

Report

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

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| Public Authority | District Council of Franklin Harbour |
| Public Officer | Mayor Robert Walsh |
| Ombudsman reference | 2019/09108 |
| ICAC reference | 2020/001195 |
| Date of referral | 15 October 2019 |
| Issues | <ol style="list-style-type: none">1. Whether Mayor Walsh committed misconduct in public administration by acting improperly in regard to the rezoning and tenure of properties in Lucky Bay2. Whether Mayor Walsh committed misconduct in public administration by providing false and misleading information in a council report in order to obtain Commonwealth funding on a project in which he had a private interest3. Whether Mayor Walsh committed misconduct in public administration by making repeated and inappropriate contact with the Department of Water and Environment |

Jurisdiction

This matter was referred to the Ombudsman by the Commissioner pursuant to section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012* (the ICAC Act), as raising potential issues of misconduct within the meaning of that Act (the referral).

Section 14B of the Ombudsman Act provides:

14B—Referral of matter by OPI or ICAC

- (1) If a matter is referred to the Ombudsman under the ICAC Act, the matter—
 - (a) will be taken to relate to administrative acts for the purposes of this Act; and
 - (b) must be dealt with under this Act as if a complaint had been made under this Act and—
 - (i) if the matter was the subject of a complaint or report under the ICAC Act—as if the person who made the complaint or report under that Act was the Complainant under this Act; or
 - (ii) if the matter was assessed under that Act after being identified by the

Commissioner acting on the Commissioner's own initiative or by the Commissioner or the Office in the course of performing functions under any Act—as if the Commissioner was the complainant under this Act.

(2) In this section—

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

ICAC Act means [Independent Commissioner Against Corruption Act 2012](#);

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

The allegations raise potential breaches by Mayor Walsh of Part 3 of the Code of Conduct for Council Members (**the Code of Conduct**). Failure by a council member to comply with Part 3 of the Code of Conduct constitutes misconduct. As a contravention of Part 3 can constitute grounds for disciplinary action under the *Local Government Act 1999*, I have considered these matters under section 5(3)(a) of the ICAC Act.

Further, the allegations raise potential breaches by Mayor Walsh of Part 2 of the Code of Conduct. Clause 2.25 of Part 2 of the Code of Conduct sets out the disciplinary action that can be taken against elected members in breach of the Code. As a contravention of Part 2 can therefore constitute grounds for disciplinary action under the *Local Government Act 1999*, I have considered these matters under section 5(3)(a) of the ICAC Act.

Investigation

My investigation has involved:

- assessing the information reported to the Office for Public Integrity (OPI)
- seeking a response from Mr Shane Gill, Chief Executive Officer of the council and seeking clarification of that response from Mr Gill
- seeking a response from Mayor Walsh
- seeking a response from the Department of Environment and Water (DEW)
- considering the ICAC Act, *the Ombudsman Act 1972*, the *Local Government Act 1999*, and the Code of Conduct
- preparing a provisional report and providing it to the parties for comment
- preparing this report.

Standard of proof

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

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

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.

Procedural fairness

A copy of my provisional report was provided to Mr Gill and Mayor Walsh.

Mr Gill responded to the provisional report by email dated 17 September 2020. Mr Gill's submission largely concerned Mayor Walsh's character, however, I do not consider those comments provide evidentiary weight to the specific allegations of misconduct.

Mr Gill also suggested that the volume of Mayor Walsh's emails to DEW employees could be explained by his technological limitations, in that Mayor Walsh can only send a single PDF attachment per email as he communicates using an iPad. Having viewed all the emails between DEW and Mayor Walsh during the relevant period, I do not consider that is the case.

Mayor Walsh responded to my provisional report by email dated 18 September 2020 and I have responded to these submissions in my report below. I note, however, that Mayor Walsh's submissions have not caused me to change my provisional views.

