the projected savings, give you any cause for concern at all?

A. They are absolute rubbish. That is my honest opinion. Right. The total net present value of this, or net present cost of the 20-year project is \$85 million. So are you saying that the saving of \$85 million means that it's free, free electricity, costing nothing?

Q. Did you understand Mr Davies' calculations of what would be paid under the EDL PPA was in excess of what your calculations were --

A. Yes.

Q. -- does that explain that discrepancy?

A. Yes, because he doesn't understand the PPA and the impact of liquidated damages and the way that the commercial agreement works. They can't run with just diesel. His 7.5 million, or I think he goes into another stage later in the report, he goes into \$10 million or something like that, but \$7.5 million, it's not \$7.5 million. And the beauty about this one is that ZEN have come up with a capital component of \$18 million which is half of what their previous proposal was.⁴⁸⁷

704. Mr Smith later commented:

A. I'm reasonably good at commercial modelling. I've had extensive experience. I've done a lot of theoretical training, done my MBA, done a whole heap of stuff around that. I don't hold a candle to the guys at ARENA. Those guys are really, really smart financial modellers and they are very, very good at it. But I know how to interpret stuff, I know how to read it and I've been doing it for 20 years and negotiating contracts and understanding the cost profiles and stuff. This is basic simplistic modelling with nothing underpinning the assertions and no justification of how you've come up with your assumptions. You couldn't -- you know, you couldn't seriously look at that and compare it against the table and say "Oh yeah, that looks fair and reasonable", it's just so far off.⁴⁸⁸

705. Mr Smith criticised Mr Davies' methodology:

A. He's not looked at the realities of the variables and the impacts of those and the sensitivity analysis that was all done. He's just gone "Oh, well, this could cost this, and this could cost that" and, you know, very basic simplistic X times Y equals Z, rather than the more complex financial modelling that's required to actually underpin a case

⁴⁸⁶ Interview with N Smith, 2 June 2017, transcript at 46:20.

⁴⁸⁷ Interview with N Smith, 2 June 2017, transcript at 59:34.

⁴⁸⁸ Interview with N Smith, 2 June 2017, transcript at 60:24.

around these type of things. [...] I did take Graham Davies through [the financial modelling]. He listened to my -- in fact, that was on 24 November. I took Tony and Graham through it and said "Look, you know, here is how it works. This is this." Took him through it in extensive detail. The following day Graham came into my office and wanted to talk to me about the financial modelling, which he decided we had agreed that his had merit. He spent the first hour and 15 minutes telling me how good he was and how much experience he had, and then when I wanted to talk about the project he was sort of flippant saying "On well, you know, we'll just -- the council will receive my report in due course".⁴⁸⁹

706. My investigation asked Mr Smith about the indicative proposals received from Epuron and Siemens:

Q. Can you recall seeing either of these two documents referred to in this proposal with Epuron --

A. No. I had actually asked for them. I had asked for a copy of them so that I could actually do my own analysis of it. When you sent them through to me was the first time that I'd actually seen them.

Q. How did you communicate that request: to the council, or Mr Davies?

A. I think in a phone conversation, I said "Look, if you have anything, send it through to me. I'm happy to have a look at it".

Q. That was Mr Davies?

A. No, it would have been with Tony I suspect.

Q. With Mr Renshaw?

A. Yes.

Q. And you didn't receive a copy, you were saying?

A. No. I'd never seen this report until, you know -- I think Graham might have sent through a copy in 2016 when he was -- when council had decided that they were trying to get out of the contract at the time. But it was a redacted version and I have never ever seen the Epuron or Siemens proposals until you guys had sent it to me.⁴⁹⁰

707. Mr Smith later commented on the proposals:

A. I mean I haven't been through the Siemens one in detail but I had a read of the Epuron stuff, you know, like they're options, you know, like --

Q. These are all options?

A. You don't know what the feasibility study is until you go through your technical detail. So, you know, what is the wind efficiency of these? How often are they running? How much solar are they getting? What is the [sic] conditions around the site? How do they need to integrate? What's the balance of the load? It's a highly, highly technical requirement, and the fact that you need to have 70% penetration guaranteed means that you need to incorporate that. There's risks associated with it for EDL. Like, my basic experience in commercial negotiations is that the first price that you see is always low and, you know, that's been justified of late when looking at the energy plan. Prices that we were quoted two weeks before the energy plan was released have come back at triple that when you go to actually install stuff. So that's because they put a risk parameter up on stuff that they don't understand. I'd say if you are quoting to develop business, yeah, it's cheap but in reality when you start going "Okay I have to do this, and do this and that and this and that, that is going to make this and I have got to achieve that, and do this", it puts a whole layer of risk and complexity over decision-making processes rather than saying "We have done this and we did this, we can potentially do it at that", there's no commitment there. It's just saying we can do stuff differently.⁴⁹¹

⁴⁸⁹ Interview with N Smith, 2 June 2017, transcript at 60:43.

⁴⁹⁰ Interview with N Smith, 2 June 2017, transcript at 61:35.

⁴⁹¹ Interview with N Smith, 2 June 2017, transcript at 62:39.

708. My investigation queried whether the Siemens or Epuron proposals might have had the potential to deliver greater value to the State:

Q. If Siemens or Epuron had been able to deliver in a manner broadly consistent with what they have proposed here, would either of those projects have been potentially of more value or of greater value to the State Government, do you think?

A. Potentially. Yeah. I mean, you know, you have to put it in perspective that these prices were achieved two years after the first modelling was done. So not saying whether that's right or wrong, but council was aware of this is my understanding. They were aware of this before they signed the contract. So they made a resolution on 19 January to support the EDL project. They didn't sign the contract until 30 or 31 March. They had a good, nearly two months to consider this. If they didn't want -- if they wanted to say "Well we think this has merit" then they should have just said "let's do another resolution to approach the market place and kill the EDL project". [...] We did our due diligence on the EDL project which is the only project that we were able to feasibly review in detail. It's the only thing that had \$18.5 million of funding to make it commercially viable. It was the only option presented to us that had any underpinning of the dollars in logic, that was able to be analysed.⁴⁹²

709. Mr Smith accepted that Siemens and Epuron are both reputable companies operating in the renewables sector:

A. Yeah, sure. No dramas with them at all. I don't [know] Epuron particularly well but I know Siemens quite well and, you know, their hydrogen electrolysis stuff is something that we're very interested, and we are interested in with the EDL project, because it's 40% renewable energy spill, so that they can maintain their 70% penetration, capturing that and producing hydrogen to run the generators, or ammonia or whatever it happens to be, whatever their carrier of hydrogen ends up being, is really exciting stuff. It can produce transport fuel for Coober Pedy in the future. There's significant opportunities around that, but the reality is it's just not commercially viable at the moment. I also sit on the hydrogen roadmap steering committee for the South Australian government, so I'm across hydrogen. Probably more so than Graham.⁴⁹³

710. Mr Smith was asked to comment on EDL's experience with renewables technology:

A. See this is a technicality, isn't it? You know, like they have significant methane recovery from landfill. So what's renewable. That is renewable gas. Now, okay, is it wind and solar? No. Are they specialists in providing electrical power generation? Yes, they are. Do they know how to capture methane from other parts of it? Yes, they do. [...] Just because you don't have start-up renewable experience doesn't mean you are not capable of delivering it. They have 900 megawatts of installed capacity globally. Some of that stuff is tricky to manage. So, you know, electrical engineering is electrical engineering, and I'm not an electrical engineer, I'm a gas man. But, you know, the physics don't change. It's about the complexity associated with integrating this and they have very strong technical support and resources.⁴⁹⁴

711. Mr Smith was unable to comment on Mr Davies' assertion that Siemens are 'renowned for being conservative' in their figures.⁴⁹⁵

712. Mr Smith was asked about the implications of the two alternative proposals:

Q. Setting aside Mr Davies' modelling and his criticism of the technical aspects of the EDL proposal, are you concerned at all now that the proposals from Siemens and

⁴⁹² Interview with N Smith, 2 June 2017, transcript at 63:24.

⁴⁹³ Interview with N Smith, 2 June 2017, transcript at 64:4.

⁴⁹⁴ Interview with N Smith, 2 June 2017, transcript at 64:30.

⁴⁹⁵ Interview with N Smith, 2 June 2017, transcript at 65:15 ('A. I don't have any experience in how they quote. So, you know, all I would be doing is providing you with my opinion and I have no facts to back that up, so I don't know.')

Epuron indicate that there may have been significantly more affordable deal if the project went to market?

A. Does it concern me? Or is there -- it indicates there are alternatives out there, but we know there are alternatives out there, and if I got your price now, there'd be a different methodology come up, you know, like on -- I'll be really interested to see what the Marree prices come back at because, you know, that's a similar project. So yes, there's always alternatives out there. Was there anyone in the situation that EDL was in to be able to provide viable alternative? Not that I was aware of. EDL had a contract for another four years, through to 2019. They had \$18.5 million worth of ARENA funding. Those two are compelling things to make a -- the \$18.5 million worth of ARENA funding is a very, very compelling case.

Q. In your view was it not possible to get ARENA funding for a reconfigured project?

A. The advice to me through ARENA was that they would not consider an alternative project in Coober Pedy. [...] [The] advice was that the board had done their due diligence on this project, they were happy to support it. If this didn't go ahead, that they would be moving onto alternative project. They have a -- their investment criteria changes as renewables evolve and they wouldn't be looking to support another project like this. If it didn't go ahead they with be looking to do something in a community where there is more likelihood of it getting up.⁴⁹⁶

713. My investigation queried whether the position expressed by ARENA influenced the department's advice to the council:

A. Not really. I mean it was no different to what we had been saying to them. "You need to make a decision in one way shape or another because if you sit there and do nothing that is a decision that you make, but be aware that you are going to lose this project." So, you know, from a commercial perspective we deep dive, we did our own due diligence around and gave ourselves satisfaction that it was -- it was a reasonable project, right, and that there was not going to be significant cost overruns or it was not going materially impact our budget position which we are required to meet and have obligations to meet. You know, from a decision-making perspective, they had to be comfortable with the decision from their own perspective. Right. They resolved to do it. If they wanted to sit there and make no decision, just so on -- we would just try to make them aware of all the potential implications of not making a decision. All right. "If you want this project to go ahead, then you will need to make a decision on it sooner rather than later. If you don't make a decision on it soon, then EDL will just pull out and you will have nothing except for diesel generation."

[...]

And I guess, you know, from our perspective they were relying on us having done our own due diligence as energy experts to provide them, you know, with a bit of information around we have done our financial analysis, we have done our technical analysis, we have done our legal review, we are comfortable that this doesn't create a significant level of risk to council or the State Government.⁴⁹⁷

714. Mr Smith was asked if he remained of the view that there are 'a lot of challenges associated with the [Siemens] technology' that still need to be overcome. Mr Smith submitted:

A. Absolutely. Yeah. You know this stuff is not commercial yet. And, you know, when you start to operate out in the outback, you suddenly encounter a completely different operating challenges like if you want to go and install a reverse style air-conditioner in the APY Lands just be prepared for all the bugs to go into it and clog it all up and ruin it. So, you know, there is completely different operating paradigms in the outback than there is, than you would get down in a normal area; completely different risk profile, completely different cost profile. You know the hydrogen stuff is really exciting but it is still in its infancy globally.⁴⁹⁸

⁴⁹⁶ Interview with N Smith, 2 June 2017, transcript at 65:20.

⁴⁹⁷ Interview with N Smith, 2 June 2017, transcript at 66:14.

⁴⁹⁸ Interview with N Smith, 2 June 2017, transcript at 69:7.

715. My investigation queried whether in his view the department should have recorded its reasons for being satisfied that the project did not need to be exposed to competitive tension:
- Q. Do you think generally when a project of this scale is not subject to competitive tension, it's important for the department to record the reasons why?
 - A. In what regard? In the record?
 - Q. Record why the department is satisfied, I suppose, that the project doesn't need to be opened up to a competitive process.
 - A. I guess we addressed that in the cabinet submission. I mean cabinet needed to provide approval and, you know, we detailed the process around that.⁴⁹⁹
716. My investigation queried whether the department's procurement framework would have applied to the department's involvement in the negotiations concerning the EDL project:
- A. No, it wasn't our procurement. We had to comply with Treasury's instruction 8 and Treasury's instruction 15, so that's why we got Crown involved to make sure that we were covering off on our legal obligations. You know, we were providing a grant, yes, but it's not a procurement per se.⁵⁰⁰
717. Mr Smith was asked to comment on the project's overall value and ability to withstand competitive tension:
- Q. Would EDL have been successful for tender for the project in a competently managed open market process, do you think?
 - A. Given that they were the only ones with \$18.5 million, I think, yes.
 - Q. Did the EDL deal present value for money to the State Government, do you think?
 - A. I think it does, yes.
 - Q. Was it the best deal obtainable?
 - A. Well, again you need to frame that around what "best" is and what is the scope in your objectives and your agenda around value for money. We think that this is a good project. I still think this is a good project. I still think this offers lots of opportunities for the future savings as well, and there's beneficial change in clauses we included in there to make sure that we capture that when the costs come down the cost curve, because 20 years is a long time. You know, if you are connected to the national electricity market, 15 years might be more appropriate or 10. But this is an isolated micro-grid in the middle of outback Australia. It's a complex operating environment to operate in and, you know, they are putting in an innovative high penetration renewable scheme that has inherent risk and uncertainty associated with it. There is always a premium that you will pay for risk and uncertainty. [...] So, I think, you know, in our analysis of this project, it ticked a whole range of criteria that add value to the Coober Pedy community, both now and in the next 20 years, and the State Government and, you know, if we did nothing and we left it as it is, we'd be running diesel generators up there and we'd still be paying a higher price. So, you know, this offers up some fantastic opportunities for them in the future.⁵⁰¹
718. When asked if he would approach the project any differently if afforded the opportunity to start over, Mr Smith responded:
- A. I'd walk away from it as soon as possible. It's been the most incredibly frustrating experience for me with the churn that has gone on in council, and just the flip-flopping and the misinformation and crap that has been going on with this, just I would prefer

⁴⁹⁹ Interview with N Smith, 2 June 2017, transcript at 70:38.

⁵⁰⁰ Interview with N Smith, 2 June 2017, transcript at 71:4.

⁵⁰¹ Interview with N Smith, 2 June 2017, transcript at 71:19.

not to be involved in it in the future. So I have been disappointed in the way it's been handled by a number of parties. I felt it's lacked openness, honesty, integrity (*inaudible*) and I have not been, I'd gladly have never been involved in this.

Q. You have spoken of your frustration with, I think, the council and the turnover within it. Are there any lessons learned from that from the department's perspective? Is there anything it could do in the future, for example, to try and, I guess, ensure a degree of consistency?

A. Well, you know, in the end the only people that were consistent to this project throughout was Energy Development, ARENA and ourselves. Everyone else at council just churned through, and what it has highlighted is that their systems for capturing information were poor and their recordkeeping was poor. So every time something else came in you had to refresh through everything you had just been through with everyone else so, you know, I think yes, there's always going to be learnings out of it. There always is in a project of this scope. It's a new project as well, in terms of innovation, so there is always learnings around it. Are there things that we could have done better? Potentially.⁵⁰²

Evidence from Mr Davies

719. My investigation interviewed Mr Davies under affirmation on 8 August 2017.

720. Mr Davies presented as a cooperative and enthusiastic witness, albeit somewhat unfocused in some of his responses.

721. Mr Davies is a Chartered Engineer and the director of Resonant. According to Mr Davies, Resonant provides advice concerning various industries, with a 'particular focus on energy', covering 'contractual, commercial and technical issues'.⁵⁰³

722. Mr Davies described his experience in the energy industry in the following terms:

A. Over 20 years of being involved in various ways, not exclusively always energy. I was manager of energy and mining for a consultancy. I've overseen a number of energy project portfolio projects in utilities; some have been in the mining area. Probably early projects were in renewables 20 years ago, small research teams. Obviously, as experience has gathered, I've been involved in a number of projects in wind farms, so the thermal wave, ocean engineering. Pretty well at some stage touched on all the different energies, including in nuclear and, in the early days coal, both of those in the earlier days. Diesel integration systems as well. Am I an expert in all of those? It's impossible to be an expert in everything but it's an understanding of that.⁵⁰⁴

723. Mr Davies advised that his work in the renewables sector has particularly focused on wind energy, with some additional focus on solar thermal technology.⁵⁰⁵ He submitted that he has experience in commercial procurement in both the mining and energy industries.⁵⁰⁶

724. Mr Davies was asked to identify the terms of Resonant's engagement by the council, as he understood it:

⁵⁰² Interview with N Smith, 2 June 2017, transcript at 72:14.

⁵⁰³ Interview with G Davies, 8 August 2017, transcript at 4:36.

⁵⁰⁴ Interview with G Davies, 8 August 2017, transcript at 5:6.

⁵⁰⁵ Interview with G Davies, 8 August 2017, transcript at 5:23 ('A. It's particularly in the wind energy. I've been project manager advisory for wind farms, with solar thermal. I've been - done peer reviewed reports. I've been a director for a company in the past which is looking at solar thermal at Port Augusta 10 years ago - no, sorry, in 2010. Then in wave energy, I've been project manager to get things up to speed and running. In solar PV, done investigation and consulting work.')

⁵⁰⁶ Interview with G Davies, 8 August 2017, transcript at 5:38 ('A. In terms of procurement, I was involved a lot with contractual terms when I was manager at Olympic Dam projects, when I oversaw EPCM projects, engineering procurement construction management, and so I was project director for some of those. So that was in mining as much as energy, and sometimes the two are interchanged.')

A. It was to review the project, the hybrid project. [...] There was a first stage and then it was extended to second stage. So it was review all the given documents and come up with a report. Thereafter, it extended to a slightly broader ambit based on a proposal.⁵⁰⁷

725. Mr Davies submitted that he had reviewed the commercial aspects of projects of this scale before:

A. Yes, certainly. And bigger. In terms of agreements and contractual obligations in the winds project, in mining projects, so, yes.

Q. Can you give a specific example?

A. So just prior to that, in fact when I was finishing off, was probably, in Aussie dollar terms, about \$100 million capital projects in the Philippines. And I was advisory to looking at that, specifically where they asked the question: can I review all the contractual terms prior to their legal team, to filter it and partly because engineers are cheaper than lawyers. So – and they like that practical insight in the contractual side. Notice I used 'contractual' not 'legal', because I'm not a legal person. But it's understanding what's written is what it is. And so I read that and refer any complexities to legal people.⁵⁰⁸

726. My investigation asked Mr Davies about the time constraints Resonant was expected to operate under:

Q. Can you recall at the time that Resonant was engaged, what [were] the council's expectations and timeframes for a review of the project, if any?

A. They wanted it fast, and, you know, initial draft report fairly fast. [...]

Q. Did the council advise you of any deadline to commit to the EDL deal at that time?

A. No. But going through the documents I knew that it had to be done by Christmas because in the power purchase agreement, PPA, it said that everything would fall off the table by December. So it was pretty obvious to me that this needed to go fast. They didn't need to chase me up. In fact, I think it took a week to write the report, which is not too long.⁵⁰⁹

727. When asked if he felt comfortable with the amount of time he was afforded to prepare Resonant's draft review of the project, Mr Davies submitted:

A. Yes. As it turns out, for what I needed for this general brief to get something together. I'm used to doing something fast. I felt that I produced a pretty honest, accurate report. It didn't have all the detail necessary but enough to flag there was an issue. That was the crux of it. [...] It was just to flag any issues. I flagged about 30 key risks.⁵¹⁰

728. Mr Davies was asked to describe his initial impression of the project:

A. It was really way overpriced. It was gouging. But I looked at - there were ludicrous risks where, if the project failed – even if – the classic was even if they produced not one electron of energy, they would have taken four million per annum in costs and their penalty would have been \$100,000. So that was written in the contract. They later said "Look, that's just because it's a contract". I said "No, these things, that's what's written in. If it's not right, let's change it". So it was a complex contract for the council. It had massive risks and was very expensive, when I knew in the industry the prices at tender would come down with companies with more experience. So yes, I was quite scathing early on, which is why, within a week – and it was a concentrated effort in a week.⁵¹¹

⁵⁰⁷ Interview with G Davies, 8 August 2017, transcript at 6:17.

⁵⁰⁸ Interview with G Davies, 8 August 2017, transcript at 6:32.

⁵⁰⁹ Interview with G Davies, 8 August 2017, transcript at 11:18.

⁵¹⁰ Interview with G Davies, 8 August 2017, transcript at 11:36.

⁵¹¹ Interview with G Davies, 8 August 2017, transcript at 12:1.

729. Mr Davies described what he took to be the elected members' early misgivings about the project:

A. They saw it as expensive. They didn't trust [EDL]. They didn't have a relationship. Now, I can't remember whether the word 'trust' came in but it was certainly apparent that they felt there was a lack of trust with the process. And they felt bullied into it. [...] At that stage I was fairly clear that it would go to a tender process. Everything pointed to that, that there would be enough to stop the process. EDL would have been invited to tender. So it's not to say that, you know, that wouldn't have been the case. So that was the nature of some of the discussions.

Q. They felt bullied by EDL?

A. Well, partly by EDL and partly by State Government; State Government are driving it. And it is difficult to separate government from EDL. That, to me, was prevalent right from the early go.⁵¹²

730. Mr Davies spoke of his early interactions with the department concerning the project:

A. We had a meeting with the State Government [on] 16 or 17 November, possibly. [...] Prior to this, [Catherine Way of the department] phoned me up when I started this work and said "We've put a lot of work into it, we don't want this project derailed". [...] And I said "Look, I'm not here to derail it". That was when I started before I did the report. I said "If it's good, it'll stack up, but I'm giving an independent assessment. That's what I've been asked to do. And I'm quite happy to do that and I'm sure it will stack up on its merits". Or words to that effect. That was really – that's when you realise something's, you know, all of this is not looking healthy. So that, to me, was really the crux of it. This project was driven by State Government, and the council, who are really not really understanding it, were the tick box, were the body to just do it.⁵¹³

731. My investigation queried whether the State Government offered a reason for advocating that the project not be 'derailed':

A. They didn't other than "It's a good project, we need to go ahead". [...] I accept there are times when you stop and - they kept saying that you can analyse this to the nth degree. I said "Look, this is not 10% I'm talking. This is a major difference". A company with minimal experience, not going to tender process and a higher price, that's - those three things are serious flags.⁵¹⁴

732. Mr Davies commented on Mr Renshaw's involvement in the negotiations and the pressure upon the council he considered was being levelled by the State Government:

A. Initially, he flagged this project was - when I gave him the information and had discussions, he flagged his concerns. He had enough insight to know what it meant and that there were massive risks. [...] The problem is he didn't use a considered opinion. He used knee-jerk reactions. [...] He disclosed to me in a meeting with the lawyer, Adam Crichton, present that he had a gun to his head. [...] [T]he way he handled it was definitely he had [multiple] agendas. Some information there and information going there. So it was pretty poor that he had another agenda and that was fairly clear to me, which is why then I sent my information sometimes to the whole council, or I attempted to. And, you know, then there's a consistent message.