Background

1. My Office received a referral from the Independent Commissioner Against Corruption on 15 October 2019 regarding the alleged conduct of Mayor Walsh in relation to his interests in a property located in Lucky Bay, a locality within the council area.
2. In 1979, shack sites at Lucky Bay were placed into two categories depending on their distance from the High Water Mark along the seashore. The purpose of this categorisation was to distinguish which properties were and were not acceptable for life tenure due to coastal hazards and erosion.
3. In brief, it is my understanding that in 1989, the categorisation based on appropriateness of life tenure was abandoned with the implementation of a Land Management Plan (**the LMP**).³ As a result of the LMP, properties came into the full control of the council, and were subject to a 30 year Miscellaneous Lease with the option of extension at the end of this period depending on the condition of properties falling under the LMP.
4. Presently, it appears that attempts are being made to rezone Lucky Bay and to convert shack settlements in Lucky Bay to Freehold Tenure.
5. It has been alleged that Mayor Walsh, who owns properties in Lucky Bay, stands to benefit financially if those properties are converted to Freehold Tenure or if Lucky Bay is rezoned.
6. In regard to the allegations of misconduct, it has specifically been alleged that Mayor Walsh has:
 - failed to declare any potential conflict of interest that he may have in relation to Lucky Bay when dealing with and taking responsibility for matters concerning Lucky Bay
 - persistently contacted DEW regarding the tenure and zoning of Lucky Bay despite being directed to make any such contact through the council's case manager
 - threatened to sue DEW, which prompted the council to apologise for his conduct
 - contacted the department without the authorisation and knowledge of the council
 - provided misleading information in the council's 'Building Better Regions Fund Round 3 report' (**the Better Regions Report**) which was used to secure funding

³ Lucky Bay Management Plan 1989, Shack Area 80 - Lucky Bay,

from the Commonwealth Government; specifically, it is alleged that the Better Regions Report suggests that the council had approval for substantial reclamation work on the Cowell foreshore when the Coast Protection Board refused approval for any such work

- it is also alleged that Mayor Walsh's actions caused work to be commenced on the redevelopment of the Cowell foreshore.

7. Mayor Walsh was elected Mayor in November 2018. Before that time, he was a Councillor. I have distinguished between those roles as necessary in this report.

Relevant law

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

(3) *Misconduct in public administration* means—

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

9. Section 63(2) of the Local Government Act provides that:

(2) Council members must observe the code of conduct

10. Clauses 2.2, 2.3 and 2.5 of Part 2 of the Code of Conduct provide that council members must:

- 2.2 Act in a way that generates community trust and confidence.
- 2.3 Act in a reasonable, just, respectful and non-discriminatory way when dealing with people.
- 2.5 Ensure that personal comments to the media or other public comments, on Council decisions and other matters, clearly indicate that it is a private view, and not that of the Council.

11. Clauses 3.1 and 3.4 of the Code of Code of Conduct provides that council members must:

- 3.1 Act honestly at all times in the performance and discharge of their official functions and duties.
- [...]
- 3.4 Not exercise or perform or purport to exercise or perform a power, duty or function that he or she is not authorised to perform.

Whether Mayor Walsh committed misconduct in public administration by acting improperly in regard to the rezoning and tenure of properties in Lucky Bay

12. This matter was referred to me on the basis that Mayor Walsh's conduct potentially amounted to other misconduct for the purposes of section 5(3)(b) of the ICAC Act.

13. I have also considered whether Mayor Walsh's conduct constitutes a breach of clause 3.4 of the Code of Conduct, and is therefore misconduct for the purposes of section 5(3)(a) of the ICAC Act.

14. I have been provided with extensive correspondence between Mayor Walsh and DEW employees for a period spanning from 18 May 2018 to February 2020. Over 100 emails during that period of time were sent by Mayor Walsh to DEW employees.
15. In considering whether Mayor Walsh improperly used his position as a Council Member and/or Mayor to improperly influence decisions and actions by external parties in regard to the rezoning and tenure of properties in Lucky Bay, I have had regard to:
 - whether Mayor Walsh was authorised to represent the council in regard to Lucky Bay matters with external parties
 - if not, whether he was purporting to represent the council in regard to this issue:
 - if so, whether this amounts to improper influence
 - if not, whether it was appropriate for him to discuss these matters in any other capacity
 - if so, whether this was appropriate, given he is a shack owner.