Q. And what was this other agenda, as you perceived it?

A. I don't know. To be honest, I would speculate a bit. There was a rapid about-face from against this project to "This project's going ahead. Just get used to it." And I said "It doesn't make sense". He said "You don't understand the whole thing". I'd been involved enough to advise him, you know. I can understand isn't – and my

⁵¹² Interview with G Davies, 8 August 2017, transcript at 18:2.

⁵¹³ Interview with G Davies, 8 August 2017, transcript at 18:7.

⁵¹⁴ Interview with G Davies, 8 August 2017, transcript at 19:11.

understanding was effectively he was saying he's been threatened. He could lose subsidies, the RAES subsidy, if he didn't adhere to this. I don't know. At that stage Tony became quite alarmed.

Q. And when he said "threatened", threatened by the State Government, is that – was that your impression?

A. That was the impression, yeah.⁵¹⁵

733. Mr Davies was critical of Mr Smith's assessment of the risks presented by the project:

A. I said to Nick, "You know, this project carries massive risks". He says "Yeah, there are all sorts of risks". I said "I'm not talking about a risk of a meteorite. These are actual probabilities of this project could go pear-shaped and be expensive" and he said "Oh well, we can agree to disagree". One of the key things I mentioned was grid defection. With these prices, people just do their own thing and they're left with a white elephant. And he said "Oh yeah, that's just – you know, that's another risk. We'll list it". I said "No, it's not a risk, this is a very likely outcome" which is now proving to be correct, by the way. [...] [H]e didn't have the – you couldn't have a sensible really robust discussion to unpick it, which is what I often like to do when you've got to really unpick projects to say "Right, what am I missing? Tell me that". It was just dismissive comments.⁵¹⁶

734. Mr Davies was similarly critical of Mr Smith's approach to the financial modelling concerning the project:

A. I asked him the question, the things, you know, "Where did you get this done from?" Or "Why is that like that?" and he said – I can't remember his words but effectively "Well, I didn't do them"; "Oh, okay". Also, I asked who wrote the model. There's no author. There is no date and this ended up as the definitive financial decision-making tool, so much so it was presented, you know, and some of the graphs from that. So those are the things – so who wrote it? Where's it from? And then I found out it was from EDL.⁵¹⁷

735. Mr Davies observed that in his estimation Mr Smith was not qualified to coordinate the project from the State Government side, submitting:

A. Look, you need the insight to understand. You need to – there are a few things. One is you need the insights. You then need the wisdom to know which people to listen to and then get them to challenge. So if you was [sic] a good manager and didn't understand the detail, you'd say "Graham, I want you to discuss with my guy there and you guys have a robust discussion". That would be fine. So that would be a management. So the process of going through it and also the insights into it, it was almost a case of "We're going to go ahead with this blindly. We don't want it challenged; we've just got to get it done." [...] He was friendly enough. We had a friendly enough relationship over, you know, over the period of time. I mean, I try – I know I can be a bit forthright, and I try and do it as tactfully as I can. So I prepare carefully about how I ask questions. [He was] [d]ismissive in the sense of "Yeah, well, those are risks" and then when I said "But don't you see this risk, don't you know they're transient?"; "Oh well".⁵¹⁸

736. When asked if he could identify the basis for his and Mr Smith's differing views about the project, Mr Davies commented:

A. [It boiled down to] the value for money of the EDL proposition. You know, they were putting forward numbers in the order of 50 cents a kW/hour. And I'm saying it could be done for half of that, 25 cents a kW/hour – in a nutshell, let alone all the other little – other clauses. But that was the absolute crux of it.

⁵¹⁵ Interview with G Davies, 8 August 2017, transcript at 27:34.

⁵¹⁶ Interview with G Davies, 8 August 2017, transcript at 31:1.

⁵¹⁷ Interview with G Davies, 8 August 2017, transcript at 31:31.

⁵¹⁸ Interview with G Davies, 8 August 2017, transcript at 32:17.

Q. And did they give you any understanding as to why they didn't accept what you were putting forward?

A. They said we went out to – asked the market to quote on similar projects and they got no response. They've actually gone out to tender in Marree. [...] Marree had been out for tender previously – and they'd looked at things, so there was indirect reference to it. But Marree hadn't – so they revamped the whole thing and then came up with this dog of a contract – my words. So, yeah. So he used examples. But [...] if you ask the wrong questions in the market, you make it complex, people don't respond. And so there was no response early on. So he said “Well, therefore, no-one is interested”.⁵¹⁹

737. Mr Davies was asked if he could recall Mr Renshaw discussing the State Coordinator-General's involvement in reviewing the project:

Q. Can you recall Mr Renshaw ever discussing some sort of review by the State Coordinator-General on behalf of the State Government to do with the EDL project?

A. State?

Q. Coordinator-General.

A. I don't recall him mentioning – that he was looking at some coordination with?

Q. No, he suggested to this office that he was aware that the State Coordinator-General had reviewed the EDL proposal and that this was one of the, I suppose, key factors that eventually convinced him that the project was value for money.

A. No, I don't recall that at all. I'm not saying it didn't happen.⁵²⁰

738. Mr Davies indicated that he could not recall reviewing any documents concerning the State Coordinator-General's assessment of the proposal.⁵²¹

739. Mr Davies argued that there was no major disagreement between himself and Mr Smith regarding the total cost of the project:

A. I don't disagree with his calculation, and I was given information from Tony differently. So the 85 million, if you had 85 million now in your pocket, and you valued it at a discount of, I think seven and a half per cent is what they looked at, that would equate to 190 million cash for over the whole time. So they're not inconsistent in that sense.

[...]

Q. Mr Smith, in his discussions with this office, suggested that your costings suggested that the project would be substantially more expensive than the department thought it would be.

A. Yeah.

Q. What would account for that, do you know?

A. I don't ask “can we have a meeting to clarify”, because there the 192 million is from an EDL document cash flow. So that's a big range. 85 is a net present value, or the net present cost actually, of 7%. And there'd been an issue with this document not being clear on what value they had. They had a figure of 0.7 where they referred to discount. But they weren't referring to discount rate. [...] I said EDL's 50 cents kW/hour, you can do it for 28 cents. That was my costing. I didn't cost diesel. I didn't cost the discount cash flow, that's very important to realise, because I didn't want to get drawn into this discounted rate issue. It's much easier to deal with that's what it's going to cost you in the first year. Is it reasonable? So you don't end up with these large figures, because I've seen this discussion before in the past. I did look at diesel-only in this one-page summary. Diesel-only 100% renewables and wind. So I did a pretty simple summary, kept it simple for the council as well, who certainly don't understand discount rates.

⁵¹⁹ Interview with G Davies, 8 August 2017, transcript at 33:2.

⁵²⁰ Interview with G Davies, 8 August 2017, transcript at 36:4..

⁵²¹ Interview with G Davies, 8 August 2017, transcript at 36:21 ('Q. Can you recall ever seeing any documents concerning the State Coordinator-General throughout the proposal? A. No.')

And diesel actually did work out with this project slightly cheaper. But that wasn't my preferred option by any means. That was because you hadn't got the best renewable option.⁵²²

740. Mr Davies was asked about the occasion on which he was invited to review the department's modelling concerning the project:

Q. What was your impression of the department's modelling at that time?

A. It wasn't their modelling, it was EDL's modelling. [...] I thought that should most definitely have been independent. He then later said that it's a company – the something group.

Q. SABBLE?

A. The SABBLE Group. But [SABBLE] had done a report, in a meeting we had not so long ago, then it became a SABBLE email, and then it became – they gave some ad hoc advice. So they defended that in the press. There was a SABBLE report. I have never seen it and I never knew it. Certainly never ever discussed it or looked at anything they'd done.

Q. And in your experience, it would be unusual for a public authority to share financial modelling with the company that it's dealing with; is that right?

A. Absolutely. Yes. Look, I have to give a qualification. There are times when you would share, depending on the nature of the financial modelling. But if there's something that should be independent of your review, yes, that is not acceptable. Where it gets a little bit grey is because ARENA get involved. ARENA insist on seeing that to know that no company is making a windfall.

741. Mr Davies was asked to respond to Mr Smith's suggestion that he at one stage conceded that the financial modelling reviewed by the department had merit:

A. If I did that, it would have been in the sense of, you know, if it was structured in the right financial context. So the merits were in that they'd captured the individual breakdown of each specific cost, which I did as well. [...] In other words, we didn't disagree with that part of it. [...] And in terms of merits of the actual value, absolutely not. In terms of how you've gone about doing your calculations, fine, yeah. [...] I don't recall saying it had merits. And, if so, it's completely taken out of context. I was absolutely clear I was not happy with – its purpose is not to be an academic exercise at university. This was to prove a project. On that basis, [it] definitely didn't have merit.⁵²³

742. Mr Davies gave an assessment of the Letter of Comfort provided by Mr Koutsantonis:

A. You know, it's a legal – any letter is legal in that sense. Is it legally binding and what is it binding to, is my issue. [...] They'd always said "We'll cover it for 20 years". It was the nature of "Do you know what you're letting yourself in for? And, in fact, you're not covering it". That was my point is, you've given caveats which give you an option out which leave the council with a massive risk. [...] I remember right up front I said "Comfort? That doesn't give me much comfort". You know, a letter of binding, you know, agreement, would have been something stronger. So it was literally of little comfort.⁵²⁴

743. Mr Davies described Resonant's final report as something of a rushed exercise, designed to impact the process and generate further discussion.⁵²⁵ When asked about the potential alternatives presented by the report, Mr Davies commented:

⁵²² Interview with G Davies, 8 August 2017, transcript at 36:29.

⁵²³ Interview with G Davies, 8 August 2017, transcript at 39:38.

⁵²⁴ Interview with G Davies, 8 August 2017, transcript at 46:21.

⁵²⁵ Interview with G Davies, 8 August 2017, transcript at 49:26 ('This report was not intended - was intended for a discussion point. I'm not claiming everything was absolutely - in that space of time, this was a rushed document. You asked me earlier on was the first report an acceptable time? Yes. Was this one? Not under the pressure I was under, knowing what it meant, and with other things in between. So I had to get it out fast to try and get impact to discuss it.')

A. Siemens [...] actually said it's conservative and they can go lower. They've got integrity to uphold, and a company that comes in with a very low proposal and then suddenly goes 30% higher would lose a lot of credibility. So I'd say it's theoretically possible; highly unlikely.

Q. And that's Siemens specifically that you're talking about?

A. Siemens and Epuron.

Q. [...] And ZEN, what's your estimate of them?

A. ZEN, I don't push the ZEN angle as strongly because I think they may not have known quite what they're getting involved with the control system. So their price might have gone up. So ZEN in this particular case would have been biting off a little bit more. And they didn't have time to substantiate it. But nevertheless they're not going to put up a proposal where they also go up drastically in price: You lose credibility.⁵²⁶

744. My investigation queried whether it was still practical for the council to test the market at the time of Resonant's final report:

Q. Was there a risk in the council going to market at this point, do you think?

A. When I wrote this it was clear to me they didn't want to. [...] This was to stop the project and get discussion. Anybody would say "Well, Graham may have his figures wrong". Any reasonable person would say "Let's look at this and see where your figures come from, where our figures come from. Let's reconcile it. There's a lot of money" and if I made a total hash of it, well, good. At least then you know that you've actually had someone to check the figures. [...] If someone said "Rest your hand on heart these are absolute figures", I would not have done that. Is it enough for discussion? Yes. I mean, they were my best numbers at the time.

[...]

Q. I mean, presumably there was some risk that they might miss out on the ARENA subsidy?

A. Yes, there was. And I wrote that in there, that there was a risk that if they stopped this, they might miss out on the ARENA subsidy. However, my view was that risk was well worth taking[.] [...] Their electricity price wouldn't have gone up because it's still underwritten by the RAES scheme. So their risk was negligible. So - but nevertheless there was a risk that that money would be taken away. [...] There's a threat - a bigger threat which I couldn't put in there - was the State Government saying "You may not get subsidies for other things if you don't go with this project". That was a threat and a risk but it's not written in because that's - it was sort of suggested that there was that risk.

Q. And who suggested that?

A. Tony [Renshaw], basically. Yeah, it's - there's the risk that there could be a retribution if they were - stood up to government.⁵²⁷

745. Mr Davies was reluctant to criticise the decision made by the elected members of the council to proceed with the project:

A. Without looking at it, they said "Okay, Ernst & Young have given information". Parsons Brinckerhoff did the due diligence for ARENA. ARENA. The State Government all say this is good and you've got some stupid little company (*Indecipherable*) that says it's bad. What would any reasonable person do under the weight of that information, if they didn't understand it? You'd go with that. [...] They were left - they were stuck between a rock and a hard place. And I felt for them. And they look at this and think, well, what would I do in their situation if I didn't understand it? It was a bigger risk by calling it off on the basis of this, because if they've got it wrong they would have been

⁵²⁶ Interview with G Davies, 8 August 2017, transcript at 49:5.

⁵²⁷ Interview with G Davies, 8 August 2017, transcript at 51:2.

taken to the cleaners. Then to say “Well, we've got it underpinned because the government said that and that's the way it looks”.⁵²⁸

746. Mr Davies disclosed that he has been re-engaged by the council.⁵²⁹

747. My investigation sought Mr Davies' comments on the evidence provided by Mr Smith regarding ARENA's willingness to fund an alternative proposal:

Q. Mr Smith has advised this office that he was in discussions with Mr Kay of ARENA at around this time, and it was put to him that ARENA would not be prepared to consider another project at Coober Pedy if the EDL deal collapsed. Now, if this was correct, would that have altered your ultimate assessment of the EDL proposal?

A. No. These guys put in their figures without the ARENA grant. So without the ARENA grant, it was cheaper. So no, it wouldn't have. [...] ARENA would have their KPIs to spend money. Do you think they're not going to spend it if there's - because this would have been a perfect project, the one that Siemens and Epuron or ZEN would be a perfect place to spend money. And even now ARENA want to spend money. They would have absolutely looked at it, yeah.⁵³⁰

748. Mr Davies acknowledged that the project would not have been commercially viable to EDL in the event that ARENA withdrew its funding.⁵³¹

749. Mr Davies affirmed that the conclusions expressed in Resonant's final report remain reflective of his current assessment of the proposal.⁵³²

750. My investigation queried the extent to which certain assumptions made within Resonant's final report might have affected his overall assessment of the project:

Q. [In Resonant's final report] you've said that no sensitivity analysis was presented in relation to the EDL proposal. Now, Mr Smith, in his interview with this office, asserted that there was a significant sensitivity analysis done by the department. And I've seen documents to that effect in what the department has provided to this office. Without putting that analysis in front of you, would the fact that the department conducted a sensitivity analysis supporting its own costings alter your ultimate conclusion at all?

A. Look, I'm always open to any evidence to rethink things. I'd leave it as broad as that. I can't see what they would compare to. They're looking at sensitivity of the diesel price. It would not greatly affect this project being uneconomic, yeah. It just can't. We had a discussion with EDL earlier this year to resolve some of these things, a final – because it was put into dispute and part of that was they said “Oh, we're going to reduce volatility”. So I said rather than pay a volatile price between \$2 and \$4 (*Indecipherable*) a consistent price of \$10, or whatever, words to that effect – those weren't my words. So sensitivity and volatility is not necessarily a problem as long as – if it's a low price. The diesel price just will not affect it that much. So sensitivity of diesel won't affect it.⁵³³

751. When asked to comment on Mr Smith's characterisation of ARENA's aptitude for financial modelling, Mr Davies submitted:

A. I've never seen a financial model from ARENA. I've seen the Parsons Brinckerhoff capital assessment, and that was done two years ago, and I think it was slightly over price. But it could have come down drastically.⁵³⁴

⁵²⁸ Interview with G Davies, 8 August 2017, transcript at 53:5.

⁵²⁹ Interview with G Davies, 8 August 2017, transcript at 53:7 ('A. I've got a good relationship now with the council. I don't know if you're aware. They've re-engaged me. They just said “We're so chuffed you stuck with your guns”.')

⁵³⁰ Interview with G Davies, 8 August 2017, transcript at 57:34.

⁵³¹ Interview with G Davies, 8 August 2017, transcript at 58:9 ('Q. Would the EDL project have been commercially viable if ARENA pulled its funding? A. No.')

⁵³² Interview with G Davies, 8 August 2017, transcript at 58:47 ('A. Yep. Except for (c), grid defection, I was conservative. It's started already. [...] The biggest business in town wants to go off grid.')

⁵³³ Interview with G Davies, 8 August 2017, transcript at 60:8.

⁵³⁴ Interview with G Davies, 8 August 2017, transcript at 61:37.

752. Mr Davies indicated that he was not afforded an opportunity to review the department's SWOT analysis concerning the project.⁵³⁵ He similarly indicated that he was not provided an opportunity to review the contributions made by SABBLE.⁵³⁶ He was unable to comment on Mr Thomas' qualifications to review the project.⁵³⁷
753. Mr Davies was asked to comment on Mr Smith's submission that recent competitive processes overseen by the department tended to confirm the value of the EDL project. He responded:
- A. If you ask the wrong questions, you'll get the wrong prices. If you're saying "I want you to deliver power at that price, come and put forward your options" - well, no, sorry. If you say "Can you deliver power for this community" and you want it to be renewable, "give us a price" and it has got to be reliable in frequency and hertz and voltage and stability and security. All of those issues, no problem. What's your price? But don't tell me you've got to do this and then this, and then has got to be there and that's got to be there, and tie it up in knots and in really complex contracts for small contracts. So if the present Marree tender is anything to go by, I can say quite clearly that companies I spoke to that they all feel it's ludicrous, the way the thing's been put forward and they could deliver something that would be same at a much lower price.⁵³⁸
754. Mr Davies submitted that it is his assessment that the Coober Pedy project 'will not last five years.'⁵³⁹
755. Concerning the State Government's involvement in the process, Mr Davies otherwise commented:
- A. Did it start off as anything that was dodgy? No. When they started the project in 2013, the prices may not have been unrealistic. And it may not have been the best project then. But over time, with the rapid drop in renewables, their capital costs went from 33 million up to 39 million when it should have gone to 24-25. If that had happened, I would have said "You know, I think it's higher priced in their tender, but it's in the ballpark". That's my assessment. This had got everything that's going the wrong way. So why did they want that? You know, that could be speculative. But I guess people sometimes are locked in. They put three years' worth of work into this and somebody comes along after one week's worth. Now you must - anybody would say "you spent one week and we spent three years", surely - who would you believe?⁵⁴⁰
756. He concluded:
- A. I know the council signed it. I advised them that, really, you know, "You're taking a risk with this". But given the balance of probabilities from their perspective, I can't blame them. They felt bullied into it. And, really, they were bullied. If you go through this, they were bullied. I've got evidence right up front from day one when I started to show that the government didn't want it derailed. And they were working like that with a private company rather than [at] arm's length.⁵⁴¹

⁵³⁵ Interview with G Davies, 8 August 2017, transcript at 61:11 ('Q. Did you ever get a chance to review the department's SWOT analysis concerning the project? A. Not prior to this. I have seen something since then.')

⁵³⁶ Interview with G Davies, 8 August 2017, transcript at 61:19 ('Q. I think we've touched upon this earlier, but were you aware at the time that you produced this report that the department had engaged its own consultants to review the proposal in October 2014? That would be the SABBLE. A. No, I wasn't aware of that at the time. I did ask and they never volunteered that. Q. And I think you've perhaps answered this already but have you ever had the chance to discuss or review any of the documents associated with the SABBLE? A. No. And we asked for that on behalf of council with (*Indecipherable*) "Can you forward it?" and they still won't.')

⁵³⁷ Interview with G Davies, 8 August 2017, transcript at 61:38 ('I don't really know them; I can't comment.')

⁵³⁸ Interview with G Davies, 8 August 2017, transcript at 63:22.

⁵³⁹ Interview with G Davies, 8 August 2017, transcript at 64:34 ('So the project is just proceeding until something - something breaks. And I'm of the view that this will not last five years.'). In his submissions in response to my provisional report, Mr Davies attributed this assessment to the effect of grid defection upon the price of electricity for those remaining on the local network; letter from G Davies dated 15 May 2018.

⁵⁴⁰ Interview with G Davies, 8 August 2017, transcript at 19:24.

⁵⁴¹ Interview with G Davies, 8 August 2017, transcript at 65:25.

Further response from Mr Smith

757. My investigation sought further comment from Mr Smith in response to certain of Mr Davies' submissions. Mr Smith responded by way of letter dated 22 September 2017.

Financial modelling and analysis

758. Mr Smith clarified that he met with Mr Davies in his office on 24 November 2015 to review the department's modelling concerning the project. He submitted:

Whilst I was able to speak to that spreadsheet in some detail, and suggested taking Mr Davies through it, I do not recall Mr Davies reviewing or commenting on the detail contained in the spreadsheet. [...] Mr Davies said he would look at the spreadsheet in his own time.⁵⁴²

759. Mr Smith confirmed that the modelling was forwarded to Mr Davies by email that same day.

760. Mr Smith acknowledged that the initial modelling and data was produced by EDL. Mr Smith submitted:

The Department reviewed and assessed that modelling. Part of that process resulted in me circulating the spreadsheet [viewed by Mr Davies].

The process by which initial modelling and data was produced by EDL, and then provided to both the Council and the Department for review, was well known to all who were involved in the Project.

[...]

I understood that Mr Davies was aware that the original financial modelling and data was provided by EDL. [...] I forwarded some of my correspondence with EDL about the modelling to Mr Davies when forwarding him the spreadsheet[.]