Was Councillor/Mayor Walsh authorised to represent the council?

November 2018 - onwards

16. Councillor Walsh was elected as Mayor on 14 November 2018.⁴ From this date, I accept that he was generally authorised to represent the council on council related matters, including matters relating to Lucky Bay, as section 58(1)(c) of the Local Government Act sets out that:

Specific roles of principal member

(1) The role of the principal member of a council is–

...

(c) to act as the principal spokesperson of the council;

17. Clearly, in representing the council as Mayor, Mayor Walsh could only put forward the council's position (as opposed to a personal position) and only act as authorised by the council and in accordance with council resolutions.

2014 - 2018

18. Councillor Walsh was elected as a member of the council on 14 November 2014.
19. Under section 58(2) of the Local Government Act, another member, other than the Mayor, may be appointed to act as its principal spokesperson. There is no evidence, however, that Mayor Walsh was appointed to such a role prior to 14 November 2018.
20. The current Chief Executive Officer (**CEO**) of the council, Mr Gill, who was appointed as CEO in November 2019, described his understanding of Cr Walsh's involvement in matters relating to Lucky Bay as follows:

...Mayor Walsh was appointed as the Council Representative on the Lucky Bay Shack Owners committee on 21/01/2015 (Resolution attached). He has taken this role very seriously and is now something of an expert on the history of all negotiations with/representations to government agencies and associated legislation.

⁴ As reflected by the Minutes of the Council Meeting held on this date.

...when [the former Chief Executive Officer of the council] Chris Smith was appointed CEO of DCFH in September 2015 he involved Mayor Walsh in most deliberations/negotiations associated with Lucky Bay.⁵

21. Mr Gill further stated to my investigation that:

...Mayor Walsh has been authorised by Council to take the lead on this issue and was actively encouraged to do so by former CEO Chris Smith and was formally involved in most discussions with DEW and other government agencies in matters related to Lucky Bay.⁶

22. As highlighted in the response from Mr Gill above, prior to becoming Mayor, Cr Walsh was appointed by the council at a council meeting held on 21 January 2015 as the council's representative for the Lucky Bay Shack Owners' Association (**the LBSOA**) by the following motion:

17.2 Cr Robert Walsh - Lucky Bay Shack-Owners Committee

Requesting that he be appointed as Council representative for the Lucky Bay Shack Owners committee with Cr Hornhardt.

Cr Hornhardt moved Cr Wagner seconded that Cr Walsh be appointed as Council representative on Lucky Bay Shack Owners Committee with Cr Hornhardt

23. The LBSOA is not, however, a Committee established by the council under section 41 of the Local Government Act. The LBSOA is an unincorporated entity,⁷ with no formal affiliation with the council.
24. The role of the council's spokesperson for the LBSOA was explained by Mr Gill in an email dated 16 June 2020 as follows:

The relationship of Lucky Bay to the District Council of Franklin Harbour is quite unique in SA in that the shackowners have neither freehold titles nor individual leases over their properties. The entire foreshore area where the shacks are located is a single crown lease between the Council and the State.

The council pays the lease and conducts all negotiations with the State government pertaining to the lease. There have been ongoing negotiations between Council and DEW regarding an extension of the 30 year lease for quite some time now and as a courtesy we have involved the Lucky Bay Shackowners association in these discussions but ultimately the agreement will be between the Council and Crown Lands. Mayor Walsh has been involved in these negotiations in his capacity as Mayor, and given his extensive knowledge of the history and issues associated with Lucky Bay it would be foolish of us not to involve him.

The Lucky Bay Shackowners committee was not set up by Council but council do have a delegate on that committee and as previously advised our current delegate is Mayor Walsh.