761. In response to my query as to how the department was satisfied that the modelling and data supplied by EDL presented a true and accurate account of the project, Mr Smith submitted:

After extensive review, by a number of officers across the Department, the Department was satisfied that the modelling presented a true and accurate account of the Project, to the extent that it is possible to model the projected performance of any project. The modelling reflected the expected consumption and costs of supply whilst identifying a range of potential variable input costs consistent with the project discussions and contractual requirements. The modelling produced by EDL was adjusted by EDL following requests by the Department for EDL to provide greater sensitivity analysis of variable factors such as diesel price movement.

The supply costs under the EDL financial modelling were consistent with the cost profile of the Coober Pedy site over the previous five years. Those costs were also consistent with RAES scheme sites, for example the Umuwa power station which is a similar micro-grid to Coober Pedy.

762. Mr Smith submitted that the department undertook a 'detailed and methodical review of the information presented by EDL' in the period between approximately October 2014 and mid-2015. Mr Smith referred my investigation to correspondence between the department and EDL in which the department queried certain of EDL's assumptions

⁵⁴² In his response to my provisional report Mr Davies contested this characterisation of the meeting; letter from G Davies dated 15 May 2018 ('I most certainly did question items in the spreadsheet.')

concerning EDL's operating costs, the capital components of the project and the fixed charges and variable input costs under the agreement.

763. Mr Smith submitted that the department's review of the commercial aspects of the project also involved:
- 'extensive discussions' with the council and ARENA 'to better understand the metrics underpinning the project'
 - the engagement of SABBLE to review the project in October 2014
 - consultation with Renewables SA, the Department of Treasury and Finance and the Energy Resources Division of the department
 - comparing EDL's assumptions, analysis and projections against the department's internal modelling of costs in relation to the RAES scheme
 - consideration of the EDL modelling of the base diesel case in light of the previous five years of financial reconciliations supplied by the council in respect of the subsidy payments under the RAES scheme
 - analysis of past and future oil prices
 - comparing the project against typical capital costs associated with wind and solar projects.
764. Mr Smith submitted that his team also 'produces, on a regular basis, an up to date analysis of production costs and energy output for RAES scheme sites.' He submitted that '[u]sing that data, the EDL figures were compared against other RAES scheme sites'.
765. Mr Smith submitted that the department also 'drew on its significant experience managing electricity for multiple micro-grids as part of the RAES scheme.'
766. Mr Smith provided a detailed description of the department's oil price analysis concerning the project, reiterating that the department's conclusions were that the project would result in a saving of \$5.4 million over the 20 year life of the agreement, based on an assumed diesel price 'well below the average price rise of the previous 10 years.'
767. Mr Smith went on to advise:

In 2015, given the volatility in oil prices, the Department entered extensive discussions with ARENA and EDL to consider alternative structures to the Project to reduce exposure to oil price movements. An alternative structure was considered whereby the South Australian Government would take on some risk through the exposure to capital costs and overruns in return for the use of ARENA funding to offset low oil prices in the initial years of the project. Whilst considerable work was undertaken to develop the alternative structure, ultimately the decision was to take the risk of oil price movements instead of exposing the government to capital overruns on the project.⁵⁴³

768. Mr Smith submitted that the department undertook its own estimate of the profit and return on investment for EDL under the agreement. Concerning the outcome of this evaluation, He submitted:

The Department's analysis of EDL's profit position indicated that EDL would be making a 9 to 10 per cent return on investment. That return is slightly higher than the typical return allowed for by the Australian Energy Regulator reflecting the innovative nature of the project and the requirement of 70 per cent renewable penetration (and financial consequences for not meeting that requirement under the PPA).

769. Contrary to Mr Davies' representations to my investigation, Mr Smith submitted that the consideration and review of financial modelling supplied by a proponent is not unusual:

⁵⁴³ Mr Smith supplied my investigation with a copy of a draft discussion paper concerning this proposal.

It is common to review and assess a proponent's modelling when assessing and reviewing a project. This occurs regularly on proposals both within and outside of government. This is necessary as, at least in the first instance, the proponent is the entity with the relevant data and projections.

770. Mr Smith disputed the assertion that the department relied upon EDL's financial modelling, submitting that the data supplied by EDL was exposed to 'considerable scrutiny' by the department.
771. Mr Smith submitted that the department actively considered the prospect of grid defection under the agreement. He advised that in the department's assessment, '[i]t is unlikely that more than 30 per cent of the energy users in Coober Pedy would move off the Coober Pedy micro-grid.' He elaborated on the department's basis for this assessment, submitting, *inter alia*, that the alignment of prices under the RAES scheme with the prices in the Adelaide metropolitan area 'disincentives and reduces the risk of grid defection.'
772. Mr Smith otherwise submitted that it is the department's assessment that '[v]alue for money is not simply the least expensive option particularly when rolling out new technologies in a remote micro-grid environment.'

The cost of the project

773. Mr Smith supplied a copy of the department's March 2015 and January 2017 total cash flow analyses concerning the project. He summarised the March 2015 analysis in the following terms:
1. total nominal cash flow of \$198.6 million (assuming 3 per cent inflation and diesel growth of 2 per cent above CPI per annum);
 2. total cash flow in real terms (in 2015) of \$131.4 million; and
 3. a net present value ("NPV") of \$84,925,000.
774. Mr Smith acknowledged that these figures have changed considerably in light of the variation in diesel prices since this time.
775. Mr Smith submitted that according to the department's January 2017 analysis, the anticipated cost of electricity per kWh paid by the council under the agreement will be approximately 41.4c/kWh.
776. Mr Smith disputed Mr Davies' assertion that a cost of 28c/kWh might be achievable under current market conditions:

A cost of 28c/kWh is an unreasonable expectation.

The Project needs to deliver guaranteed high penetration of renewables and deliver long term system security and reliability on an isolated micro-grid. A price in the order of 28c/kWh may be achievable without guarantees as to renewable penetration and security and reliability. However given the reliability of supply is significant, especially given Coober Pedy's location, the Project required supply guarantees. During the process leading to the Council entering into the PPA no information was provided to the Department as to how a tariff in the order of 28c/kWh was achievable.

Whilst I have not seen the ARENA / EDL funding agreement, based on funding agreements the Department has negotiated with ARENA, I expect that the ARENA / EDL funding agreement would have specified required criteria to be met regarding final technical design and renewable output. This likely impacts on supply costs.

777. Mr Smith submitted that he 'agreed' with Mr Davies' submission that their respective pricing of the project is similar insofar as '\$85 million at net present value is roughly equivalent to \$190 million total cash flow'.

778. Mr Smith otherwise submitted:

Ultimately measuring the project in terms of net present value is the appropriate way to analyse the expenditure. Total cash flow is a poor tool for considering the value of the Project. Commercial projects are usually evaluated on net present value to provide a consistent valuation method for comparison purposes recognising the value of money at the time decisions are being made. Using forecast cash flows, over a 20 year period, escalated at CPI is not a typical method for comparing and analysis projects. Such analysis does not consider the overall value of the project.

The Marree tender process

779. Mr Smith explained that while the period for submitting tenders has closed, the Marree tender evaluation process is ongoing.

780. Mr Smith supplied my investigation with a copy of the terms of reference for the Marree process. Those terms stipulate that a minimum renewable energy contribution of 70% must be achieved by the proponent. Bids must be priced for a 20 year term and cannot exceed approximately 54.3 c/kWh.

781. At my request, and subject to an undertaking by my Office to maintain confidentiality of this information, Mr Smith produced a comparative table of the complying bids received by the department under this process.

782. Mr Smith otherwise rejected Mr Davies' submission that the Marree process has been engineered to justify the cost of the Coober Pedy project:

That suggestion is incorrect.

The aim of the Marree process is to implement a model providing reliable, secure and high renewable penetration electricity to the Marree community. The Department has been developing the Maree [sic] project since before the Coober Pedy Project. The first expression of interest was publically released in 2013. The terms of reference were developed in consultation with ITP Power [a renewable energy consultancy] to achieve the above aims. It is those aims which have driven the process.

The specific tender documentation for the Maree [sic] Project was developed with ARENA to reflect the potential for a funding agreement between ARENA, the successful bidder and the State. Negotiations with ARENA have be [sic] ongoing since 2013. The potential funding agreement with ARENA has a number of specific requirements of both the successful tenderer and the SA Government in order to obtain funding. Many of the requirements set out in the tender's terms of reference reflect those ARENA requirements.

783. Mr Smith acknowledged that Mr Davies had submitted a non-complying bid under this process. He indicated that in accordance with advice from the department's probity advisor he has not been involved in the department's evaluation of Mr Davies' bid.

Treasurer's Instructions

784. Mr Smith advised that no written legal advice was received by the department as to whether the instruments signed by Mr Koutsantonis complied with Treasurer's Instruction 8 and Treasurer's Instruction 15.
785. With the benefit of further consideration, Mr Smith submitted that Treasurer's Instruction 15 may not apply to the instruments signed by Mr Koutsantonis, owing to the Instruction's stated application to 'public authorities *that are administrative units*' (emphasis added).
786. Notwithstanding this, Mr Smith submitted:
- [T]he Department nonetheless sought to comply with that Treasurer's Instruction so as demonstrate [sic] within and outside of Government that the RAES subsidy is conducted through a rigorous and appropriate process. Therefore the Deed of Grant and letter of comfort reflect the requirements of Treasurer's Instruction 15: see e.g. clause 17 of the Deed of Grant.
787. Mr Smith provided his view that, having been approved by Cabinet and executed by Mr Koutsantonis, both instruments comply with Treasurer's Instruction 8.

Unsolicited Proposals Guidelines

788. Mr Smith advised that the department did not obtain legal advice concerning the possible application of the Unsolicited Proposals Guidelines to the instruments signed by Mr Koutsantonis.
789. Mr Smith submitted:

The Council's requirement for ongoing support to subsidise the costs of electricity provided to the Coober Pedy community is unlikely to be an "*unsolicited proposal*" for the purposes of the Guidelines for Assessment of Unsolicited Proposals. The SA Government's subsidy is the provision of support through an established program: the RAES scheme. That scheme has been in place since the privatisation of the Electricity Trust of South Australia. Prior to privatisation ETSA provided energy to remote communities at a loss. With privatisation the RAES scheme was implemented to ensure the ongoing provision of affordable electricity to remote South Australian communities.

Further, the Council's requirement for ongoing support is not unsolicited as such support has been provided by the SA Government since 2003 and during that entire period EDL (or its precursor / related companies) have been selling electricity to the Council.

Given the nature of the ongoing RAES scheme, whereby payments are made to a council (being a public entity) under an established grant scheme and process, the Council's requirement for ongoing assistance appears to be outside the purpose of the unsolicited bid proposal process.

Resonant's assessment

790. At my invitation, Mr Smith provided a detailed response to the conclusions expressed within Resonant's final report to the council. In summary, Mr Smith submitted, *inter alia*:
- concerning the assertion that the EDL project is 'significantly more expensive than other available commercial options':
 - while it is difficult to analyse the proposals presented by Siemens, Epuron and ZEN without knowledge of the terms of reference provided by Resonant, it appears to him that these companies 'have not performed the

-
- detailed modelling or necessary factual investigations to produce reliable or accurate quotes'
 - Resonant's calculation that the council will pay \$7.5 million per annum conflicts with data supplied by EDL, which suggests the council will pay \$5.6 million for the 2017/2018 financial year
 - the assertion that 'no sensitivity analysis was presented' is incorrect, insofar as the department provided a copy of its sensitivity analysis to the council
 - the capital expenditure costs suggested by the alternative suppliers appear 'particularly low', suggesting 'insufficient reliability and/or renewable penetration' or an undeveloped grasp of the terms and scope of the project
 - concerning the assertion that the project will result in 'significant increase' in the council's reliance on the department for the 20-year life of the agreement
 - the nature and extent of the subsidy to the council under the RAES scheme 'likely improves under the PPA, as it decreases the reliance on diesel generation'
 - Resonant appears to him to have misunderstood the liquidated damages payable under the PPA; liquidated damages 'provide an efficient method of redress for temporary supply interruptions'; for longer interruptions, where the liquidated damages cap has been reached this gives rise to a fundamental breach by EDL entitling the Council to purchase the generation assets at a written down value likely to be 'considerably less than the market value of the Project'
 - Resonant's characterisation of the process for redressing a fundamental breach by EDL under the agreement is incorrect, insofar as this process is 'clearly set out and defined so as to prevent unnecessary legal costs being incurred'
 - owing to the department's own consideration of the risks of grid defection, he considers that Resonant overstates the risk and extent of potential grid defection under the agreement
 - concerning the other risks identified by Resonant:
 - the council received its own legal advice prior to entering into the PPA and remains able to seek further legal advice to assist with management of the contract
 - contrary to Resonant's suggestion, the department did not spend \$700,000 on legal fees in reviewing the PPA
 - Resonant itself concedes that the prospect of EDL producing no renewable electricity under the agreement is 'highly unlikely', however much of Resonant's analysis appears based on such a scenario occurring; contrary to Resonant's suggestion, the terms of the PPA would not result in the council being 'locked-in' to the agreement for 24 years in such a scenario as this would trigger a transfer of the generation assets under the fundamental breach clauses
 - the consequences of the council failing to perform its obligations under the PPA flow from the terms of the agreement and the council taking responsibility for power supply to the Coober Pedy community
 - Resonant incorrectly suggests that any default by the council would oblige it to purchase the power generation assets at an inflated value; rather, a fundamental breach by the council would oblige it to purchase the assets at a price reflective of their written-down value plus an additional component in recognition of EDL's loss of earnings, this being 'an ordinary and expected consequence of the breach of a commercial agreement'
 - power can continue to be provided under the previous contract with EDL until December 2019; failure by EDL to achieve completion and commissioning of the new plant by this date would amount to a fundamental breach of the PPA
 - it would not have been commercially or technically feasible for EDL to allow other companies to provide new technologies under the agreement without

- its consent; EDL is in any case contractually obligated to 'act reasonably and in good faith' in considering new technologies with the potential to reduce supply costs under the agreement
- the department rejects Resonant's assertion that the PPA is 'skewed to incentivise more diesel'; EDL is contractually obligated to deliver no less than 70 per cent renewable penetration; it is also in EDL's interest to minimise its use of diesel generators due to the cost in operating, maintaining and servicing this infrastructure when compared to wind and solar infrastructure
- it was open to the council to proceed to open tender; this was highlighted in the SWOT analyses provided to the council; the department 'would not have objected to the Council adopting that course'
- concerning Resonant's assertion that the project appears 'sub-optimal':
 - the dual flywheel system adopted by the project was considered necessary given the risk of equipment failure in such a remote location
 - the management of spilled energy was extensively discussed with EDL; a dynamic resistor was considered to be the most cost effective and reliable way of dealing with spilled energy at the time
 - distributed solar would have required a significant capital upgrade to the council's distribution network, which the council was likely not in a position to fund
 - the project was necessarily designed in consultation with ARENA in order to satisfy ARENA's funding requirements
- concerning Resonant's commercial analysis of the project:
 - the basis for many of Resonant's figures remains unclear; Resonant identifies the market estimate of the capital value of the project to be between \$18 and \$26 million, however the combined capital investment by EDL and ARENA is \$37 million; the basis for the assumption that 50 per cent of the local community will defect from the grid is also unclear given 'prices are at parity with Adelaide metropolitan prices'
 - Resonant's per annum charges are 'inconsistent with actual supply costs' based on EDL's model
 - Resonant is incorrect to suggest that EDL would earn \$4.674 million in the event that no electricity is produced in a year; this would trigger a transfer of the generation assets which would entitle the council to arrange for an alternative provider to manage the facilities; on this basis it is 'misleading to suggest that Coober Pedy would be without power for a year.'

791. Mr Smith otherwise observed that while Resonant's proposal of 100 per cent renewable penetration is a 'desirable goal', 'it has not been achieved on any Australian electricity grid.' He submitted that some component of diesel generation remains necessary in micro-grid scenarios in order to ensure reliability and security of supply; the alternative being 'excessive quantities of energy storage' to allow for the production of energy at times of low solar and wind production, likely resulting in a capital cost 'well over the proposed EDL project cost'.

The Jaksa review

792. On 7 March 2017 the department engaged Mr Gaby Jaksa, formerly of the CSO, now commercial consultant, to review aspects of the department's involvement in developing the project.

793. Mr Smith supplied my investigation with a copy of Mr Jaksa's final report, which I understand was provided to the department in or around early June 2017.

794. The final report identified the scope of the review as being focused on:

commercial, non-legal aspects of the due diligence on the Project and the evaluation of the costs, benefits, risks, and their mitigation, of the Project and of SAG's proposed participation, as well as giving consideration to viable alternatives.⁵⁴⁴

795. The final report, which I understand drew information from discussions with Mr Duffy and Mr Smith and a review of the department's communications concerning the project between May 2014 to December 2016, relevantly concludes:

In my view, DSD's analysis and due diligence concerning the Project was sufficient and rigorous in order to be able to evaluate the merits of the Project and its value for money, as well as to assess and mitigate any relevant risks.

The decision on whether to undertake a market procurement was a matter for the Council.

In my view, there was no overriding commercial or prudential requirement for DSD to require that a market procurement be conducted in the current circumstances notwithstanding DSD's primary role as a provider of a RAES subsidy.

796. While I have reviewed this document, I have not had specific regard to its conclusions when reaching my own views in respect of the issues raised by the referral.

Relevant law/policies

797. 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.

Legislation and policies applicable to the council

798. Section 8 of the Local Government Act provides:

8—Principles to be observed by a council

A council must act to uphold and promote observance of the following principles in the performance of its roles and functions—

- (a) provide open, responsive and accountable government;
- (b) be responsive to the needs, interests and aspirations of individuals and groups within its community;
- (c) participate with other councils, and with State and national governments, in setting public policy and achieving regional, State and national objectives;

⁵⁴⁴ In identifying the scope of the review, Mr Jaksa discloses his previous role in providing legal advice in relation to the PPA.

- (d) give due weight, in all its plans, policies and activities, to regional, State and national objectives and strategies concerning the economic, social, physical and environmental development and management of the community;
- (e) seek to co-ordinate with State and national government in the planning and delivery of services in which those governments have an interest;
- (f) seek to facilitate sustainable development and the protection of the environment and to ensure a proper balance within its community between economic, social, environmental and cultural considerations;
- (g) manage its operations and affairs in a manner that emphasises the importance of service to the community;
- (h) seek to ensure that council resources are used fairly, effectively and efficiently;
- (i) seek to provide services, facilities and programs that are adequate and appropriate and seek to ensure equitable access to its services, facilities and programs;
- (j) achieve and maintain standards of good public administration;
- (k) ensure the sustainability of the council's long-term financial performance and position.

799. Sections 48 and 49 of the Local Government Act provide:

48—Prudential requirements for certain activities

- (aa1) A council must develop and maintain prudential management policies, practices and procedures for the assessment of projects to ensure that the council—
 - (a) acts with due care, diligence and foresight; and
 - (b) identifies and manages risks associated with a project; and
 - (c) makes informed decisions; and
 - (d) is accountable for the use of council and other public resources.
- [...]
- (1) Without limiting subsection (aa1), a council must obtain and consider a report that addresses the prudential issues set out in subsection (2) before the council—
 - (b) engages in any project (whether commercial or otherwise and including through a subsidiary or participation in a joint venture, trust, partnership or other similar body)—
 - (i) where the expected expenditure of the council over the ensuing five years is likely to exceed 20 per cent of the council's average annual operating expenses over the previous five financial years (as shown in the council's financial statements); or
 - (ii) where the expected capital cost of the project over the ensuing five years is likely to exceed \$4 000 000 (indexed); or
 - (iii) where the council considers that it is necessary or appropriate.
 - (2) The following are prudential issues for the purposes of subsection (1):
 - (a) the relationship between the project and relevant strategic management plans;
 - (b) the objectives of the Development Plan in the area where the project is to occur;
 - (c) the expected contribution of the project to the economic development of the local area, the impact that the project may have on businesses carried on in the proximity and, if appropriate, how the project should be established in a way that ensures fair competition in the market place;

- (d) the level of consultation with the local community, including contact with persons who may be affected by the project and the representations that have been made by them, and the means by which the community can influence or contribute to the project or its outcomes;
- (e) if the project is intended to produce revenue, revenue projections and potential financial risks;
- (f) the recurrent and whole-of-life costs associated with the project including any costs arising out of proposed financial arrangements;
- (g) the financial viability of the project, and the short and longer term estimated net effect of the project on the financial position of the council;
- (h) any risks associated with the project, and the steps that can be taken to manage, reduce or eliminate those risks (including by the provision of periodic reports to the chief executive officer and to the council);
- (i) the most appropriate mechanisms or arrangements for carrying out the project.

[...]

- (4) A report under subsection (1) must be prepared by a person whom the council reasonably believes to be qualified to address the prudential issues set out in subsection (2).

[...]

- (4b) A council must give reasonable consideration to a report under subsection (1) (and must not delegate the requirement to do so under this subsection).

[...]

49—Contracts and tenders policies

- (a1) A council must develop and maintain procurement policies, practices and procedures directed towards—
 - (a) obtaining value in the expenditure of public money; and
 - (b) providing for ethical and fair treatment of participants; and
 - (c) ensuring probity, accountability and transparency in procurement operations.
- (1) Without limiting subsection (a1), a council must prepare and adopt policies on contracts and tenders, including policies on the following:
 - (a) the contracting out of services; and
 - (b) competitive tendering and the use of other measures to ensure that services are delivered cost-effectively; and
 - (c) the use of local goods and services; and
 - (d) the sale or disposal of land or other assets.
- (2) The policies must—
 - (a) identify circumstances where the council will call for tenders for the supply of goods, the provision of services or the carrying out of works, or the sale or disposal of land or other assets; and
 - (b) provide a fair and transparent process for calling tenders and entering into contracts in those circumstances; and
 - (c) provide for the recording of reasons for entering into contracts other than those resulting from a tender process; and
 - (d) be consistent with any requirement prescribed by the regulations.

800. Section 59 of the Local Government Act provides:

59—Roles of members of councils

- (1) The role of a member of a council is—
 - (a) as a member of the governing body of the council—
 - (i) to participate in the deliberations and civic activities of the council;
 - (ii) to keep the council's objectives and policies under review to ensure that they are appropriate and effective;
 - (iii) to keep the council's resource allocation, expenditure and activities, and the efficiency and effectiveness of its service delivery, under review;
 - (iv) to ensure, as far as is practicable, that the principles set out in section 8 are observed;
 - (b) as a person elected to the council—to represent the interests of residents and ratepayers, to provide community leadership and guidance, and to facilitate communication between the community and the council.