25. In light of the above, it does not appear that Cr Walsh's role as spokesperson for the LBSOA provided him with authority to discuss matters concerning Lucky Bay as a representative of the council with external parties, other than the LBSOA.
26. On the contrary, there is evidence to suggest that Cr Walsh was not authorised to discuss matters with external parties on behalf of the council. An email from Mr Smith to a DEW employee, dated 4 July 2018, states that:

⁵ Letter dated 9 January 2020.

⁶ Letter dated 9 January 2020.

⁷ <https://abr.business.gov.au/ABN/View?abn=11715544171>.

Councillor Walsh is not authorised to communicate with Government on Council's behalf. I have asked Mayor Starr to ensure that his emails are at an end. This obviously does not apply to any personal matter he may have with your department regarding his family properties.

27. This email appears to have been sent in response to concerns raised about Cr Walsh's communications with DEW employees, which are addressed later in this report.
28. Further, on 15 October 2018, Mr Smith sent a letter of apology to DEW in regard to Cr Walsh's communications with DEW employees and stated that both he, Mr Smith, and Mayor Robert Starr were the only authorised representatives of the council permitted to make representations to external bodies in regard to coastal issues.
29. In light of the evidence before me, I am persuaded, on balance, that Cr Walsh was not authorised to represent the council in relation to Lucky Bay matters, prior to becoming Mayor in November 2018.
30. It is necessary to note that during the course of my investigation, it became apparent that during a council meeting held on 15 November 2015, the council appeared to establish a Section 41 Committee in relation to Lucky Bay. The relevant motion set out the following:

15.1 Section 41 Committees (item 1) Cr Williams moved Cr Wagner seconded that the following Section 41 committees be established within each case a minimum of two elected members to progress the matters to their earliest conclusion:

...

2. Lucky Bay Tenure and Zoning

Mayor Robert Starr, Cr Robert Walsh and Cr Michael Williams Brief
Description: To achieve a tenure extension and rezoning of Lucky Bay shacks with a final view to rezoning back to Coastal Settlement

31. My investigation requested further details about this Committee from the council, in an email dated 2 September 2020, as it had not previously been drawn to my investigation's attention, and it was not clear how long it had been in place or when it was abolished, if at all.
32. Mr Gill responded to my investigation by email dated 2 September 2020, and advised that:

I can see where that committee was formed but there is no evidence of it beyond that resolution.

33. In light of the fact that there is no evidence that the Lucky Bay Tenure and Zoning Committee performed any functions, or appears to have been referred to in any council meetings beyond the passing of the motion set out above, I do not consider it bears any significance to this investigation, or the question of whether Cr Walsh was authorised to represent the council on Lucky Bay matters prior to becoming Mayor.

Did Councillor/Mayor Walsh purport to rely on his position as Council Member/Mayor to influence the department in relation to Lucky Bay matters?

34. I have viewed over 100 emails between Mayor Walsh and DEW employees between 2015 and February 2020.

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35. Prior to becoming Mayor, in almost all of the correspondence, with the exception of some emails closer to 2015, Cr Walsh used his private email address and signed off his emails as 'Rob Walsh'.
36. None of the emails I have viewed that were sent prior to Cr Walsh becoming Mayor reflect, or purport to reflect the views of the council. In my view, it appears that during his time as a councillor, Cr Walsh was communicating and seeking information in his personal capacity, or at times, as a council member, but not as a representative reflecting the views of the council.
37. It appears that some of the DEW employees who engaged with Cr Walsh, also had that understanding. For example, in an email dated 17 September 2018, a DEW employee stated the following in reference to a telephone discussion with Cr Walsh:
- [Cr Walsh] [i]ndicated he was not ringing in his capacity as a Councillor. Also indicated he has a position in the local liberal branch and has had discussions with David Spiers.
38. In response to concerns about communications from Cr Walsh, a further email from a separate DEW employee dated 17 September 2018 states:
- ...And Mr Walsh is representing himself, not Council. Does that make a difference re channels or communication?
39. In light of the above, and the evidence before me, I am of the view that Cr Walsh did not purport to represent the council prior to becoming Mayor in November 2018.
40. On balance, I consider he made it clear he was making representations in his private capacity.
41. I note, however, that clause 2.5 of the Code of Conduct sets out that council members must:
- Ensure that personal comments to the media or other public comments, on Council decisions and other matters, clearly indicate that it is a private view, and not that of the Council.
42. Further, clause 3.4 of the Code of Conduct sets out that council members must:
- Not exercise or perform or purport to exercise or perform a power, duty or function that he or she is not authorised to perform.
43. On the evidence before me, and as highlighted in the examples of correspondence from DEW employees above, it does not appear that Cr Walsh failed to make it clear that his views were his own, and not those of the council or that he was purporting to act for the council without authorisation.
44. That said, I also note that the former Chief Executive Officer saw fit to clarify the issue with DEW, which suggests that there may have been scope for misunderstanding about the issue of in what capacity Cr Walsh was dealing with DEW.
45. On balance, however, I do not consider that Cr Walsh's conduct amounted to a breach of clause 2.5 or 3.4 of the Code of Conduct, or other misconduct for the purposes of clause 5(3)(b) of the ICAC Act.
46. Upon becoming Mayor, Mayor Walsh appears to have continued to mainly communicate with external parties in his personal capacity.