801. Section 83 of the Local Government Act relevantly provides:

83—Notice of ordinary or special meetings

[...]

- (4) The chief executive officer must, insofar as is reasonably practicable—
 - (a) ensure that items on an agenda given to members of the council under this section are described with reasonable particularity and accuracy; and
 - (b) supply to each member of the council at the time that notice of a meeting is given a copy of any documents or reports that are to be considered at the meeting (so far as this is practicable).

802. Section 91(1) of the Local Government Act provides:

91—Minutes and release of documents

- (1) The chief executive officer must ensure that minutes are kept of the proceedings at every meeting of the council or a council committee.

803. Section 99 of the Local Government Act relevantly provides:

99—Role of chief executive officer

- (1) The functions of the chief executive officer include—
 - (a) to ensure that the policies and lawful decisions of the council are implemented in a timely and efficient manner;
 - (b) to undertake responsibility for the day-to-day operations and affairs of the council;
 - (c) to provide advice and reports to the council on the exercise and performance of its powers and functions under this or any other Act;

[...]

 - (g) to ensure that the assets and resources of the council are properly managed and maintained[.]

804. Section 13 of the State Records Act is binding upon local government authorities and provides:

13—Maintenance of official records

Subject to this Act, every agency must ensure that the official records in its custody are maintained in good order and condition.

805. As at 19 January 2016, the council's Procurement Policy relevantly provided:

3. PROCUREMENT PRINCIPLES

Council must have regard to the following principles in its acquisition of goods and services:

3.1 Encouragement of open and effective competition

3.2 Obtaining Value for Money

3.2.1 This is not restricted to price alone.

3.2.2 An assessment of value for money must include, where possible, consideration of:

3.2.2.1 the contribution to Council's long term plan and strategic direction;

3.2.2.2 any relevant direct and indirect benefits to Council, both tangible and intangible;

3.2.2.3 efficiency and effectiveness of the proposed procurement activity;

3.2.2.4 the performance history, and quality, scope of services and support of each prospective supplier;

3.2.2.5 fitness for purpose of the proposed goods or service;

3.2.2.6 whole of life costs;

3.2.2.7 Council's internal administration costs;

3.2.2.8 technical compliance issues;

3.2.2.9 risk exposure; and

3.2.2.10 the value of any associated environmental benefits.

[...]

4. PROCUREMENT METHODS

Generally, open and fair competition is best achieved by undertaking a tender process so that all interested parties have an opportunity to bid. However, there may be procurements in which a tender process will not necessarily deliver the most advantageous outcome for the Council - in such instances, other market approaches may be more appropriate.

The Council may, having regard to its Procurement Principles and any other factors considered relevant by the Council, in its absolute discretion determine to utilise one or more of the following procurement methods:

4.1 *Direct Purchasing*

4.1.1 This is where Council purchases from a single source, without first obtaining competing bids.

4.1.2 This method may be suitable for low value, low risk goods and services, and where the supplier already has a successful service history with the Council.

4.1.3 The payment methods for this direct purchase include, [sic] petty cash, credit cards, memo of supply or purchase order.

[...]

4.7 *Request for Tenders (RFT)*

4.7.1 This is where the Council issues a tender for a proposed goods and/or service.

4.7.2 Council may issue a “Select” Request for Tender where it has already issued a REOI, or where it has reasonable grounds for only dealing with a select group of potential suppliers.

4.7.3 Otherwise, Council may issue an “Open” Request for Tender.

[...]

5. CONSIDERATIONS FOR THE COUNCIL

The appropriate method of procurement will be determined by reference to a number of factors, including:

5.1 *Value of the Purchase*

Value of Purchase (\$)	Process
Less than \$1,000	Direct Sourcing
\$1,001 - \$5,000	1 Quotation
\$5,001 - \$15,000	At least 2 Quotations
\$15,001 - \$50,000	At least 3 Quotations
\$50,001 - \$100,000	Selected Tender
Greater than \$100,000	Open Tender

The value of the purchase will be calculated as follows:

- single one-off purchase - the total amount, or estimated amount, of the purchase (excluding GST);
- multiple purchases - the gross value, or the estimated gross value, of the purchases (excluding GST); or
- ongoing purchases over a period of time - the annual gross value, or the estimated annual gross value, of the purchases (excluding GST).

5.2 *cost of an open market approach versus the value of the acquisition and the potential benefits;*

5.3 *the particular circumstances of the procurement activity;*

5.4 *the objectives of the procurement;*

5.5 *the size of the market and the number of competent suppliers;*

5.6 *the Council's leverage in the marketplace;*

5.7 *time constraints;*

5.8 *a global assessment of the risks associated with the relevant activity and /or project, including the risk profile of the procurement and any risks associated with the preferred procurement method.*

6. RECORDS

The Council must record written reasons for utilising a specific procurement method in each activity and where it uses a procurement method other than tendering.

7. EXEMPTIONS FROM THIS POLICY

This Policy contains general guidelines to be followed by the Council in its procurement activities. There may be emergencies, or procurements in which a tender process will not necessarily deliver best outcome for the Council, and other market approaches may be more appropriate.

In certain circumstances, the Council may, after approval from its elected members, waive application of this Policy and pursue a method which will bring the best outcome for the Council. The Council must record its reasons in writing for waiving application of this Policy.

- (a) if the Chief Executive Officer decides that there is only one supplier reasonably available to it; or
- (b) the Chief Executive Officer decides that a genuine emergency exists; or
- (c) the Chief Executive Officer is satisfied that the services to be supplied are of such a specialised or confidential nature that it would be impractical or disadvantageous to Council to invite tender or quotations; or
- (d) the purchase of goods at auction; or
- (e) the purchase of secondhand goods; or
- (f) the contract is made with a person who is on a panel of suitable suppliers maintained by Council[.]

806. As at 19 January 2016, the council's Prudential Management Policy relevantly provided:

7. Policy

- 7.1 Council will be guided by the requirements of Section 48 of the [Local Government] Act in regard to preparing and implementing prudential reports, commercial activities and projects.
- 7.2 Before Council engages in a prudential project, the Chief Executive Officer will engage the services of a suitably qualified independent person in accordance with Section 48(4), to prepare a prudential report that includes all issues listed in Section 48(2) of the Act.
- 7.3 Council will ensure that prudential projects are only undertaken after an appropriate level of due diligence has been applied to the proposed project.
 - 7.3.1 Effective due diligence will be considered to have occurred where Council has devoted itself to how compliance, public interest benefits or needs, and financial risks associated with the project have been considered in the prudential report (before, during and after completion of the project).

Legislation and policies applicable to the department and/or the former Minister

807. The Ministerial Code of Conduct has been approved by Cabinet and imparts standards of conduct upon Ministers. Clause 2.5 and 2.7 relevantly provide:

2.5 Fairness and Diligence in Decision Making

Ministers should not make an official decision without first giving due consideration to the merits of the matter at hand and the impact the decision is likely to have on the rights and interests of the people involved and the citizens of South Australia.

A Minister must use all reasonable endeavors [sic] to obtain all relevant information and facts before making a decision on a particular issue and should consult, as appropriate, in relation to the matter at issue.

Decisions made by Ministers in or in connection with their official capacity, should be made in the interests of advancing the interests of the citizens of South Australia.

[...]

2.7 Financial Accountability

Ministers have an obligation to account to Parliament fully and effectively for all monies they have authorized be spent, invested or borrowed. Ministers are obliged to give Parliament full, accurate, and timely accounts of all public money over which Parliament has given them authority.

It follows that Ministers must keep appropriate records and ensure that the officers of their departments and agencies regularly account for the expenditure and allocation of resources under their control.

The public has a right to know that monies provided to government by way of taxes and charges are being spent in accordance with the law and for the purposes for which they have been appropriated; and that the standard of community services reflects value for money from the level of taxes and charges imposed.

808. While this is not a misconduct investigation, I have had general regard to the above provisions insofar as they reflect some of the particular expectations upon Ministers.
809. A Minister of the Crown is a 'semi-government authority' for the purposes of Division 4 of Part 2 of the Public Finance and Audit Act. Section 18 of this Act relevantly provides:

18—Financial arrangements

- (1) Despite the provisions of any other Act, a semi-government authority may, with the consent of the Treasurer, enter into a financial arrangement.
- (2) Despite the provisions of any other Act, a semi-government authority must not enter into a financial arrangement without the consent of the Treasurer.

810. Pursuant to section 41 of the Public Finance and Audit Act, the Treasurer may issue instructions regulating, *inter alia*, the expenditure of public funds by the Treasurer and other public authorities.
811. Treasurer's Instruction 8 establishes the governance regime applicable to the expenditure of public funds by 'public authorities' (including, relevantly, a Minister of the Crown).⁵⁴⁵ Under clause 8.11.1 of this instruction, a contract that involves expenditure of \$15 million or more requires the approval of Cabinet.
812. Treasurer's Instruction 15 establishes accountability measures applicable to financial grants provided by public authorities. As submitted by Mr Smith, this instruction would not appear to apply to a grant entered into by a Minister of the Crown.⁵⁴⁶
813. The State Procurement Board is responsible for promulgating policies and guidelines relating to the procurement activities of public authorities in accordance with section 12 of the State Procurement Act. The term 'public authority' as defined by the State Procurement Act does not include a Minister of the Crown. This notwithstanding, I have had regard to the State Procurement Board's *Procurement Policy Framework* insofar as it provides general guidance as to the concepts of 'best value' and 'value for money' within government.
814. Under 'Key Procurement Principles', the *Procurement Policy Framework* provides:

Obtaining Value in the Expenditure of Public Money

Procurement outcomes that deliver the best value in the expenditure of public money ensure the optimal use of government resources. The Board's policy framework promotes procurement practices that will result in best value for money outcomes.

The achievement of value for money can be driven through each stage of the procurement process, from acquisition planning to contract management.

⁵⁴⁵ Treasurer's Instruction 1, clause 1.6.7.

⁵⁴⁶ Treasurer's Instruction 15, clause 15.1 ('[t]his instruction applies to public authorities that are administrative units').

A key principle of value for money is that 'lowest price' does not always represent the best outcome when evaluating alternative offers. When selecting a supplier, achieving value for money involves determining the extent to which the proposed solutions will deliver the optimum combination of whole-of-life cost and quality (non-cost) factors.

Factors which may be considered in assessing value for money include:

- fitness for purpose
- quality
- whole of life costs
- risk/opportunity
- timeliness
- flexibility
- price
- financial and operational soundness
- service, support and warranty
- environmental and sustainability issues
- contribution to government priorities
- efficiency and effectiveness

The achievement of value needs to be considered within the context of creating 'public value'. The achievement of public value within the context of procurement involves both procurement practitioners and procurement processes.

815. The Unsolicited Proposals Guidelines were first issued in November 2014. During the period relevant to my investigation, these Guidelines relevantly provided:

1. What is an Unsolicited Proposal?

An unsolicited proposal originates from a private entity (either for profit or not-for-profit) which is submitted without formally being requested by the Government.

The nature of the proposal can cover a wide range of areas and may include:

- Delivery of goods and services to or on behalf of Government;
- Provision of infrastructure;
- Access to Government assets;
- Seeking Government support (financial, regulatory or other support) to undertake a specific activity; or
- Financing arrangements

There is an applicable minimum financial threshold in the application of these Guidelines. This will ensure low cost, low risk unsolicited proposals are handled directly by agencies and remove the requirement for State Coordinator-General involvement.

The minimum financial thresholds for an unsolicited proposal under these Guidelines are:

1. A \$3 million threshold for unsolicited proposals with an investment construction value of \$3 million or greater, or
2. A \$1 million threshold for non-infrastructure unsolicited proposals.

While dollar limits will apply the State Coordinator General can elect to review any proposal that is below these thresholds. These thresholds do not preclude a proponent making an application through this process.

816. The Unsolicited Proposals Guidelines established that the State Government could:

at its absolute discretion, negotiate with a party that presents an unsolicited proposal where the Government considers circumstances warrant such an approach (in accordance with the criteria contained in [the Unsolicited Proposals Guidelines].

817. The Unsolicited Proposals Guidelines established the following criteria for a proponent to enter into exclusive negotiations with the Government:

1. No Competing Proposals

The Government will assess the unsolicited proposal against any existing proposals or procurement processes to ensure the same or similar issues are not already under consideration by the Government or under active and advanced consideration by another proponent.

If these conditions are not satisfied, the proponent should clearly demonstrate that their proposal has a distinct advantage over any other similar proposal and why the proponent's proposal was not submitted as part of that process.

In these circumstances it is likely that the Government will not accept an unsolicited proposal.

2. Community Need/Government Priority

The unsolicited proposal must promote economic, social and/or environmental outcomes for the South Australians and be consistent with the achievement of the Government's strategic priorities.

Proponents should demonstrate how their proposal will create additional economic activity and jobs, or meet unmet community needs, and how it assists with the achievement of the Government's strategic priorities.

3. Uniqueness of the proposal

Uniqueness may be established by the proponent possessing strategic assets, innovative ideas or other unique attributes that meet government priorities and could not be delivered by another party within acceptable timeframes.

The proponent will need to demonstrate the unique aspects of their proposal – for example:

- Can this proposal be readily delivered by competitors? - if so, what advantage is to be gained from the government entering into exclusive negotiations with the proponent?
- Are there genuine intellectual property rights, without which the proposal could not proceed to implementation (e.g. software or technology)?
- Does the proponent have ownership of strategic assets such as contractual rights or real property that would place it in a unique position to deliver the aims of the proposal, and which other parties could not deliver?
- Are there unique financial arrangements that support the delivery of the project?
- Does the proponent have a unique ability to deliver outcomes which support the achievement of the Government's strategic priorities; or
- Does the proponent's proposal have other demonstrably unique elements or innovative ideas that are not able to be delivered by another party within acceptable timeframes?

4. Value for money

The Government will seek to assess whether the proposal represents value for money when the proponent is seeking any form of financial contribution or risk sharing from government.

The proponent should:

- Identify what is being sought from government to facilitate the project (which may include financial support, assets, legislative/regulatory amendments or other support);

- Demonstrate that the proposal is fairly and sustainably priced relative to comparable projects;
- Demonstrate that the proposal involves an acceptable and optimal sharing of costs and risks between the Government and the proponent.
- Demonstrate that the proposal will meet acceptable commercial and industry standards.
- The Government will also consider whether the benefits of the proposal will outweigh the costs of any government support. The proponent should articulate what they consider to be the benefits to South Australians of the proposal.

5. Capacity and Capability of proponent

The Government must ensure that the proponent has the skills and experience required to deliver the project as specified in the proposal.

The proponent will need to demonstrate it has the capacity and capability to deliver the proposal. Information will need to be provided regarding the proponents' relevant commercial and trading history, financial capacity, prior dealing with Government and its experience in delivering similar projects. The proponent must also demonstrate that it has the financial and technical competencies to successfully deliver the project. The proponent should provide information regarding any reliance on third parties.

818. The Unsolicited Proposals Guidelines established a three-stage assessment process for the consideration of unsolicited proposals. The 'initial proposal stage' requires a proponent to submit a 'high level outline' to the State-Coordinator General, who is then responsible for submitting a completed submission to the USPSC.

Whether the District Council of Coober Pedy committed maladministration in public administration through its negotiation and execution of a Power Purchase Agreement with Energy Generation Pty Ltd

819. Pursuant to section 5(4) of the ICAC Act, maladministration in public administration will arise from 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 the 'substantial mismanagement of public resources'. Maladministration in public administration will also arise from conduct of a public officer involving 'substantial mismanagement in or in relation to the performance of official functions'.
820. In my view, the council's management of the project involved a clear pattern of significant errors. Some of these errors were committed during the early stages of the project's development. Many were committed during the final stages of the negotiations, when the project was formally presented to the elected body for a decision.
821. The terms of the first referral invite me to consider whether, *inter alia*, a practice, policy or procedure of the council has resulted in an irregular and unauthorised use of public money or the substantial mismanagement of public resources. That is, whether the council itself has committed maladministration in public administration.
822. The terms of the first referral also invite me to consider whether the conduct of any particular public officer has resulted in an irregular and unauthorised use of public money, the substantial mismanagement of public resources or has involved substantial mismanagement in or in relation to the performance of official functions. That is, whether any particular officer or former officer of the council by his or her conduct has committed maladministration in public administration.
823. In the circumstances of this matter I have determined to direct my consideration toward the issue of the council's practices, policies and procedures. This is because the errors

I have identified span a period of a number of years and relate to the activities of a succession of public officers, many of whom no longer hold office in the council.

824. My report nevertheless singles out for particular criticism the actions of the council's Interim Chief Executive Officer during the period in which the project was finalised, Mr Renshaw, and the former and current elected members who constituted the council's governing body at this time. I provided a copy of my provisional report to each of these individuals for comment before I finalised my views.
825. I summarise the various errors I have identified in the passages that follow.

Record-keeping practices

826. Until very recently the council did not have a Records Management Policy or equivalent. It enacted such a policy in response to my provisional report, pre-empting my recommendation that it do so.
827. The council was unable to locate a number of critical records requested by my investigation.
828. Over the course of my investigation I had to prompt the council to undertake further searches in light of information provided by other parties. Many key documents originally drafted or commissioned by the council were only located through the interrogation of the department's records concerning the project. Remarkably, this included a copy of the April 2014 KelledyJones advice.
829. I suspect that other critical records of the council have been lost or misplaced through poor record-keeping practices.
830. The council's Chief Executive Officer as at November 2017, Ms Hogan, conceded to my investigation that there appeared to be 'no real centralisation' of records concerning the project at the time of her appointment to the council in July 2016.⁵⁴⁷
831. At this time, isolated documents concerning the project were stored in a filing cabinet located in the office assigned to the Chief Executive Officer and within the council's enterprise system, 'SynergySoft'. Other records were subsequently located and supplied to my investigation through accessing archived email accounts.⁵⁴⁸
832. During interview, Mr Renshaw spoke of similar issues:
- I was quite surprised that some things were in the record system, were stored in the record system very well, and some things weren't. So we have got two glasses that are exactly the same and glass number one is recorded perfectly, glass number two is not in there.
833. The significance of the council's failure to adequately store and maintain records concerning the project cannot be overstated. It caused the council's systems to present an inaccurate and incomplete record of the council's involvement in the process and led to critical legal advice being lost and ignored. It led to an overall lack of continuity in the council's understanding of the project and its own negotiating position.
834. One notable example should suffice. In January 2016 Mr Renshaw emailed the department to request a copy of the project's financial modelling. He subsequently expressed criticism of the modelling provided, asserting that the document was

⁵⁴⁷ Telephone call dated 28 November 2017.

⁵⁴⁸ Telephone call dated 28 November 2017.

'virtually illegible' and did not 'appear to have been reviewed by anyone'. A version of the document in question had in fact been circulated and discussed between the council, EDL and the department during the terms of each of the three preceding Chief Executive Officers. It had been emailed to Mr Renshaw less than two months earlier.

835. The negotiations were managed by a total of six Chief Executive Officers. This fact alone speaks to significant dysfunction within the council.
836. The significant turnover within the council's senior administration and elected body made adequate record-keeping all the more critical. The need for a legible, centralised project file in respect of a procurement activity of this significance and scale should have been obvious to all involved.
837. As observed elsewhere in this report, the council has also evidently failed to retain any record of matters considered in confidence during its 15 December 2015 ordinary meeting. In this regard, it appears likely that Mr Renshaw contravened his requirement under section 91(1) of the Local Government Act to 'ensure that minutes are kept of the proceedings of every meeting of the council'.
838. The council was and is obliged under section 13 of the State Records Act to 'ensure that the official records in its custody are maintained in good order and condition.' In my view, the council's record-keeping practices in respect of the negotiation and development of the hybrid renewable project fell substantially short of this requirement.

Clarifying the terms of engagement

839. EDL's early communications concerning the matter foreshadowed significant investment in developing the proposal beyond the concept stage. It should have been apparent to the council that any decision to support EDL's expression of interest to ARENA was likely to result in further approaches from EDL in respect of the council's future energy supply arrangements.
840. The report tabled before the council's 20 August 2013 ordinary meeting, while recognising the need for a new Power Purchase Agreement if the project was to be commissioned, sought to draw a distinction between the requested support for EDL's approach to ARENA and the question of a new energy contract with EDL:

EDL are asking whether Council would support the EOI so that they can determine whether they should invest time in getting the proposal developed.

Council needs to consider the following:

- Existing Contract with EDL expires July 2019
- This Solar PV Project will require either an amendment to original contract or a separate contract (Power Purchase Agreement)
- KPMG report into Grid connection for Coober Pedy
- Possible Coal/Gas mining operations being developed close to Coober Pedy

If Council chooses to support EDL in its EOI submission it does not commit Council to signing a contract with EDL.

The main benefits for this proposal to Council are the reduction in risk of diesel price fluctuations and also increased power capacity at peak times.

841. The council's November 2013 letter of support for the proposal did not commit the council to a new Power Purchase Agreement with EDL. This was nevertheless a critical moment in the project's development. Although the council's stated agreement to 'look at' supporting a new 20-year Power Purchase Agreement with EDL was qualified in

nature, the council at this stage should have turned its mind to the question of how future approaches by EDL would be managed.

842. While I do not consider it was inappropriate for the council to provide the requested letter of support, the council's resolution to do so should have been qualified by reference to the procurement processes mandated by the Procurement Policy, the circumstances under which the council considered it could appropriately entertain any subsequent unsolicited proposal from EDL and the terms to be observed in negotiating that proposal.
843. On its actual terms, the letter of support provided by the council marked the first of several missed opportunities to clarify the council's position in respect of EDL's approaches. As can be seen from what followed, the council's commitment to 'look at' a new energy supply agreement would ultimately lead to protracted negotiations with a single proponent.

Clarifying the role of the department

844. The record of communications concerning the project evidences a considerable shift in the level and nature of the department's participation in the development of the project. The early correspondence between the parties evidences something of a tacit understanding (sometimes referred to as the 'communications protocol') that the department would abstain from direct participation in the negotiations; instead providing limited technical and commercial guidance to the council as necessary.
845. The department's shift toward active participation in the negotiations was significant, insofar as it appears to have resulted in a reduced sense of understanding and ownership over the process within the council. These factors appear to have later manifested into a sense of outright distrust of the State Government and its role in the negotiations.
846. The purpose and nature of the department's involvement in the negotiations can be attributed to two specific considerations: the State Government's direct financial interest, owing to the RAES scheme, in the terms of any new Power Purchase Agreement entered into by the council; and, as Mr Smith put it, the 'limited resources and limited expertise' within the council concerning energy generation when contrasted with the capacity of the department.
847. Owing to these and other factors,⁵⁴⁹ I do not consider it was inappropriate for the council to seek input from the department over the course of the proposal's development. Although it would no doubt have been preferable for the council to keep the department at arm's length from the negotiations, this would have been rendered difficult by the department's own technical review of the project (which appears to have necessitated a direct dialogue with EDL) and the nature of the department's contributions.
848. What concerns me, however, is the lack of any evidence to suggest that the council formally determined (whether by resolution or otherwise) to invite the department's input into the process or, for that matter, to clarify the manner and form that input would take.
849. At no stage does the council appear to have considered the implications of it inviting the contributions of a third party stakeholder into the process. There appears to have

⁵⁴⁹ In its response to my provisional report the department also adverted to the apparent mismanagement of the negotiations within the council, the degree of turnover of council officers and the department's interest in ensuring continuity of energy supply to the Coober Pedy community.

been no attempt to identify the extent to which the council's interests in the project overlapped with the department's or the extent to which, if at all, the council could rely upon the department's due diligence concerning the project.

850. What is lacking in my view, and with the benefit of considerable hindsight, is a clear, documented agreement between the council and the department setting out the parameters within which the department was expected to operate in its contributions to the development of the proposal.

Adherence to legal advice

851. Remarkably, the question of the procurement process to be followed by the council appears to have been first flagged by the department in March 2014. There is no evidence before me to suggest that the council paid any thought to the matter prior to this – although it must be observed that the council was able to supply my investigation with exceedingly few records from this stage of the project's development. The department's email in any case appears to have been the impetus behind Mr Cameron's decision to seek legal advice in early April of that year.
852. Mr Cameron's 1 April 2014 email to Mr Kelledy appears to constitute the only occasion on which the council sought direct legal advice on the project's capacity to satisfy the council's Procurement Policy. Given the nature of the project and what followed, this is inexcusable.
853. The April 2014 KelledyJones advice advised upon the need for the council to justify by formal resolution any decision to waive compliance with the Procurement Policy. It foreshadowed risks in the council adopting such a course and to this end recommended that the council engage a suitably qualified consultant to advise that the costs of any agreement were 'fair and reasonable and unlikely to be improved through market testing.'
854. As it would turn out, the council failed to follow this advice in either respect.
855. The legal advice also opined that it would be open to the council to waive compliance with the Procurement Policy and enter into the foreshadowed arrangement with EDL. In this regard, reference was made to the council's discretion to do so under clause 7(a) of the Policy ('if the Chief Executive Officer decides that there is only one supplier reasonably available to it').
856. I have real reservations regarding this aspect of the advice. At the time, there was simply no basis to conclude that other suppliers did not exist or would have been unable to deliver on the terms foreshadowed by EDL.
857. While the other criteria identified as informing or supplementing this assessment (i.e. EDL's position as the incumbent supplier and the suggested 'positive environmental outcomes' under the proposal) may have properly informed an assessment of the project's 'value for money' under clause 3.2 of the Policy, these matters should have been largely irrelevant to any consideration of the alternatives available through a market procurement process.
858. My reservations concerning this issue aside, I accept that the council would have been entitled to place a certain deal of weight upon the April 2014 KelledyJones advice in considering whether to waive compliance with the Procurement Policy.

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859. As it turned out, however, the council's administration and elected members were oblivious to the existence and nature of the advice by the time the council determined to execute the PPA.
860. The report presented to the council's 13 May 2014 special meeting in my view misinterpreted the substance of the April 2014 KelledyJones advice. It appears to have conflated the two separate matters of the council obtaining a consultant's report speaking to the reasons for departing from the council's Procurement Policy and the preparation of a prudential report as required by section 48 of the Local Government Act.
861. This error was significant as it came to shape the outcome of the resolution passed by the council at the meeting ('[t]hat Council engages a suitable consultant to undertake a prudential report...'). As it turned out, the council would not go on to hire a consultant for the purposes of obtaining advice on the value of EDL's proposal until the determination to engage Resonant some 18 months later. By this time, there was considerably more momentum behind the project.
862. As I have already observed, the council otherwise failed to follow the April 2014 KelledyJones advice when it resolved to execute the PPA in January 2016.
863. Contrary to the advice, the council did not resolve to waive application of the Procurement Policy. It also did not record its reasons for proceeding with a procurement process that ran contrary to the recommendations of the Procurement Policy.
864. At the time it voted to execute the agreement, the council had also failed to obtain advice from a specialist consultant confirming that the costs of the agreement were 'fair and reasonable and unlikely to be improved through market testing'. The council's only consultant was in fact advising to the contrary.
865. Mr Renshaw during interview disclaimed any knowledge of the April 2014 KelledyJones advice during his involvement with the project. This strikes me as plausible, considering the record-keeping practices of the council.
866. The elected members of the council who voted to execute the PPA similarly disclaimed any knowledge of the April 2014 advice to my investigation. The advice was not tabled at the 19 January 2016 meeting and of the councillors present at this meeting, only Cr Rapaic sat on the council in May 2014 when the substance of the advice was originally presented to the elected body.
867. It is, of course, astounding that a key piece of legal advice informing the council's early consideration of the project was forgotten and ignored by the council by the time the negotiations concluded.
868. The critical passages of the advice were quoted in the report tabled at the council's 13 May 2014 special meeting, as any person who cared to review the past resolutions concerning the project would have discovered.
869. It is perplexing that the December 2015 KelledyJones advice made no specific reference to the April 2014 advice. It is possible that Mr Crichton was unaware of the advice provided by his colleague.
870. The December 2015 advice at least adverted to the operation of the Procurement Policy, albeit in a manner that failed to recommend any specific action:

We understand that a formal tender process was not undertaken for the project – although we are not aware of what (if any) reasons were recorded for proceeding in this manner for the purposes of ensuring that the Council was not at risk under the procurement policies and section 49 of the [Local Government] Act.

871. This passage, if nothing else, should have served as an immediate red flag to Mr Renshaw and the council's elected body.
872. The December 2015 advice was discursive and, in my view, unduly equivocal for such an important document. The recommended course of action was, however, reasonably apparent: in the event that Resonant's final report concluded that the council could obtain a better value deal through an alternative supplier, the council would be obliged to either utilise that information to leverage a better value outcome with EDL or undertake a market procurement process.
873. Mr Renshaw during interview dismissed the December 2015 KelledyJones advice as 'a bit of butt-covering' on the part of the council's solicitors. He submitted:
- [W]e certainly heard that advice and we listened to it. I think I have said all along we were negotiating or working with EDL to try and find ways to generate a better outcome; to lower the risk to the council; to lower the risk for the community. So, yeah, we heard that advice, we listened to that advice, we responded to that advice in terms of our negotiations with EDL.
874. I am not satisfied that Mr Renshaw meaningfully considered the December 2015 advice. I query whether he properly understood it. The document itself appears to have been treated by the council as little more than a means through which it could extract further concessions from the State Government. Although it was appended to Acting Mayor Provatidis' 7 December 2015 letter to Mr Koutsantonis, its substance was in no way reflected in the position communicated to the State Government on this occasion.
875. Both the April 2014 and December 2015 KelledyJones advice should have been tabled before the 19 January 2016 meeting. The recommendations put to the elected body at that meeting should not have been made in the absence of the council's written legal advice. If it was the case that KelledyJones' assessment of the project had changed in light of subsequent modifications to the Letter of Comfort offered by Mr Koutsantonis, that position should have been reduced to writing and tabled before the elected body.
876. The council should also have sought written legal advice in light of the conclusions expressed in Resonant's summary review and final report to the council.

Satisfaction of prudential obligations

877. The BESTEC report supplied to the council in June 2015 was hardly comprehensive. While it purported to address each of the 'prudential issues' identified in section 48(2) of the Local Government Act, in my view it was not sufficient to meet the objects of section 48 for a project of this scale.
878. The BESTEC report in any case predated Resonant's review of the project. Resonant's advice, if accepted, threw into question many of the conclusions expressed by BESTEC with respect to the financial viability of the project and the risks presented to the council.
879. The BESTEC report similarly predated the drafting and finalisation of the Deed of Grant and Letter of Comfort provided by Mr Koutsantonis. A thorough prudential review of the project necessitated consideration of these documents in their final form.

880. It appears that the council during Mr Rusby's term as Chief Executive Officer anticipated seeking an updated prudential report at a date closer to the finalisation of the negotiations.
881. Various of Mr Renshaw's emails to the department alluded to the council's ongoing 'prudential review' of the project; however I do not understand Mr Renshaw here to have been referring to a report of the kind required by section 48 of the Local Government Act.
882. The council should have commissioned a supplementary prudential report for consideration by the elected body at the 19 January 2016 meeting. This was among the ostensible recommendations made by the December 2015 KelledyJones advice.
883. The BESTEC report should also have been tabled at the 19 January 2016 meeting. I have in fact been unable to locate any record to suggest that the BESTEC report was ever tabled before the council's elected body. If so, the council's resolution to execute the agreement arguably contravened section 48(1) of the Local Government Act.
884. Clause 7.3 of the council's Prudential Management Policy requires the council to 'ensure that prudential projects are only undertaken after an appropriate level of due diligence has been applied to the proposed project.' Clause 7.3.1 provides that '[e]ffective due diligence' requires the council to 'devote[] itself to how compliance, public interest benefits or needs, and financial risks associated with the project have been considered' in a prudential report obtained for the purposes of complying with section 48(2) of the Local Government Act.
885. I do not consider the council complied with clauses 7.3 and 7.3.1 in this instance. There is no evidence to suggest that the council's determination to execute the PPA was informed by the BESTEC report. There is also no evidence that the elected body satisfied itself that the BESTEC report adequately addressed the financial risks associated with the project. Had the elected body turned its mind to this issue, it would have been apparent that the BESTEC report did not meet this requirement because it was not prepared upon a consideration of the terms of the instruments executed by the State Government.

Compliance with the Procurement Policy

886. The council's Procurement Policy identifies an open tender process as the appropriate method of procurement for a project of this scale.
887. Clause 7 of the Procurement Policy identifies specific circumstances in which the council may determine to waive application of the policy in respect of a given procurement activity:
- (a) if the Chief Executive Officer decides that there is only one supplier reasonably available to it; or
 - (b) the Chief Executive Officer decides that a genuine emergency exists; or
 - (c) the Chief Executive Officer is satisfied that the services to be supplied are of such a specialised or confidential nature that it would be impractical or disadvantageous to Council to invite tender or quotations; or
 - (d) the purchase of goods at auction; or
 - (e) the purchase of secondhand goods; or
 - (f) the contract is made with a person who is on a panel of suitable suppliers maintained by Council[.]

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888. The Procurement Policy does not clarify whether these criteria are intended to be exhaustive, although that is the impression I draw from the policy.
889. Pursuant to clause 7 of the Procurement Policy, any determination to waive compliance with the policy must be approved by the council's elected body. The council's reasons for a resolution to this effect must also be recorded.
890. The council's 19 January 2016 resolutions clearly contravened both of these requirements. Mr Renshaw conceded as much during interview with my investigation.
891. Mr Renshaw submitted to my investigation that the council would have been entitled to waive application of the Procurement Policy on the grounds identified in clause 7(c) ('the Chief Executive Officer is satisfied that the services to be supplied are of such a specialised or confidential nature that it would be impractical or disadvantageous to Council to invite tender or quotations').
892. With respect to Mr Renshaw, I am unable to agree with this submission. There was no proper basis to conclude that the services to be supplied by EDL were so specialised as to militate against an open tender process – Resonant's advice certainly spoke to the contrary. It cannot otherwise be suggested that the services were of such a 'confidential nature' as to merit an alternative procurement method. The existence and nature of EDL's proposal was public knowledge.
893. I accept Mr Renshaw's submission that the circumstances of the project were somewhat anomalous and may not have sat easily with a rigid application of clause 7 of the Procurement Policy. There is no evidence, however, that the council actively turned its mind to this issue at the time.
894. It is baffling that neither Mr Renshaw nor any of the elected members present at the 19 January 2016 meeting appear to have considered the issue of the council's compliance with the Procurement Policy.
895. The existence and maintenance of such a policy is mandated by section 49 of the Local Government Act. It is something that the council's senior administration and elected body should have been intimately familiar with. It was clearly of direct and fundamental import to a project of this consequence and scale.
896. The failure to record reasons for proceeding in the absence of an open tender process was significant. The council determined, contrary to the advice of its only consultant, to enter into a 20-year, multimillion-dollar contract with an incumbent supplier in circumstances where it had declined (or neglected) to meaningfully consider alternative tenders. In doing so, it did not follow the appropriate method of procurement identified by its Procurement Policy and, at least in appearance, ignored what had been recommended in written legal advice.

Internal communications and instructions

897. It has been suggested by various elected members of the council that the elected body was not in favour of the PPA and that it was pressured into authorising the PPA's execution by the council's administration and the State Government.

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898. It has been reported in the media that some of the elected members have now disclaimed knowledge of Resonant's concerns at the time they voted to proceed with the agreement.⁵⁵⁰
899. Some of the elected members present at the 19 January 2016 meeting submitted to my investigation that they were never provided with a copy of Resonant's reports concerning the project. Others were evasive as to this issue.
900. Only Mr Pantelis has affirmed that he received a copy of each of Resonant's reports. Mr Pantelis no longer sits on the council.
901. I understand the level of information presented to the elected members by Mr Renshaw is central to litigation that is being threatened by the council against the Local Government Association, which was responsible for the secondment of Mr Hitchcock to the council.
902. The elected members have an incentive to deny contemporaneous knowledge of Resonant's concerns because it is now the position of the council's elected body that it was misled about the alternatives to the EDL proposal and the costs and risks associated with the project.
903. Both Mr Renshaw and Mr Davies affirmed that the elected members received a copy of Resonant's draft review. Mr Davies spoke at some length about the reaction of the elected members to that report.
904. This fact that the elected members received a copy of the draft review is in any case evidenced by the confidential minutes concerning the council's 17 November 2015 meeting.
905. Mr Renshaw submitted that the elected members 'would have' also received a copy of Resonant's summary review, although Mr Davies could not personally speak to this. Ms Provatidis must certainly have been aware of the report as it was appended to her 7 December 2015 letter to Mr Koutsantonis. The other elected members of the council received a copy of this letter in draft form.⁵⁵¹ It is reasonable to infer that they were aware of the existence of Resonant's summary review, if not its contents.
906. Records supplied to my investigation suggest that Mr Renshaw emailed a version of Resonant's vendor comparison table to the elected members on 4 February 2016 and that Mr Davies himself emailed a copy of Resonant's final report to the elected members on 8 February 2016.
907. Mr Renshaw insisted that he took active measures to ensure that critical information concerning the project was collated and stored in the council chambers for review by the elected members.
908. I am in possession of an email from Mr Renshaw to the elected members dated 1 February 2016 that adverts to the creation of a 'documentation file' concerning the project that was to be 'available for inspection at any time' and 'updated as new documents [were] received.'⁵⁵² It appears this file was only created some weeks after the council's resolution to execute the PPA.

⁵⁵⁰ InDaily, 'Accusations and Threats Fly Over Outback Power Deal', 9 March 2017 ('[Cr Rapaic] said the then CEO, Tony Renshaw, had failed to provide the council with a report written by consultant engineer Graham Davies which detailed deep concerns about the cost of the EDL project, and risks to the council over the deal's 20-year run. [...] [Cr Reynolds] echoed Rapaic's claim that the council had not been shown the critical analysis provided by Davies, and that the council felt it had no choice but to agree to the deal. [...] Councillors who have spoken to *InDaily* insist that Davies' critical report was never presented to the council by its administration.')

⁵⁵¹ Email from A Renshaw to P Athanasiadis et al. dated 4 December 2015.

⁵⁵² Email from A Renshaw dated 1 February 2016.

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909. As I have already observed, Mr Renshaw's evidence to my investigation often appeared self-serving when viewed in light of contemporaneous media reports that were critical of his leadership and communication with the elected members. I have accordingly approached Mr Renshaw's evidence in respect of these matters with some caution.
910. That being said, I am satisfied that a copy of Resonant's draft review was made available to the elected members prior to Mr Davies' visit to Coober Pedy in November 2015. In any case, it was certainly tabled before the council's 17 November 2015 meeting.
911. I am also satisfied that the elected members were generally aware of Mayor Provatidis' correspondence with Mr Koutsantonis around Resonant's summary review of the proposal. Certain of Mr Renshaw's emails to the elected members suggest as much.⁵⁵³
912. As I have observed, it is clear that the elected members received a copy of Resonant's vendor comparisons and final report at the time of their provision to the council's administration and prior to execution of the PPA.
913. That the elected members had previously been made aware of Resonant's concerns does not excuse Mr Renshaw's failure to ensure that a copy of each of Resonant's reports concerning the project was tabled at the 19 January 2016 meeting.
914. It is difficult to determine the extent to which the position communicated by Mr Renshaw to EDL and the State Government accurately reflected the expectations and desires of the council's elected body.
915. I do not consider that I can safely rely upon the evidence of Mr Renshaw or any of the elected members on this issue as that evidence appears to have been constructed to serve the positions that have now been adopted by the parties.
916. The documentary evidence confirms that Mr Renshaw generally sought to update the elected members as the negotiations progressed.
917. I very much suspect that the positions put forward by Mr Renshaw during the negotiations were informed by informal discussions with some of the elected members.
918. The general tenor of Mr Renshaw's email communications with the elected members prior to approximately 19 December 2015 was that it would be appropriate for the council to seriously entertain the project however significant concessions needed to be extracted from EDL and the State Government before an agreement could be executed.
919. Mr Renshaw submitted that the council did not seriously entertain seeking or developing alternative proposals and that representations to the contrary in his correspondence with the State Government and EDL were made as a negotiating tactic only.
920. I reject Mr Renshaw's evidence on this issue. The record of correspondence in my view demonstrates that there were discussions within the council around the prospect of it discreetly or openly developing alternative proposals to the EDL project. That conclusion is corroborated by Mr Davies' recollections of the period.

⁵⁵³ Email from A Renshaw to P Athanasiadis et al. dated 4 December 2015; email from A Renshaw to M Provatidis et al. dated 11 December 2015 ('Our message has got [sic] through with the Treasures [sic] office that much more work needs to be done.');

email from A Renshaw to M Provatidis et al. dated 19 December 2015 ('We have previously provided various oral reports and written reports from Kelledy Jones and Graham Davies.')

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921. The tenor of Mr Renshaw's communications with the elected body in relation to this issue clearly changed by 19 December 2015. In an email to the elected members sent on that day, Mr Renshaw attempted to talk down Resonant's advice to the council and talk up the prospect of an agreement with EDL.
922. I do not know if Mr Renshaw's position in this regard was precipitated by discussions with the elected members because the council's record-keeping concerning the project has been so poor.
923. By 10 January 2016 Mr Renshaw's communications with the elected members clearly anticipated that the council would execute the PPA in some form or another. In an email following the ARENA workshop, Mr Renshaw adverted to a conditional agreement between the council, EDL and the State Government to execute the PPA.
924. There is nothing to suggest that the council's elected body explicitly authorised Mr Renshaw to commit the council to the project in such a manner.
925. The position articulated by Mr Renshaw in his communications with the State Government and EDL was frequently incoherent.
926. There appears to have been a general lack of oversight by the council's elected body in respect of Mr Renshaw's representation of the council in the negotiations concerning the project. That appears to be consistent with the approach adopted by the elected body in respect of the various preceding Chief Executive Officers involved in the project.
927. The council's elected body convened at least five times between the appointment of Mr Renshaw on 9 September 2015 and the resolution to execute the PPA on 19 January 2016.
928. The council's records do not disclose any substantive discussion of the project by the elected body during this period. As best I can determine, there was no discussion of the project at all during the council's meetings on 15 September 2015, 22 September 2015, 20 October 2015 and 15 December 2015.
929. At no stage prior to the 19 January 2016 meeting does Mr Renshaw appear to have presented a formal report to the council's elected body as to the status of the negotiations or sought the elected body's formal position in respect of any of the points of major contention.
930. Under section 99(1)(c) of the Local Government Act Mr Renshaw was responsible for providing advice and reports to the council on the exercise and performance of its powers and functions.
931. It is arguable that Mr Renshaw did not meet these obligations in respect of the information formally put to the council's elected body in the lead-up to the resolution to execute the agreement.
932. Mr Renshaw was unable to identify precisely how and when he was first briefed in relation to the project and the council's negotiating position. There are no records before my investigation that clarify this issue.
933. There are no records before me to suggest that the council's elected body ever formally determined upon a set of objectives in respect of the negotiations or otherwise resolved to set out or constrain Mr Renshaw's authority to negotiate on behalf of the council.

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934. At no stage does the council's elected body appear to have resolved to identify its negotiating position or modify any of its objectives in light of the informal updates provided by Mr Renshaw.
935. The council may have resolved to articulate support for the agreement during a meeting on or around 15 September 2015 and during another meeting on or around 1 October 2015, however no records of any such resolutions now appear to exist.
936. The nature and scale of the project required rigorous and meaningful oversight by the council's governing body. In my view, the council's elected members failed to exercise this oversight in respect of Mr Renshaw's activities or in respect of the negotiations more generally.
937. Under section 59(1)(a)(iii) of the Local Government Act each elected member of a council is required to exercise a degree of oversight over the council's resource allocation, expenditure and activities. Pursuant to sections 59(1)(a)(iv) and section 8(j), each elected member is also responsible for ensuring as far as practicable that the council observes the principle of achieving and maintaining 'standards of good public administration.'
938. It is arguable that the council's elected members did not meet these obligations in respect of their governance concerning the project.