47. On some occasions, Mayor Walsh formally appeared to represent the council as Mayor. For example, in the following email to the Premier Steven Marshall dated 21 June 2019:

Steve,

I received correspondence from Stephan Knoll 18/6/19 Ref. 19 MPL 0336 in relation to our DP after speaking to you wednesday at Government House.

The letter received from Stephan supports a DPA that changes my Councils zoning on farmland and Coastal Settlement of Luckybay that Rau zoned Conservation.

It is interesting to note that the Senior Planner for Coastal Tony Huppertz states that he and no staff of his department advised that Luckybay should be changed from the BDP Coastal Settlement to Coastal Conservation in Rau,s DP 2015.

To get a direction to DPTI to change the BDP from Coastal could only have occurred if it was not done by employees of DEW or another interested referral agency or person.

Allan Holmes has the power of Direction as Presiding Member of Coastal Protection to change zoning on any area that is Coastal, he is also on the Planning Board and at the time of the DP 2015 was on the EPA Board.

Allan Holmes has a very strong and well known view against tenure of shacks on Crown Land.

Piers Brissenden sent me a draft of the 30 year lease for Luckybay on Thursday last week. The draft relates to our Current DP of Coastal Conservation that makes buildings unsuitable in a Conservation Zone.

Stephan Knoll has been advised that DPTI don't have time to do a SOI DPA for the shacks at Luckybay till after implementation of the new Planning Code early 2020. This concerns me because it is my understanding that Allan Holmes expects that Coastal will get full power of Direction instead of referral in the new Planning Code of any zoning that is Coastal.

To get a SOI DPA to change zoning of shacks will most likely not be supported by Coastal after the new Code is implemented.

In my Councils DP 2015 Rau placed our brand new multi use port facility in Coastal Conservation. I was the nominated Council representative for Luckybay at the time and still are. My Council and Andrew Humby DPTI were directed by Rau to do a DPA immediately. Myself and my Council worked very efficiently in harmony and changed zoning of Port Facility immediately. I was promised by Andrew Humby that he would support a DPA for Luckybay in return for our support in the Port Facility

Rau was not to be embarrassed in zoning a new Port Facility into Coastal Conservation. This can happen if a Department gets Direction from the Minister to proceed with a SOI DPA. Secure Tenure for the shacks at Luckybay need a SOI and DPA to correctly change Zoning to Coastal Settlement to advance secure tenure in the term of a Liberal Government.

I wish for your continued support in obtaining secure tenure for the shacks at Luckybay in what has been a very difficult process by Labor Governments and the Presiding Member of Coastal Protection Allan Holmes in having no support for tenure of Crown Leases.