Consideration of expert advice

939. The April 2014 KelledyJones advice recommended that the council engage a consultant to advise it 'that the costs of the services proposed to be embodied in the contract [are] fair and reasonable and unlikely to be improved through market testing.'
940. That was clearly the correct advice if the council anticipated considering EDL's proposal in the absence of a market procurement process.
941. For whatever reason, the council did not go on to engage a consultant until November 2015, some 18 months later.
942. I consider it was a mistake for the council to defer engaging a consultant until the eleventh hour of the negotiations. By this time, there were considerable pressures upon the council to quickly come to a position in respect of the proposal. The circumstances were not conducive to a careful consideration of independent advice.
943. Resonant's draft review advised that the commercial outcome of the agreement appeared suboptimal and that the technical solutions proposed were generally feasible but not optimal. The recommendations within the draft review contemplated further review of the terms of the PPA with a view to determining whether it was in the council's interests to accept the proposal, renegotiate its terms or reject the offer outright and undertake a competitive tender process.
944. Resonant's summary review recommended that the council initiate an EOI process to gauge indicative prices available on the open market.
945. The council does not appear to have followed Resonant's preliminary advice in any material respect.
946. Mr Renshaw's evidence was that the council determined to utilise Resonant's advice to prompt further concessions from EDL and the State Government. That appears supported by the record of communications between the parties.

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947. It is clear that Mr Davies was led to believe something different. His evidence was that he did not anticipate the council executing the agreement on the terms offered by EDL and the State Government.
948. Mr Davies submitted that the council was in fact contemplating a competitive tender process and that the elected members otherwise required a significant overhaul to the proposed agreement with EDL before they would be prepared to authorise its execution.
949. The PPA was not substantively modified in the period between Resonant's engagement and the decision of the council to execute the agreement on 19 January 2016.
950. Mr Renshaw submitted that Mr Davies' advice lacked an appreciation for the council's difficult financial position.
951. The terms of the Letter of Comfort were reformulated in January 2016 to provide greater assurances to the council that the RAES subsidy would continue for the life of the agreement. According to Mr Renshaw, this was a significant factor that informed the council's decision to execute the agreement.
952. According to Mr Renshaw, the council also ultimately came to rely upon the assurances provided by the department as to the State Government's own due diligence concerning the project.
953. Mr Renshaw also submitted that the council came to doubt the validity of Resonant's criticisms of the commercial aspects of the agreement.
954. If these were considerations that informed the council's decision to disregard Resonant's advice to undertake a market procurement process then they were never sufficiently documented.
955. A public authority, upon careful consideration, may come to disagree with the position expressed in independent advice. In these circumstances, it is critical that any decision to diverge from the course recommended is sufficiently rationalised and documented.
956. The council clearly failed to rationalise and document its decision to disregard Resonant's advice.
957. The council, in resolving to execute the PPA, failed to set out its reasons for deciding not to undertake a market procurement process of a kind recommended by Resonant's summary review.
958. The council also failed to set out its reasons for determining to execute the PPA in circumstances where Resonant had advised that it was suboptimal and that it presented significant risks to the council.
959. Resonant's final report was submitted to the council after the council had determined to execute the agreement but before the agreement was executed. The council appears to have terminated Resonant's services shortly after the report was submitted.
960. The final report concluded that the PPA offered by EDL was significantly more expensive than available commercial alternatives and recommended, *inter alia*, that the council carefully consider the indicative proposals submitted by Siemens, Epuron and ZEN. The council was otherwise urged not to execute the PPA unless it was completely underwritten by the State Government and various other conditions by EDL were met.

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961. The final report also asserted that there were potential savings of \$85 million available to the council at the open market.
962. The contents of the final report should have been of profound concern to the council, although there is no evidence before me that they were.
963. There is no evidence before me to suggest that the council's administration or elected members ever meaningfully discussed the contents of the final report, either formally or informally.
964. The council's elected body convened on at least five separate occasions in the period between the 19 January 2016 resolution and the execution of the PPA on 30 March 2016. The final report was not tabled before any of these meetings.
965. There is no evidence before me to suggest that the elected body discussed the matter of the hybrid renewable project at all during this period.
966. Mr Hitchcock appears to have been supplied with a copy of Resonant's final report on 24 March 2016. There is no evidence that he sought to discuss the contents of the report with the elected members. That omission needs to be viewed in context, however.
967. The council's failure to properly consider the conclusions expressed in Resonant's final report is inexcusable.
968. The conclusions expressed in the final report, if accepted, demonstrated that the council had resolved to execute an agreement that was significantly more expensive than other available options, that was suboptimal on its terms and which posed considerable, long-term risks to the council.
969. If the council was of the view that these concerns were valid then it was incumbent upon it to seek urgent legal advice as to the consequences of it rescinding the 19 January 2016 resolution.
970. If, to the contrary, the council was of the view that Resonant's advice was not reliable then it was of critical importance that it set out and document its conclusions in this regard.

The 19 January 2016 resolution

971. I have already criticised the failure of Mr Renshaw to table a copy of Resonant's draft reports, the council's legal advice and the BESTEC report before the council's 19 January 2016 meeting.
972. It is also inexcusable that a copy of the PPA and the draft versions of the Letter of Comfort and Deed of Grant that had been provided by the State Government were not tabled at this meeting.
973. There is in fact no evidence before me that a version of the PPA was ever tabled before the elected members of the council.
974. On the information available to me, I am not satisfied that Mr Renshaw satisfied his obligation under section 83(4)(b) of the Local Government Act to supply the elected members with a copy of each document to be considered at the meeting.

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975. The elected members should never have resolved to execute the PPA in the absence of these documents.
976. It has been necessary for me to reconstruct the council's reasons for executing the agreement because the relevant resolution does not record why the council was satisfied that the project presented value for money and because Mr Renshaw's report to the council in support of the resolution does not meaningfully speak to this issue.
977. Mr Renshaw's evidence was that he came to recommend that the council execute the agreement on the strength of the State Government's due diligence concerning the project and in light of the assurances provided by Mr Koutsantonis in the Letter of Comfort.
978. In respect of the former consideration, Mr Renshaw frequently deferred to the State Coordinator-General's input concerning the project, as he understood it.
979. Mr Renshaw was plainly mistaken in his understanding of the input provided by the State Coordinator-General. The substantive project was not reviewed under the Unsolicited Proposals Guidelines.
980. Although I accept that Mr Renshaw was genuine in his belief that the State-Coordinator General had provided advice concerning the procurement process to be adopted in respect of the project, I am unable to conclude that this belief stemmed from a miscommunication from the department.
981. By his own admission Mr Renshaw never reviewed a copy of the State Coordinator-General's letter to EDL. Had he done so, it would have been immediately apparent that the USPSC's consideration of the project did not extend beyond the relatively insubstantial matter of the crown leases.
982. It was plainly inappropriate for Mr Renshaw to rely so heavily upon an understanding of the terms of an assessment that he had not personally reviewed.
983. The report tabled by Mr Renshaw at the 19 January 2016 meeting did not speak to the assessment by the State Coordinator-General. The report did not advert to the purported benefits of the agreement, the reasons for contracting with EDL to the exclusion of other suppliers or what options existed in the event that the council determined not to execute the agreement.
984. Mr Renshaw's report also did nothing to respond to or address the concerns that had been expressed by Resonant and did not otherwise attempt to reconcile the recommendation in favour of executing the agreement with the council's earlier criticisms of the project.
985. If it was Mr Renshaw's opinion that the modifications to the Letter of Comfort proposed by the State Government somehow satisfied those earlier criticisms, that position should also have been clearly communicated in his report to the elected members.
986. The report tabled by Mr Renshaw before the meeting was clearly inadequate to support a recommendation to enter into a contract of this scale and significance.
987. The council's resolution to execute the PPA was made without any direct consideration of the contract or associated agreements, in the absence of a thorough or convincing report from the council's administration recommending in favour of the project and in circumstances where the only qualified expert retained by the council vehemently advised against it doing so.

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988. The resolution also failed to identify why the council deemed it appropriate to contract with EDL in circumstances where another provider, ZEN, had drastically underquoted EDL's figures.
989. The resolution to execute the agreement was in any case deficient because it was made in circumstances where the PPA had not been tabled before the meeting and because it did not expressly identify what version of the document was to be executed or, given that the document was not yet finalised, contemplate further revisions to the document being made.
990. Several of the elected members present at the 19 January 2016 meeting submitted that they felt pressured to vote in favour of the agreement in light of certain comments purportedly made by Mr Renshaw.
991. Mr Renshaw is said to have adverted to a risk that the State Government would withdraw the RAES subsidy in the event that the agreement was not executed. Some councillors went further in submitting that Mr Renshaw also claimed that EDL would be entitled to seek damages in such a scenario.
992. It would have been seriously misleading for Mr Renshaw to have presented either scenario as a real possibility to the elected body.
993. There is no evidence before me that the State Government ever suggested to Mr Renshaw that the continued provision of the RAES subsidy was contingent on the council executing the PPA.
994. Mr Renshaw's evidence was that during the 3 December 2015 meeting Mr Koutsantonis gave him the impression that the State Government would not be prepared to subsidise an alternative project. Mr Renshaw did not advert to any particular statement from Mr Koutsantonis that caused him to reach this impression.
995. There is no evidence before me to suggest that EDL or KelledyJones adverted to the possibility of EDL taking legal action if the council resolved not to execute the PPA.
996. Mr Renshaw's account of the 19 January 2016 meeting is, of course, substantially different to the versions put forward by the elected members.
997. It is not necessary that I determine precisely what was said by Mr Renshaw during the 19 January 2016 meeting. The elected members themselves bear ultimate responsibility for the resolution to execute the agreement.
998. In any case, no attempt was made to rescind the 19 January 2016 resolution in light of the conclusions that were subsequently expressed in Resonant's final report or in light of the subsequent termination of Mr Renshaw's employment. There is no evidence to suggest that the council sought legal advice as to the consequences of it doing so in the circumstances.
999. None of the elected members present at the 19 January 2016 meeting have put forward a satisfactory explanation as to whether and how they came to be satisfied that the PPA presented value for money. Of the five elected members present at the meeting, only Cr Reynolds directly responded to my query concerning this issue.
1000. The responses received from the relevant elected members do not lead me to conclude that they had a sound understanding of the PPA or the associated documents.

1001. On the evidence before me, I am not satisfied that the council's elected body gave meaningful consideration to the terms and consequences of the PPA and the associated documents.

1002. I am also not satisfied that the elected body reasonably satisfied itself that the agreement presented value for money.

Conclusion

1003. I have identified the following errors on the part of the council:

- failure to ensure that key records concerning the project were created, stored and adequately maintained
- failure to maintain a legible, centralised project file concerning the project
- failure to appropriately qualify early letters of support for the project
- failure to anticipate and appropriately manage exclusive negotiations with EDL
- failure to appropriately consider and document the terms under which the department would contribute to the project's development
- failure to adhere to legal advice or otherwise sufficiently rationalise the decision not to adhere to legal advice
- failure to advert to the existence and terms of prior legal advice concerning the project
- failure to seek updated legal advice on the project's capacity to satisfy the terms of its Procurement Policy
- failure to seek further legal advice in response to Resonant's summary review and final report
- failure to obtain and consider a prudential report that sufficiently addressed the requirements of section 48(2) of the Local Government Act
- failure to consider and observe the terms of its Prudential Management Policy
- failure to obtain a supplementary prudential report in light of subsequent developments
- failure to consider and observe the terms of the Procurement Policy, including
 - failure to employ the procurement method recommended by the Procurement Policy
 - in not employing the procurement method recommended by the Procurement Policy, failure to waive compliance with the policy and failure to appropriately document the basis for doing so
- failure of the council's senior administration to ensure that the elected body considered and decided upon matters of strategic importance
- failure of the council's governing body to exercise meaningful oversight over the activities of the council's senior administration in respect of the project
- failure to seek qualified, independent advice in respect of the project in a timely manner
- failure to meaningfully consider Resonant's advice concerning the project
- failure to rationalise and document the decision not to follow Resonant's advice, including the decision to execute the PPA in the absence of a market procurement process
- failure to reconsider or otherwise sufficiently rationalise the resolution to execute the agreement in light of the conclusions expressed in Resonant's final report
- failure to obtain and consider a copy of the USPSC's determination in respect of the project
- failure of the council's senior administration to ensure that the report in support of the recommendation to execute the agreement contained all information necessary to inform that decision

- failure to ensure that key documents were tabled at the 19 January 2016 meeting, including:
 - the PPA itself
 - the draft Letter of Comfort and draft Deed of Grant
 - the April 2014 and December 2015 KelledyJones advice
 - the BESTEC report
 - Resonant's draft review and summary review concerning the project
- failure to ensure that the resolution to execute the agreement was made on consideration of the terms of the agreement
- failure to ensure that the resolution to execute the agreement was adequately rationalised and documented
- failure to ensure that the resolution to execute the agreement identified what version of the document was to be executed or contemplated further revisions to the document being made
- failure of the council's governing body to give meaningful consideration to the terms and consequences of the agreement.

1004. In my view, the practices of the council identified above resulted in the substantial mismanagement of public resources because they caused the council to commit to expend in excess of \$100 million in circumstances where the council did not observe established procurement and prudential processes and did not satisfactorily demonstrate that the transaction presented value for money.

1005. The council responded to my provisional report to indicate that it does not accept that it committed maladministration in public administration. The council largely did not engage with the criticisms expressed in the preceding passages of this report, however sought to assign primary responsibility for the execution of the agreement with Mr Hitchcock and, to a lesser extent, Mr Renshaw and the department.

1006. The council submitted that Mr Hitchcock acted inappropriately by failing to independently assess the merits of the PPA and the position expressed by Resonant.

1007. The council submitted that Mr Hitchcock should have sought to investigate the circumstances surrounding the council's resolution to proceed with the PPA and, upon becoming aware of Ms Provatidis' reservations about the agreement, should have 'immediately convene[d] a council meeting to ascertain whether there were other issues of concern that may have lead [the council] to rescind the 19 January 2016 Resolution.'

1008. The council sought to draw my attention to several authorities pertaining to the responsibilities of corporate directors, submitting:

We refer you to three authorities⁵⁵⁴ plus an extract from Ford's Principles of Corporation how [sic] the general propositions we have put to you as to how Australian Courts have held directors of corporate entities liable in circumstances where they have either failed to have exercised independent judgement in the discharge of their duties or in case of Southern Resources did act using the required skill and judgement that the law demands of directors of companies. We say that the CEO of a South Australian local government body has the same obligations to that body as does a director of a public or private company to it and the shareholders.

1009. I must confess that I find this submission wholly counterintuitive. It confuses the responsibilities of a council's elected body (surely the direct equivalent to the board of directors in the proffered analogy) with that of its administration. It neglects to recognise

⁵⁵⁴ Being *Re Idyllic Solutions Pty Ltd, Australian Securities and Investments Commission v Hobbs* [2012] NSWSC 1276; *Southern Resources Ltd v Residues Treatment & Trading Co Ltd* (1990) 56 SASR 455 and *ASIC v Healey* (2011) 278 ALR 618.

that the first responsibility of a council's Chief Executive Officer under the Local Government Act is 'to ensure that the policies and lawful decisions of the council are implemented in a timely and efficient manner.'⁵⁵⁵

1010. I consider that the council's submissions in respect of Mr Hitchcock's responsibility for the agreement generally belie the circumstances of Mr Hitchcock's secondment to the council and the history of the project up until that date.

1011. The council otherwise contended:

[The council] submits that whilst it was partially responsible for passing the Resolution on 19 January 2016 to execute the PPA that [sic] the former CEO, Renshaw by threatening those Elected Members present at the meeting with being held personally liable for any loss and damage that Council could sustain by not executing the PPA was negligent in his duties to Council by in effect bullying them into passing the said Resolution when at all times Council was fully entitled to and should have refused to execute the PPA.

1012. I have already made various criticisms of Mr Renshaw's approach to the matter of the 19 January 2016 meeting, which I do not repeat here. I do not consider the council's submissions meaningfully add to what has already been expressed. I draw attention to the above submissions, however, for the remarkable contention that the council is only 'partly responsible' for a resolution that was unanimously carried by its elected body.

1013. The council otherwise submitted:

[O]fficers of the Department of State Development imposed undue influence and improper influence over DCCP Elected Members so as to meet the State Government's desire to implement renewable energy programs in rural South Australia and to avoid the risk that it perceived of [EDL] losing Federal Government funding though the ARENA grant being withdrawn from the EDL Coober Pedy project.

1014. I do not consider these submissions to be at all supported by the evidence supplied to my investigation.

1015. I am not persuaded to reconsider the conclusions foreshadowed in my provisional report.

1016. I am accordingly satisfied that the council committed maladministration in public administration for the purposes of section 5(4) of the ICAC Act.

Opinion and recommendation

Maladministration in public administration

It is my final view that the District Council of Coober Pedy committed maladministration in public administration for the purposes of section 5(4) of the ICAC Act through its negotiation and execution of a Power Purchase Agreement with Energy Generation Pty Ltd.

This remains one of the most serious examples of maladministration in public administration I have observed since the relevant provisions of the ICAC Act were enacted.

I remain concerned that the elected body appears unwilling to accept ownership and responsibility for the decision to execute the agreement.

⁵⁵⁵ Section 99(1)(a).

Those concerns have been underscored by the council's submissions in response to my provisional report. Of the eleven or so pages of those submissions, approximately nine are devoted towards Mr Hitchcock's involvement in the process. Mr Hitchcock, it will be recalled, was seconded to the council for a period of approximately two weeks before his and Ms Provatidis' execution of the agreement.

The decision to execute the PPA on the information presented to the council was a unanimous one.

In my view, each of the elected members remaining on the council who participated in that decision should now consider their position.

I intend to provide a copy of this report to the Minister for Transport, Infrastructure and Local Government at the time it is supplied to the council.

In the circumstances, I invite the Minister for Transport, Infrastructure and Local Government to:

- consider whether to exercise his powers of direction under section 273(2)(b) of the Local Government Act; and/or
- consider whether to recommend to the Governor that the council be declared to be a defaulting council under section 273(2)(c) of the Local Government Act.

Compliance with the State Records Act

It is also my final view that the council's failure to ensure that official records in its custody concerning the project were maintained in good order and condition appears contrary to section 13 of the State Records Act and, accordingly, appears contrary to law for the purposes of section 25(1) of the Ombudsman Act.

In my provisional report I foreshadowed recommending that the council urgently adopt and implement a policy governing the creation, storage and retention of official records.

I am satisfied that such a recommendation is no longer necessary in light of the council's enactment of a Records Management Policy on 15 May 2018.

I nevertheless intend to provide a copy of my final report to the Director of State Records.

Whether the District Council of Coober Pedy, by executing a Power Purchase Agreement with Energy Generation Pty Ltd in circumstances where that agreement was not considered by the elected body in its final form, acted in a manner that was wrong

1017. The terms of the second referral invite me to consider whether it was prudent for Mr Hitchcock and Mayor Provatidis to execute the PPA in circumstances where the agreement had not been considered by the council's elected body in its final form.

1018. I have already criticised the circumstances and terms of the council's 19 January 2016 resolution to execute the agreement insofar as that resolution was not made on direct consideration of the PPA, did not expressly identify what version of the document was to be executed and did not otherwise contemplate further revisions to the document being made.

1019. Mr Hitchcock submitted that finalisation and execution of the PPA was one of a number of important matters that he was required to address upon his secondment to the council.

1020. Mr Hitchcock's recollection is that upon his secondment he was informed by KelledyJones that the council had resolved to execute the PPA but had yet to do so. According to Mr Hitchcock, he was specifically advised that it would not be necessary for him to negotiate the terms of the PPA and that the document itself was in the 'tidying up' stage.
1021. Mr Hitchcock submitted that shortly after his arrival in Coober Pedy he reviewed the terms of the council's resolution and the version of the PPA that existed at that time.
1022. Mr Hitchcock was subsequently provided with an execution copy of the PPA. According to Mr Hitchcock, he was also provided with a list of changes that had purportedly been made to the previous version of the document.
1023. Mr Hitchcock submitted that he was:
- assured [by KelledyJones] that the execution copy was not materially different from the agreement which Council had approved in January 2016 but that the language had been tidied up.
1024. The council submits that I should treat Mr Hitchcock's evidence in respect of these and other issues with considerable caution. In light of the council's comments, I have reconsidered Mr Hitchcock's submissions to my investigation. In doing so, I have also scrutinised the documentary evidence (such as still exists) relating to the period of Mr Hitchcock's secondment to the council.
1025. Excepting the issue of his receipt of Resonant's final report, I consider that Mr Hitchcock's evidence is largely supported by the records supplied to my investigation. In the circumstances, I do not consider that much turns on the correction issued by Mr Hitchcock in respect of that issue. Mr Hitchcock in his original submissions to my investigation acknowledged speaking with Mr Davies and acknowledged being made aware of Resonant's criticisms of the project.
1026. I have compared the version of the PPA that existed at the time of the council's resolution to execute the agreement⁵⁵⁶ with the version executed by the parties on 30 March 2016.
1027. The amendments made to the document during this period appear to have been solely directed towards revising the construction and commissioning timetable (which had provided for a project start date of 31 January 2016) and clarifying the circumstances under which the council would be obliged to provide the commissioning certificate to EDL.
1028. The latter class of amendments imparted additional obligations upon both the council and EDL. I do not consider these changes to be particularly significant when viewed in their proper context.
1029. The need for these changes, if not their precise form, could have been anticipated and addressed at the time of the council's resolution to execute the agreement.
1030. I do not consider that the changes made to the document would have had any impact upon the council's determination to execute the agreement because I am not satisfied that the elected body formally considered the terms of the PPA in any form.
1031. I have considered and largely accept Mr Hitchcock's explanation for how he came to execute the agreement in the circumstances. In my view, it was not unreasonable for

⁵⁵⁶ Last modified on 14 December 2015.

Mr Hitchcock to conclude that the council's solicitors were across the matter and would have alerted him to any irregularities in the course adopted.

1032. That being said, I consider that the PPA should not have been executed on the strength of the 19 January 2016 resolution because that resolution was not made on a consideration of the terms of the document in its final form, and because the changes subsequently made to the document had the effect of altering some of the obligations arising under the agreement.

1033. I am of the view that by executing the PPA in circumstances where the agreement was not considered by the elected body in its final form, the council acted in a manner that was wrong for the purposes of section 25(1) of the Ombudsman Act.

Opinion

It is my final view that by executing a Power Purchase Agreement with Energy Generation Pty Ltd in circumstances where that agreement was not considered by the elected body in its final form, the District Council of Coober Pedy acted in a manner that was wrong for purposes of section 25(1) of the Ombudsman Act.