Mayor
Rob Walsh

48. An email dated 12 January 2020 to Mr Gill, an unknown recipient, and what appears to be a blind carbon copy or error in addressing a DEW employee, Mr Piers Brissenden, states the following:

From: Robert Walsh <walsh@franklinharbour.sa.gov.au>
Sent: Sunday, 12 January 2020 4:20 AM
To: Shane Gill <shane@franklinharbour.sa.gov.au>
Cc: schase@cescopartners.com.au
Subject: 30 Year Lease Luckybay

Hi all,

I appreciate that Piers has made some conditions easier to understand. The lease conditions are consistent with the Lease signed in 2008.

The original lease previous to the Freeholding offer December 21/1994 by Minister Wotton was issued as a rolling 30 year lease in 1989.

The Shack Freeholding Committee recommendation for Freehold was in April 1995.

The point in our whole exercise is my Council has already spent a lot of time and money trying to please our former Labor Government in negotiations for an extension from 2026.

Allan Holmes prior to our current Liberal Government in February 2018 refused our application for a Seawall. My Council had already spent \$64,000 raising the Boulevard Road as recommended in the SMEC Report. A Seawall was also recommended in the SMEC report but warned that it would be cost prohibitive. Application for a Seawall triggered the need for a new management plan.

Allan Holmes and Murray Townsend prefer sand replenishment. If a 100,000 cubic meters of dredging sand doesn't satisfy a sand management plan nothing ever will.

The SMEC Report recommendation for sand replenishment instead of a Seawall was a combination of scenarios and costs.

The conditions 4.1.4, 4.1.6, 4.2, 4.3 were conditions made by a previous Labor Government that did not support Shacks on Crown Land.

In Coasts special conditions item 4.3 is also of interest to them.

Item 4.3 also concerns myself because if I sign to this condition it will be legally binding that my Council agreed that this lease can be cancelled prior to the 30 year term of lease.

Piers,

Can conditions 4.1.4, 4.1.6, 4.2, 4.3 be removed ?

I ask also that my Council has the option to pay the 30 year lease in one full payment.

I also feel that we should write another management plan that is acceptable to our current Minister. [my emphasis]

If all goes well for T Ports in the next few months and the 100,000 cubic meters of sand is replenished in front of Shacks this will change our management plan in any case.

I feel that we should immediately do a management plan that is acceptable to our current Minister David Spiers that has a rolling clause when lease expires in 30 years.

I would then happily sign lease.

Mayor

Rob Walsh

49. Although Mayor Walsh was an authorised spokesperson for the council, I do not consider it is appropriate for him to take it upon himself to decide on the council's stance on issues and to then speak on the council's behalf on those issues, without consensus from the council, or some other directive from council administration.
50. Accordingly, I have considered whether Mayor Walsh's position in regard to Lucky Bay is consistent with the council's view on this issue, in addition to whether he was an authorised spokesperson.
51. In an email to my investigation dated 17 August 2020, Mr Gill stated the following in response to enquiries as to what the council's official position in regard to Lucky Bay is:

DCFH meeting minutes have been electronic since 2011 and I can find no motion since suggesting gaining freehold tenure for Lucky Bay Shacks was a priority. I am not surprised by this as to my knowledge the renewal of the 30 year lease at Lucky Bay ,with more reasonable conditions than previously, has been the priority and certainly that is what council have tasked me with. I believe that we will be signing this lease before the end of 2020.

It would seem to me that there has been some confusion on the subject of Freeholding in that Council were pursuing (on the recommendation of Coastal Protection) the freeholding of "retreat blocks" behind the existing shacks at Lucky Bay, rather than the shacks themselves. You will see in the attached DCFH Long Term Financial Plan 2017 - 2026 (Page 11) that there was a forecast \$5,000,000 in land sales forecast for Lucky Bay for the period 2021 - 2025. This was for the retreat blocks that were to be freeholded. I have attached minutes of DCFH Council meeting from March 2017 where you will see this Long Term Financial Plan was ratified by council (16-2).