I do not consider it necessary to make any recommendations in respect of this issue.

Whether the Department of State Development, through its participation in the development of a Power Purchase Agreement between the District Council of Coober Pedy and Energy Generation Pty Ltd, and by recommending that the Minister for Mineral Resources and Energy execute a Deed of Grant and Letter of Comfort subsidising payments made by the District Council of Coober Pedy under that agreement, committed maladministration in public administration

1034. The referral requires me to consider whether an issue of maladministration in public administration arises from the department's involvement in the development of the PPA and from its recommendation that Mr Koutsantonis execute the Letter of Comfort and Deed of Grant.

1035. It is not suggested that the actions of the department resulted in an irregular and unauthorised use of public money and I have accordingly considered whether a practice, policy or procedure of the department resulted in the substantial mismanagement of public resources.

1036. I consider that aspects of the department's participation in the development of the project could have been better managed.

1037. The department expressed early support for EDL's application for ARENA project funding by the letters it supplied to EDL dated 15 November 2013 and 20 May 2014.

1038. The Unsolicited Proposals Guidelines did not exist at the time of either letter of support and it is in any case doubtful that EDL's request for State Government support would have been an 'unsolicited proposal' for the purposes of the Guidelines.⁵⁵⁷

1039. I do not consider there was anything inherently inappropriate in the department expressing qualified support for EDL's funding application. The project clearly had the potential to align with certain State Government priorities. The support expressed by

⁵⁵⁷ Although the Unsolicited Proposals Guidelines define an 'unsolicited proposal' as including '[s]eeking Government support (financial regulatory or other support) to undertake a specific activity', it does not appear that the support requested by EDL could have been assigned a dollar value so as to meet the minimum financial threshold for an unsolicited proposal.

the department did not commit the State Government to subsidise a new Power Purchase Agreement between EDL and the council, nor did it invite or foreshadow exclusive negotiations between EDL and the State Government in respect of the project.

1040. That being said, I do not consider the support offered by the State Government was sufficiently qualified.
1041. The 15 November 2013 letter of support recognised that the department had an interest in the project arising from the RAES subsidy arrangements. That letter went on to observe that the department supported EDL's submission for project funding to ARENA 'provided that the project does not adversely affect the subsidy paid to [the council] under the RAES scheme.'
1042. The second letter of support from the department, dated 20 May 2014, expressed support for further negotiation of the proposal on substantially similar terms ('...provided that the project does not adversely affect the subsidy....').
1043. Mr Smith was not responsible for drafting either letter of support, but his evidence in respect of the formulation of the 20 May 2014 letter is helpful to understanding the position adopted by the department:
- We were looking at it from a perspective of, you know, how does this impact the subsidy that's going to be paid? Is it fair and reasonable? Is it commercially viable? [...] [T]he basic premise was that we weren't going to support something that was going to cost significantly more.
1044. That position is problematic because it suggests that it was the department's view that the State Government would be prepared to subsidise a new Power Purchase Agreement provided it did not result in an increase to the subsidies paid under the RAES scheme.
1045. As Mr Smith acknowledged, it was in the State Government's direct financial interest for the amount payable by the council under any new Power Purchase Agreement to be minimised as far as reasonably possible because it was reasonable to expect that the amount paid in subsidies by the State Government would largely turn on the terms of that agreement.
1046. In my view, the department's expression of support for the proposal should have been further qualified to reflect the need, owing to the subsidy arrangements, for the costs of any new Power Purchase Agreement to be fair and reasonable when considered against comparable alternatives. The department acknowledged and accepted this criticism in its response to my provisional report.
1047. As I have already observed, the letters of support on their terms did not commit the department or the State Government to any particular funding outcome. The terms of the letters are important, however, because they had the potential to shape the nature and objectives of the department's contributions to the project.
1048. I have already expressed the view that it would have been prudent for the council and the department to have reached a more formal understanding of the department's role in the process because the council appears to have lacked a solid grasp of the department's objectives and responsibilities.
1049. According to Mr Smith, the department understood its role in the process as being to '[mitigate] any legal and financial and technical risks to the government through the Deed of Grant'.

1050. Mr Smith submitted that the question of whether the proposal presented value for money was primarily a matter for the council to consider, owing to the contractual relationship between the parties:

I think the value for money thing is more of a council decision. You know, it's their procurement. Right. They were the ones that were procuring this; they were the ones that had the direct contractual relationship with EDL. [...] [The] [v]alue for money side of things is an area that the council should be looking at under their procurement guidelines, and given that it is their procurement.

1051. Mr Smith nevertheless affirmed that the department's review of the project included an assessment as to whether it presented value for money to the State Government through the subsidy arrangements:

Of course, we did [assess whether the proposal presented value for money to the State]. You know, as the people bearing all the financial risk effectively, we did our own due diligence to make sure that this wasn't crystallising any financial liabilities for us or legal liabilities.

1052. The view that the department consistently articulated to the council was that it was the council's responsibility to determine whether or not it would enter into the PPA, however it could do so in the knowledge that the State Government had reviewed the project to the State's satisfaction and was prepared to subsidise the council's electricity supply costs over the life of the agreement.

1053. Mr Smith acknowledged that the council's decision to proceed with the agreement was informed by the department's assessment of the project:

[F]rom our perspective they were relying on us having done our own due diligence as energy experts to provide them, you know, with a bit of information around we have done our financial analysis, we have done our technical analysis, we have done our legal review, we are comfortable that this doesn't create a significant level of risk to council or the State government.⁵⁵⁸

1054. According to Mr Renshaw, the council's decision not to undertake a market procurement process was made in deference to 'advice' from the department:

[T]he issue around the -- concern about the probity of the procurement was dealt through the advice of the State. [...] Whether -- whether our decision to rely upon the State's advice was wrong, or sound or unsound, reasonable or unreasonable, I'm not saying, but we were of the view that we had put that matter to the State and that the State had replied back to us to this effect and that we were, that the matter had been dealt with.

1055. I make it clear that I have not located any records to suggest that the department or Mr Koutsantonis ever represented to the council that the State Government was satisfied that the project did not need to be exposed to competitive tension. I consider it highly unlikely that such a view was ever articulated to the council. It is more likely that Mr Renshaw misunderstood the department's position.

1056. It is nevertheless concerning that the department and the council, in reaching their respective decisions as to whether to support the project, each appear to have proceeded on the understanding that the other bore ultimate responsibility for assessing whether the costs of the project were fair and reasonable.

1057. It was not unreasonable for the department to expect that the council's procurement guidelines would oblige the council to satisfy itself of the value of the project.

⁵⁵⁸ Interview with N Smith, 2 June 2017, transcript at 67:2.

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1058. That being said, it would have been profoundly irresponsible for the department to recommend that Mr Koutsantonis subsidise the PPA in circumstances where the department had not directly considered whether the costs of the agreement could have been materially improved by exposure to competitive tension.
1059. I say this because, as previously observed, the State Government had a direct financial interest in minimising the costs of the agreement, and because it should have been apparent to the department that the council was not operating effectively under Mr Renshaw's management and that the council's administration and elected body lacked the necessary competencies to assess the value of the agreement.
1060. It should also have been apparent to the department that the council, once satisfied that the State Government would subsidise the agreement, had very little incentive to bring down the amount payable to EDL.
1061. It is not sufficient to observe that the department was not a party to the PPA and could only abide the council's decision in respect of the matter. The department's review of the technical and commercial aspects of the project preceded the council's decision to execute the PPA. The council's position was that it could not execute the PPA in the absence of certain assurances from the State around the future subsidy arrangements. This was the ostensible reason for the Letter of Comfort.
1062. Such a contention also overlooks the nature of the department's participation in the development of the project and the extent to which the State came to shape the outcome of that process. Clauses of the PPA were in fact redrafted on input from the State. Advice from the department certainly appears to have been instrumental to the council's decision not to pursue the only alternative proposal put before it.
1063. These comments are largely directed toward how the department conceptualised its role in the process. Although I think there were flaws in the department's approach, for reasons that follow, I am ultimately satisfied that the department gave sound and meaningful consideration to the value presented by the project and the alternatives reasonably available to the council.
1064. During interview with my investigation, Mr Smith made submissions about the concept of 'value for money' and the various considerations that informed the department's assessment of the value presented by the project.
1065. Mr Smith submitted that the value of a proposal should not be determined solely by reference to its cost or solely by reference to the possibility of achieving savings through an alternative supplier. I accept that submission.
1066. The definition of 'value for money' within the State Procurement Board's *Procurement Policy Framework* is of some assistance: 'the extent to which the proposed solutions will deliver the optimum combination of whole-of-life cost and quality (not-cost) factors.'
1067. Mr Smith provided extensive written submissions as to the steps the department took to satisfy itself of the value of the proposal. I have not reproduced the whole of those submissions in this report. I simply note that the department's submissions appear generally consistent with the contemporaneous records that I have reviewed such that I am satisfied that the department actively and meaningfully scrutinised the technical and commercial aspects of the proposal.
1068. I am also satisfied, notwithstanding the lack of competitive tension, that the department gave meaningful consideration to whether the total costs of the project were reasonable when viewed in light of the prevailing market conditions. It seems to me that the

department was in an unusually good position to conduct this assessment given the other market procurement processes it was overseeing at the time.

1069. I observe that the confidential information concerning the Marree tender process supplied by the department tends to support the department's position that the price of energy under the EDL project is not excessive when compared to the complying bids received in respect of that process.
1070. I have drawn other conclusions from the complying bids submitted under the Marree process which, owing to my intention to observe the confidentiality of the information supplied, I do not set out in this report. I simply note that this information tends to support contentions made by the department as to what might have been available to the council on the open market.⁵⁵⁹
1071. I am cognisant of Mr Davies' criticisms of the expectations imposed upon suppliers under the Marree tender process. Having reviewed the terms of reference associated with the process, it does not appear to me that the requirements imposed by the department are irrational or overtly unreasonable. I must acknowledge, however, that this is a matter that falls outside of my area of expertise.
1072. On the information supplied by the department, I conclude that the agreement was not unduly profitable to EDL.
1073. I have carefully considered the terms of the ZEN proposal and the department's response. The outcomes suggested by ZEN were no doubt attractive and, as Mr Smith acknowledged, the existence of the proposal suggested that there may have been a competitive market for the council's energy supply arrangements. The department's contemporaneous advice to the council in respect of ZEN's approaches nevertheless evidences a careful consideration of the merits of the proposal and the risks associated with pursuing it. Having reviewed the proposal documentation, it does not appear to me that the advice provided by the department was altogether unreasonable.
1074. It has been suggested that the department became in some way fixated on the council proceeding with the EDL project, or that the department otherwise lacked the objectivity necessary to meaningfully assess the project. I do not consider either contention is supported by the records supplied to my investigation.
1075. In some ways, I think, the department may have been a little too ready to mediate in favour of the parties reaching an agreement during the latter stages of the negotiations. The department's actions in this regard are somewhat explicable when considered in light of the behaviour of the council. I simply note that the situation called for a sense of detachment that is not always evident in the department's internal communications relating to this period.
1076. On the information before me there is no basis to conclude that the department exerted improper pressure on the council to proceed with the agreement.
1077. It is clear that the department gave real consideration to the risks associated with the project. That is evidenced in the department's communications with SABBLE and the SWOT analysis produced by Mr Smith. Contemporaneous records demonstrate that the department secured modifications to the project in light of specific concerns that were identified in the course of the department's technical review.
1078. The department's SWOT analysis identified that there was a risk that '[h]igh penetration of distributed solar' would reduce revenue to the State Government and increase the

⁵⁵⁹ Here I specifically refer to the information contained within sub-paragraphs 3 and 5 of the document.

cost of the RAES subsidy. I understand this to be a reference to the risk of grid defection under the agreement.

1079. Resonant identified grid defection as a 'crucial' risk associated with the project. Mr Davies reiterated those concerns in his evidence to my investigation.
1080. Mr Smith submitted that the sort of risk event that Resonant adverted to was not likely to occur. He observed that the alignment of prices under the RAES scheme to the Adelaide metropolitan area means that it is unlikely that the Coober Pedy community will be any more inclined to go 'off-grid' than their metropolitan counterparts.
1081. Any assessment of risk necessarily involves a degree of speculation based on observable evidence and, ultimately, a person's professional judgement. The appropriate amount of weight to be assigned to a particular risk event is a matter on which reasonable minds may sometimes differ. Mr Davies may prove correct in his assessment of the likelihood of grid defection under the agreement; this is not an issue in which I feel qualified to express an opinion. In the circumstances, however, I am satisfied that the department identified and considered this particular risk and, based on professional judgment, assigned what it considered to be an appropriate amount of weight to the matter. That is, in my view, as far as my investigation can take the issue.
1082. In other cases, I am of the opinion that certain of Resonant's concerns appear overstated. Having reviewed the PPA, I accept the department's submissions in respect of the purpose and nature of the liquidated damages clauses and the remedies available to the council in the event of a fundamental breach of the agreement by EDL. The asset transfer provisions are indeed complex; I simply note that these were negotiated and drafted in accordance with CSO advice and that the transfer charge schedule was determined after extensive negotiations involving input from both the CSO and DTF.
1083. I note that successive versions of the PPA were reviewed by the CSO and renegotiated in accordance with CSO advice. It is clear that the CSO approached the matter on a proper understanding of the State's anticipated exposure under the various instruments.
1084. I note that it was SABBLE's view in December 2014 that the project was 'very likely to be the lowest cost option given the ARENA funding support.'
1085. It is clear that the project gained a certain momentum behind it and, as I have already observed, the department's approach to its responsibilities may have benefited from greater structure. There will always be certain risks in entertaining an unsolicited proposal. It is of note that the department appears to have recognised this in certain of its early internal communications concerning the project.
1086. Although I am cognisant of Mr Smith's submissions in respect of this issue, I consider that the department should have sought specific legal advice in respect of the question of whether the Unsolicited Proposals Guidelines extended to the instruments executed by Mr Koutsantonis. In my view, it is at least arguable that the council's request for additional financial guarantees from the State Government amounted to an unsolicited proposal.
1087. In my view, the briefings submitted to Mr Koutsantonis in support of the recommendations that he execute the Letter of Comfort and Deed of Grant were inadequate. Mr Koutsantonis should have been made explicitly aware that the project had not been exposed to competitive tension. Mr Koutsantonis should also have been informed that a consultant engaged by the council had represented that significantly

more affordable alternatives existed on the open market.⁵⁶⁰ These were relevant considerations that should have informed Mr Koutsantonis' decision to execute the documents.

1088. The department in its response to my provisional report submitted that Mr Koutsantonis was 'fully and properly briefed at all material times'. In this regard, the department submitted that the lack of a tender process was raised during its regular weekly meetings with Mr Koutsantonis.

1089. Accepting those submissions, I nevertheless consider that the information at issue should have been included in the relevant briefings.

1090. More importantly, in my view, Mr Koutsantonis should have been briefed as to how and why the department was satisfied that subsidising the project presented value for money in circumstances where the project had not been exposed to competitive tension. I do not consider either briefing sufficiently addressed this consideration.

1091. The department in its response to my provisional report submitted that such matters are typically required to be addressed in the submission put before Cabinet. The department further adverted to its reference in each briefing to ARENA's 'rigorous technical and financial due diligence'. The department submitted that it was appropriate for Mr Koutsantonis to defer to the department's judgement as to whether the project was fairly and reasonably priced. I accept each of these submissions. They are consistent with the conclusions I have reached in respect of Mr Koutsantonis' conduct, below.

1092. In my view, it was not sufficient that the 22 March 2016 briefing spoke to the anticipated savings of the project as against a 'business as usual' case, because that was not the only relevant reference point.⁵⁶¹

1093. Taking into account the department's submissions in response to my provisional report, I accept that the 'business as usual' case (that is, 100% diesel generation) may have been one relevant reference point by which to measure the project. I remain of the view, however, that the department should have sought to brief the Minister in respect of how the project compared to other options available on the market, albeit in a manner that may have recognised the difficulties inherent in such an assessment.

1094. Mr Smith submitted that it was his understanding that the project's ability to withstand competitive tension was addressed in the submission put before Cabinet. My powers under the Ombudsman Act do not permit me to compel the production of information relating to Cabinet proceedings and, regrettably, I have been unable to draw any conclusions in respect of this issue.

1095. Notwithstanding the possibility that the issue had been properly assessed by Cabinet, I am of the view that it was wrong within the meaning of section 25(1)(g) of the Ombudsman Act for the department to have omitted to demonstrate in the relevant briefings to Mr Koutsantonis that the project was fairly and reasonably priced when considered against comparable projects.

1096. I say this because this was a fundamental consideration informing any assessment of the value of the subsidy arrangements and because the department was aware that questions had been raised about this issue and it was important that Mr Koutsantonis proceed on a full understanding of the facts.

⁵⁶⁰ I note and accept Mr Koutsantonis' evidence that he was 'advised by [the department] that the Council had engaged a consultant who had raised concerns but that it was [the department's] view that those concerns were unmeritorious.'

⁵⁶¹ My provisional report observed that 'this was not the relevant reference point'; a statement which I have now qualified.

1097. I have carefully considered Mr Davies' submissions in respect of the overall merits of the PPA. I do not consider the terms of the referral require me to express a definitive position in respect of the value of the project. In my view, the statutory definition of maladministration in public administration, insofar as it relates to the substantial mismanagement of public resources, is often as much about processes as it is about outcomes.

1098. In the circumstances, it is sufficient to say that I do not consider resources were substantially mismanaged by the department in this instance because, some criticisms notwithstanding, I am ultimately satisfied that the department undertook reasonable endeavours to satisfy itself that subsidising the project presented value for money to the State.

1099. It follows that I am not satisfied that the department committed maladministration in public administration.

1100. I also make it clear that I do not consider that the conduct of any officer of the department resulted in the substantial mismanagement of public resources or involved substantial mismanagement in or in relation to the performance of official functions.

Opinion and recommendation

Maladministration in public administration

It is my final view that the Department of State Development, through its participation in the development of a Power Purchase Agreement between the District Council of Coober Pedy and Energy Generation Pty Ltd, and by recommending that the Minister for Mineral Resources and Energy execute a Deed of Grant and Letter of Comfort subsidising payments made by the District Council of Coober Pedy under that agreement, did not commit maladministration in public administration.

Briefings to the Minister

It is my final view that the Department of State Development, by omitting to demonstrate in relevant briefings to the Minister for Mineral Resources and Energy that a proposed Power Purchase Agreement between the District Council of Coober Pedy and Energy Generation Pty Ltd was fairly and reasonably priced when considered against comparable projects, acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

I have reviewed the relevant briefing template available on the department's intranet. I note that under the heading 'Key Points', the template includes the following prompt (emphasis in original):

The section below outlines any **financial implications**, e.g. any funding, policy (particularly where a deviation from established policy is proposed), legislative or other implications.

In developing the below recommendation I have also considered submissions made by the department in response to my provisional report.

To remedy the error identified above, I recommend that the Department for Energy and Mining⁵⁶² revise its briefing template so as to prompt the author to identify, where relevant to

⁵⁶² The Department for Energy and Mining was established on 1 July 2018. The department in its response to my provisional report submitted that my recommendation should be directed towards the Department for Energy and Mining because at

a procurement activity involving the proposed expenditure of previously uncommitted State funds:

- any procurement method used in connection with the proposed expenditure
- the process by which the project has been assessed
- the outcomes of that analysis (including by reference, where relevant, to any analysis performed by third party consultants or technical experts)
- other information as may be necessary to inform an assessment of the value of proposal.

Whether the former Minister for Mineral Resources and Energy, the Hon Tom Koutsantonis MP, committed maladministration in public administration by committing the State of South Australia to subsidise payments made by the District Council of Coober Pedy under a Power Purchase Agreement with Energy Generation Pty Ltd

1101. Mr Koutsantonis is a public officer for the purposes of the ICAC Act because at all material times he has been a Member of the House of Assembly.

1102. The referral requires me to consider whether Mr Koutsantonis' conduct resulted in an irregular and unauthorised use of public money, the substantial mismanagement of public resources or otherwise involved substantial mismanagement in or in relation to the performance of official functions. That is, whether Mr Koutsantonis committed maladministration in public administration in his capacity as a public officer.

1103. During the period relevant to my investigation, the Minister for Mineral Resources and Energy was also a public authority for the purposes of the ICAC Act.

1104. A public authority commits maladministration in public administration if a practice, policy or procedure of the public authority results in an irregular and unauthorised use of public money or substantial mismanagement of public resources.

1105. I do not think the evidence demonstrates a practice, policy or procedure of the Minister for Mineral Resources and Energy resulted in such an outcome and I have not had further regard to this limb of the definition.

Irregular and unauthorised use of public money

1106. During the period relevant to my investigation, Mr Koutsantonis was generally empowered to enter into a financial arrangement with the council by virtue of section 18 of the Public Finance and Audit Act.⁵⁶³

1107. Treasurer's Instruction 8 required Mr Koutsantonis to obtain Cabinet approval before executing the relevant instruments.

1108. Mr Koutsantonis submitted that Cabinet approved him to enter into a Letter of Comfort in respect of the project, although I do not know what the terms of that approval were.

1109. The terms of the Letter of Comfort in turn required Mr Koutsantonis to enter into the Deed of Grant.

that time it was anticipated that this administrative unit would incorporate the Energy Markets and Programs Division. I have accepted that submission.

⁵⁶³ At the relevant time, Mr Koutsantonis was also the Treasurer.

1110. In the circumstances, I have little choice but to accept Mr Koutsantonis' evidence that his execution of the Letter of Comfort was done in accordance with the approval granted by Cabinet.

1111. On the information before me, I am unable to conclude that there was an irregular and unauthorised use of public money in this instance.

Substantial mismanagement in or in relation to the performance of official functions

1112. By convention, a Minister is responsible for the administration of his or her department and not its day-to-day affairs. Operational matters are properly the responsibility of the Chief Executive and other senior officers of the department.

1113. Although the department was responsible for administration of legislation falling within the Mineral Resources and Energy portfolio, on the information before me it does not appear that Mr Koutsantonis was ever formally proclaimed as responsible for the department.

1114. In any case, it has not been suggested that Mr Koutsantonis failed to exercise appropriate oversight over the department's activities in respect of the PPA, assuming that he was required to do so. I do not consider such an issue otherwise arises from the evidence.

1115. It has not been put to me that Mr Koutsantonis failed to exercise or properly exercise any of his statutory functions and I do not consider such an issue otherwise arises from the evidence.

1116. On the evidence before me, I do not conclude that Mr Koutsantonis' conduct involved substantial mismanagement in or in relation to the performance of his official functions.

Substantial mismanagement of public resources

1117. I have considered Mr Koutsantonis' conduct in executing the Letter of Comfort and Deed of Grant and in respect of the project more generally.

The 3 December 2015 meeting

1118. It has been suggested that the State Government exerted inappropriate pressure upon the council to come to an agreement with EDL and that in doing so it caused or induced the council to execute an agreement that did not present value for money.

1119. It is largely within this context that I have considered the position said to have been conveyed by Mr Koutsantonis during his meeting with Mr Renshaw on 3 December 2015.

1120. According to Mr Koutsantonis, during that meeting he:

told Mr Renshaw that DSD considered the PPA to be a good deal but that if the Council was dissatisfied then it should not enter into the PPA.

1121. Mr Koutsantonis acknowledged that Mr Renshaw expressed 'general concerns' about the project during the meeting. Mr Koutsantonis did not clarify what those 'general concerns' were. When asked whether Mr Renshaw's concerns related to the lack of a market procurement process, Mr Koutsantonis submitted that he 'does not specifically

recall a discussion about a market procurement process'. I acknowledge that the meeting took place some years ago and that Mr Koutsantonis' recollection may have suffered.

1122. I do not consider Mr Koutsantonis adequately responded to my question as to whether Mr Renshaw requested or raised the possibility of the council requesting State Government support for a three- to six-month delay with respect to finalising the PPA. The circumstantial evidence leads me to conclude that Mr Renshaw did so.
1123. I do not think much turns on this issue because it was not the State's responsibility to grant or facilitate such a moratorium.
1124. I simply note that Ministers are expected to lead by example and it would have been helpful if Mr Koutsantonis had been more forthcoming in his response to my direct queries in respect of this and other issues.
1125. I consider that Mr Koutsantonis was also evasive in his written responses as to whether he and Mr Renshaw discussed the matter of the council considering alternative suppliers.
1126. I do not think much turns on the question of whether Mr Koutsantonis expressed an unfavourable view of the council pursuing the ZEN proposal. The department had previously advised the council that that proposal appeared lacking in substance. This was also the advice that the department communicated to the Minister's office in the September briefings. The State Government was a stakeholder in the process and it was not inappropriate for it to caution the council against what the State considered to be an underdeveloped and risky venture.
1127. The question of whether Mr Koutsantonis went further in attempting to discourage the council from considering other alternatives to the EDL project is an important one because it goes to the heart of whether Mr Koutsantonis was inappropriately driving a particular outcome on behalf of the State Government.
1128. That is a particularly serious allegation because, if proven, it would potentially suggest that Mr Koutsantonis' position towards the EDL project was determined by something other than the value presented by that proposal. Consistent with the principle espoused in *Briginshaw*, I have approached the evidence concerning this issue with considerable caution.
1129. Mr Koutsantonis' evidence was that he sought to reinforce to Mr Renshaw that the council was free to pursue any supplier it wished.
1130. Mr Renshaw's evidence was that Mr Koutsantonis articulated that the State was opposed to the council pursuing ZEN or an alternative supplier.
1131. According to Mr Renshaw, his 'sense' from the meeting was that the State would not be prepared to fund an alternative project:

I reckon -- you know how I said I sensed I had a couple of meetings with the Treasurer, so I reckon -- my sense is I can recall in the second meeting, maybe even in the first, it was if we didn't do this project, there would be no more funding support for an alternative project.

[...]

I think it's inappropriate to say this is what I think he was thinking. You can't say that. But the sense I had was that the State view was ARENA are in bed, EDL are in bed, we are in bed, and that's the deal. And if you want to do something else, see you later.

1132. There is no evidence that Mr Koutsantonis met with Mr Renshaw on a second occasion. I consider that Mr Renshaw was mistaken in his evidence on this issue.
1133. As I have already observed, Mr Renshaw did not advert to any particular statement from Mr Koutsantonis that caused him to reach the impression that the State would not fund an alternative proposal.
1134. I have already observed that in respect of certain matters Mr Renshaw did not present as an overly reliable witness.
1135. It is in my view highly unlikely that Mr Koutsantonis sought to convey the impression identified by Mr Renshaw.
1136. This would have been inconsistent with the position Mr Renshaw otherwise describes Mr Koutsantonis as having adopted during the meeting ('...We don't give a toss what you do; it's a decision for the council...'). That description is not inconsistent with Mr Koutsantonis' own characterisation of the position he advanced at the meeting ('...[that] the Council was free to enter into an energy supply contract with any supplier it wished to use and whether to proceed with the PPA was entirely a matter for the Council...') or the position attributed to Mr Koutsantonis by Mr Smith ('...he was always very consistent that it's a council project, if they want to go ahead with it, we are happy to support it. If they don't want to go ahead with it, you know, he's not too fussed....').
1137. I have already observed that I do not consider the department was driving a particular outcome in the process. There is no evidence before me to suggest that Mr Koutsantonis had particularly strong views about the EDL project such that he might have departed from the line being reinforced by the department.
1138. It also strikes me as odd that Mr Renshaw could have gained such an impression and then not addressed it in the 7 December 2015 letter to Mr Koutsantonis or in any of the correspondence between the parties that followed.
1139. On the evidence before me I am not satisfied that Mr Koutsantonis sought to dissuade the council from considering an alternative supplier other than ZEN.
1140. It does not appear to me that Mr Koutsantonis otherwise acted inappropriately during his meeting with Mr Renshaw.

The subsidy commitment

1141. I have considered whether an issue of maladministration in public administration otherwise arises from Mr Koutsantonis' execution of the Letter of Comfort and Deed of Grant.
1142. It has been suggested that Mr Koutsantonis should not have acted to execute the Letter of Comfort and Deed of Grant because to do so was to subsidise an agreement that did not present value for money when compared to alternatives available on the open market.
1143. I have already observed that it was in the State Government's direct financial interest for the amount payable by the council under the PPA to be as low as reasonably

possible because the amount paid in subsidies under the Deed of Grant largely turned on the terms of that agreement.

1144. Mr Koutsantonis submitted to my investigation that the amount paid by the State under the Deed of Grant can in some sense be decoupled from the value of the PPA and the underlying project because, under the terms of the Deed of Grant, the State is not obliged to subsidise expenditure of the council that exceeds the budget previously agreed with Mr Koutsantonis unless that expenditure is 'in the Minister's reasonable opinion, necessary and reasonable' to achieve the Deed of Grant purpose, being 'for the [council] to supply quality, safe and reliable electricity to all customers in Coober Pedy', etc.⁵⁶⁴

1145. In this regard, Mr Koutsantonis submitted:

If it is assumed that the PPA and underlying project does not represent good value for money (although that is not accepted [...]), the State's exposure is limited to subsidising only those costs necessary for achieving the Deed of Grant Purpose, namely the reasonable costs of supplying quality, safe and reliable electricity.

1146. There are a number of reasons why I do not find this submission particularly persuasive.

1147. Firstly, the Deed of Grant was executed in circumstances where the council had already entered into the PPA and where the terms of the PPA were known to the State and were explicitly contemplated and addressed by the Deed of Grant.

1148. Secondly, the Deed of Grant was executed in circumstances where the State Government had purportedly reviewed the PPA to its satisfaction and where certain of the terms of the PPA had been drafted and revised by or at the request of the State Government.

1149. Thirdly, the PPA was executed in circumstances where Mr Koutsantonis had provided a Letter of Comfort to the council that observed that the department had reviewed the commercial and technical aspects of the PPA and was satisfied that the PPA would 'give fair and reasonable outcomes for the provision of safe reliable electricity to Coober Pedy.'

1150. Fourthly, it was clear to all parties involved that the council would not have executed the PPA unless Mr Koutsantonis provided the undertaking contained within the Letter of Comfort.

1151. Fifthly, the terms of the Deed of Grant provided that the council could not agree to or execute the PPA 'without the prior written consent of the Minister', which could be given 'on such terms and conditions as the Minister may require.'⁵⁶⁵

1152. All of this is to say that I do not consider it sufficient to observe that the State's exposure under the Deed of Grant is limited to 'the reasonable costs of supplying quality, safe and reliable electricity' without also recognising that the Deed of Grant was executed in circumstances where the State had reviewed the PPA and underlying project and had made it known that it was satisfied that the project was likely to achieve this outcome. Under the various agreements, and in the particular circumstances of the matter, I do not consider that the State could reasonably refuse to subsidise the PPA upon some reappraisal of its value as assessed against prevailing market conditions.

⁵⁶⁴ Deed of Grant, clauses 5.4; 5.7; Schedule 1, item 5.

⁵⁶⁵ Deed of Grant, clause 25.2.

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1153. Mr Koutsantonis' evidence was that he executed the Letter of Comfort and Deed of Grant so as to 'maintain the longstanding energy subsidy' supplied to the council and 'on the basis of [the department's] assessment that the Deed of Grant and Letter of Comfort properly protected the State's interests and that the underlying PPA would ensure reliable electricity supply to Coober Pedy.'
1154. Mr Koutsantonis' evidence was that he relied on the department's assessment of the value presented by the PPA. In this regard, Mr Koutsantonis submitted that he had regard to the department's advice that the Letter of Comfort and Deed of Grant would assist the provision of reliable electricity to Coober Pedy, and that the PPA would be likely to reduce the cost of electricity supply, achieve certain favourable environmental outcomes and was not expected to increase the cost of the State's exposure through the RAES scheme.
1155. Mr Koutsantonis otherwise referred to the Cabinet approval provided in respect of the Letter of Comfort. He submitted that 'it would have been inappropriate for [him] to proceed differently, disregard the Cabinet decision, and not execute the Letter of Comfort and the associated Deed of Grant.'
1156. I have given careful consideration to the issue of the Cabinet approval.
1157. I accept, on the strength of Mr Koutsantonis' evidence and based on the contemporaneous documents, that Cabinet approved Mr Koutsantonis to enter into a Letter of Comfort in respect of the project.
1158. Owing to the operation of section 21(1) of the Ombudsman Act, I am wholly unable to determine what information informed Cabinet's decision or what the terms of Cabinet's approval were.
1159. This presents enormous difficulties in assessing the appropriateness of Mr Koutsantonis' decision to execute the Letter of Comfort because I do not know, for example, whether Mr Koutsantonis' decision to do so was made in the knowledge that Cabinet had assessed the value of the State subsidising the project in the absence of a market procurement process.
1160. I also do not know if Cabinet's approval was qualified in any way or allowed for any residual discretion by Mr Koutsantonis as to whether to underwrite the project.
1161. In fact, I do not even know if the Cabinet approval was given on a consideration of the EDL project at all, although it is reasonable to infer that it was.
1162. In the circumstances, the most that I can say is that I do not consider Cabinet's collective decision, whatever its actual terms, would have relieved Mr Koutsantonis of the obligation to ensure that public funds committed by him for a particular purpose were being appropriately spent.
1163. In my view, if Mr Koutsantonis became aware that executing the Letter of Comfort would result in the mismanagement of public funds then it would have been incumbent upon him to return to Cabinet and seek that it re-decide the matter.
1164. Beyond Cabinet's approval, Mr Koutsantonis' decision to execute the Letter of Comfort was also made on the strength of a recommendation endorsed by Mr Smith and the Executive Director of the department's Energy Markets and Programs Division. Mr Koutsantonis executed the Deed of Grant on the strength of a similar recommendation from the department and in circumstances where, owing to the terms of the Letter of Comfort, he was more or less legally bound to do so.

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1165. I have already criticised the level of information supplied by the department to Mr Koutsantonis in the relevant briefings.
1166. Those briefings failed to disclose that the project had not been exposed to competitive tension. They also did not advert to the concerns expressed by Resonant or disclose that Resonant had represented that significantly more affordable alternatives existed at the open market. These were relevant considerations that should have informed Mr Koutsantonis' decision to execute the documents.
1167. I note and accept Mr Koutsantonis' evidence to the effect that the department informed him that a consultant engaged by the council had expressed concerns about the project. I accept that the department advised Mr Koutsantonis that those concerns lacked merit. That would appear entirely consistent with the position articulated by the department at the time.
1168. I accept that Mr Koutsantonis would have been entitled to assign significant weight to the department's advice in this regard.
1169. Mr Koutsantonis submitted that he was not provided with a copy of any of Resonant's reports concerning the project. With the exception of the 7 December 2015 letter from the council's Acting Mayor, there is nothing before me to suggest that these reports were ever supplied to the Minister's office.
1170. Mr Koutsantonis' evidence was that the 7 December 2015 correspondence was not brought to his personal attention and was instead forwarded to the department for comment. I have examined his office's file movement record pertaining to this document and am satisfied that this was the case.
1171. I do not criticise the Minister's office for forwarding the Acting Mayor's correspondence to the department for a response. The department was clearly in the best position to assess the criticisms of the project expressed by Ms Provatidis and in Resonant's summary review.
1172. I accept that a great deal of information will ordinarily pass through a Minister's office and that it is not realistic to expect that an item of correspondence addressed to a Minister will necessarily be brought to his or her personal attention.
1173. I also accept that a Minister may come to rely upon the professional judgement of others to ensure that matters are appropriately brought to his or her personal attention.
1174. I am nevertheless troubled by the fact that Mr Koutsantonis was not personally informed of the Acting Mayor's correspondence or its contents. Whatever its merits, the letter from Ms Provatidis purported to raise significant concerns about a project that the State was nominally committed to subsidise. The letter specifically adverted to the lack of a market procurement process and raised questions about the project's ability to withstand competitive tension. Resonant's summary review, which was enclosed with the letter, expanded upon these criticisms.
1175. I have also criticised the department for failing to set out in its briefings why it was satisfied that subsidising the project presented value for money in circumstances where the project had not been exposed to competitive tension.
1176. Mr Koutsantonis submitted that he was not aware that the project did not go through a tender process. I note that Mr Smith gave evidence that it was his understanding that

Mr Koutsantonis was aware of this fact because the department did not seek to conceal the matter from Mr Koutsantonis.

1177. The department in its response to my provisional report submitted that the lack of a tender process was raised at the weekly meetings between the department and Mr Koutsantonis. The department submitted that it considers that the Minister's office was also likely aware that the project did not go to tender.
1178. The relevant briefings did not disclose the procurement method employed by the council, although they did advert to EDL's status as the incumbent energy supplier.
1179. There is nothing within the contemporaneous documents to contradict Mr Koutsantonis' evidence as to his knowledge of the procurement method employed by the council. The department has adverted to the contents of its weekly meetings with Mr Koutsantonis however these meetings do not appear to have been minuted. The 7 December 2015 letter from the council's Acting Mayor suggested that the council had not meaningfully tested the market but I have found that that letter was not supplied to Mr Koutsantonis.
1180. The department in its response to my provisional report noted that Mr Koutsantonis was on leave at the end of December 2015 and throughout early January 2016. The department submitted that this may 'be relevant to [my] assessment of Mr Koutsantonis' evidence that he was not aware that the project went through an open [sic] tender process.' I accept that submission.
1181. It is possible that both Mr Koutsantonis and Mr Smith were being truthful in their evidence on this issue but that Mr Smith was mistaken about what had been specifically drawn to Mr Koutsantonis' attention. Having weighed the evidence, I think that is likely where the truth lies.
1182. The uncertainty surrounding this issue to some extent reinforces my views in respect of what should have been specifically included in the relevant briefings.
1183. I have considered whether it was appropriate for Mr Koutsantonis to execute the instruments on the information put before him and generally known to him.
1184. I accept that Mr Koutsantonis was entitled to assign significant weight to recommendations that had been endorsed by the department's senior officers. That would be in keeping with the usual conventions governing the relationship and division of responsibility between Ministers and their departments.
1185. I consider that Mr Koutsantonis' role in the process was to carefully and objectively review the advice from the department and, on taking proper account of the relevant Cabinet approval, come to a decision as to whether to execute the documents.
1186. In my view, if Cabinet's approval allowed for any residual discretion in respect of the matter then Mr Koutsantonis in executing the documents needed to be satisfied that the department had assessed the project such that it considered that the proposed subsidy arrangements presented value for money to the State.
1187. Again, I make it clear that I consider that the State's responsibility extended to considering the proposed subsidy commitments in light of the specific value presented by the PPA and the underlying project. I say this because of the nature and extent of the State's involvement in the development of the project, the direct correlation between the amount paid by the council under the PPA and the amount expended by the State under the subsidy arrangements, and the fact that the Letter of Comfort was itself a *sine qua non* of the council's execution of the PPA.

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1188. As I have observed in the preceding section of this report, I accept that the value of a proposal should not be determined solely by reference to its cost or solely by reference to the possibility of achieving savings through an alternative supplier.
1189. That being said, if Mr Koutsantonis had been made aware that the project had not been exposed to competitive tension and that Cabinet had not been informed of this information then I do not consider he could reasonably have executed the Letter of Comfort on the information that was before him.
1190. In my view, in such circumstances it would have been incumbent upon Mr Koutsantonis to seek additional information from the department as to how it was satisfied that the project was fairly and reasonably priced when considered against comparable alternatives because the relevant briefing was entirely silent in respect of this issue.
1191. The relevant briefing, on its actual terms, adverted to various factors that suggested that the project presented value to the State. It spoke to costs and emissions reductions under the project and how the project was expected to align with certain State Government policy objectives.
1192. That briefing also spoke to the manner and extent to which the PPA and the underlying project had been scrutinised by various authorities.
1193. It would have been entirely reasonable for Mr Koutsantonis to have assumed, on the terms of the briefing, that the department and the CSO's review of the PPA had been robust and thorough.
1194. It would also have been reasonable for Mr Koutsantonis to have assumed that the department would not have recommended that he execute the Letter of Comfort and Deed of Grant unless it was satisfied that the proposed subsidy arrangements presented value to the State.
1195. I consider that it would have been prudent for Mr Koutsantonis to have requested further information from the department as to how it was satisfied that the costs of the agreement were fair and reasonable when considered against comparable alternatives. This question was not specifically addressed in the briefings and it was an important consideration that should have informed Mr Koutsantonis' decision to execute the documents.
1196. Although maladministration in public administration may arise from a public officer's failure to act,⁵⁶⁶ I am not satisfied that Mr Koutsantonis' omission to request further information from the department resulted in the substantial mismanagement of public resources in this instance.
1197. I have reached this conclusion because, subject to my earlier observations, I am not satisfied that Mr Koutsantonis was made sufficiently aware of the procurement method employed by the council or the matters articulated in the 7 December 2015 correspondence from the council's Acting Mayor such that he might have been more meaningfully prompted to undertake further enquiries.
1198. I also note that I am satisfied that the department was capable of demonstrating that the project was fairly and reasonably priced when considered against comparable alternatives.

⁵⁶⁶ ICAC Act, section 5(5)(c).

1199. Having carefully considered the matter, and noting that I have not been able to consider the terms of the relevant Cabinet decision, I do not conclude that Mr Koutsantonis acted inappropriately in executing the Letter of Comfort and Deed of Grant on the information that was before him.

1200. It follows that I am not satisfied that Mr Koutsantonis' conduct resulted in the substantial mismanagement of public resources and, accordingly, I do not consider Mr Koutsantonis committed maladministration in public administration.

Opinion

It is my final view that the former Minister for Mineral Resources and Energy, the Hon Tom Koutsantonis MP, did not commit maladministration in public administration by committing the State of South Australia to subsidise payments made by the District Council of Coober Pedy under a Power Purchase Agreement with Energy Generation Pty Ltd.

Summary and recommendations

In light of the above, my final views are as follows:

1. The District Council of Coober Pedy committed maladministration in public administration for the purposes of section 5(4) of the ICAC Act through its negotiation and execution of a Power Purchase Agreement with Energy Generation Pty Ltd.

In respect of this issue, I invite the Minister for Transport, Infrastructure and Local Government to:

- consider whether to exercise his powers of direction under section 273(2)(b) of the Local Government Act; and/or
 - consider whether to recommend to the Governor that the council be declared to be a defaulting council under section 273(2)(c) of the Local Government Act.
2. The District Council of Coober Pedy's failure to ensure that official records in its custody concerning the project were maintained in good order and condition appears contrary to law for the purposes of section 25(1) of the Ombudsman Act.
 3. The District Council of Coober Pedy, by executing a Power Purchase Agreement with Energy Generation Pty Ltd in circumstances where that agreement was not considered by the elected body in its final form, acted in a manner that was wrong for purposes of section 25(1) of the Ombudsman Act.
 4. The Department of State Development, through its participation in the development of a Power Purchase Agreement between the District Council of Coober Pedy and Energy Generation Pty Ltd, and by recommending that the Minister for Mineral Resources and Energy execute a Deed of Grant and Letter of Comfort subsidising payments made by the District Council of Coober Pedy under that agreement, did not commit maladministration in public administration.
 5. The Department of State Development, by omitting to demonstrate in relevant briefings to the Minister for Mineral Resources and Energy that a proposed Power Purchase Agreement between the District Council of Coober Pedy and Energy Generation Pty Ltd was fairly and reasonably priced when considered against comparable projects, acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

To remedy this error, I recommend that the Department for Energy and Mining revise its briefing template so as to prompt the author to identify, where relevant to a procurement activity involving the proposed expenditure of previously uncommitted State funds:

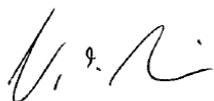
- any procurement method used in connection with the proposed expenditure
- the process by which the project has been assessed
- the outcomes of that analysis (including by reference, where relevant, to any analysis performed by third party consultants or technical experts)
- other information as may be necessary to inform an assessment of the value of proposal.

6. The former Minister for Mineral Resources and Energy, the Hon Tom Koutsantonis MP, did not commit maladministration in public administration by committing the State of South Australia to subsidise payments made by the District Council of Coober Pedy under a Power Purchase Agreement with Energy Generation Pty Ltd.

In accordance with section 25(4) of the Ombudsman Act, the Department of Energy and Mining should report to me by **13 August 2018** on what steps have been taken to give effect to the recommendation above; including:

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

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



Wayne Lines
SA OMBUDSMAN

3 July 2018