52. Mr Gill further stated in an email dated 2 September 2020, that there is:

...quite a trail of activity and information re councils position on Lucky Bay. I have attached what I believe are the key files/info. As previously mentioned, leadership and direction on this issue was emanating predominantly from the previous CEO (Chris Smith)

I have attached the following :

Lucky Bays Future 10/02/17
Presentation to Premier 27/06/18
Lucky Bay Management Plan 2019
SMEC Report summary 2014

53. Having viewed the documents referred to in Mr Gill's email below, I am persuaded that Mayor Walsh's position in regard to Lucky Bay, as he has presented to external parties in his capacity as Mayor, is generally consistent with the views of the council.

54. Further, although I do not consider that the motion that was passed on 15 November 2015 carries any weight as to whether Mayor Walsh was authorised to represent the council prior to becoming Mayor, I do consider that it reflects the position on Lucky Bay, and what it hoped to achieve:

15.1 Section 41 Committees (item 1)

Cr Williams moved Cr Wagner seconded that the following Section 41 committees be established within each case a minimum of two elected members to progress the matters to their earliest conclusion:

...

2. Lucky Bay Tenure and Zoning

Mayor Robert Starr, Cr Robert Walsh and Cr Michael Williams
Brief Description: To achieve a tenure extension and rezoning of Lucky Bay shacks with a final view to rezoning back to Coastal Settlement.

55. On the one hand, I am of the view that Mayor Walsh's communications with external parties are generally consistent with achieving 'a tenure extension and rezoning of Lucky Bay shacks with a final view to rezoning back to Coastal Settlement.'
56. On the other hand, in the absence of a clear resolution on the council's position, it could be perceived that Mayor Walsh was continuing his personal endeavours to achieve freehold, but now using his position as Mayor. In that regard, I note that Mayor Walsh made comments on specific conditions, including one which he identified as affecting himself. I query whether that sort of detail should have been brought back to the elected body for its consideration. It is essential that a person in Mayor Walsh's position makes clear the capacity in which they are acting at all times. Overall, I consider that there was a concerning lack of clarity about Mayor Walsh's role in this process. I suggest that, going forward, the council may wish to seek confirmation from the elected body as to Mayor Walsh's ongoing role in relation to Lucky Bay issues.

57. While I consider the position arguable, on balance, however, I do not consider that Mayor Walsh's communications with external parties in the examples above, and any other correspondence I have viewed, amounts to a clear breach of clause 3.4 of the Code of Conduct, or an attempt to exert improper influence, for the purposes of considering 'other misconduct'.

Comment on conflict of interest

58. Although I have formed the view that Mayor Walsh's communications with external parties did not amount to improper influence, on the basis that he was not purporting to represent the council prior to becoming Mayor, it is necessary to note the issue of whether Mayor Walsh had a conflict of interest.
59. There is potential for concern that Mayor Walsh's personal interests as a holder of proprietary interests conflict with his duty to represent the broader interests of the council and the community.
60. Mr Gill advised my investigation that in his view, the primary motivation for shack owners in securing certainty of tenure at Lucky Bay was for 'cultural/family' reasons.⁸ Mr Gill could not, however, rule out any financial benefit to Mayor Walsh.
61. In response to my investigation, Mayor Walsh asserted by email dated 18 March 2020 that 'a zoning change does not advantage or increase value of my family shack number 46.'⁹ He further stated that:

...Existing rights still exist even with a zoning change over the 'Top', the family shack that I am a 1/5 owner of has not been affected by the current zoning.

To say I personally will benefit from a zoning change is not correct. The shack we own is one that is in extremely good condition and has a well established dune in front of it. Our management plan does not allow replacement shacks.

The negotiations on continuation of the rolling 30 year lease were before my family members purchased our shack.

The zoning change for shacks at Luckybay (sic) is needed before a seawall can be built. This Seawall was to be built in the first 40 shacks that are identified as at risk by a study by Magrins. The protective seawall application was not in front of our family shack number 46.

62. On the evidence before me, it is unclear whether Mayor Walsh stands to receive a pecuniary benefit by ensuring Lucky Bay is rezoned or converted to freehold tenure. I am of the view, however, that there is a potential perception of a benefit, pecuniary or otherwise, by the public.
63. While it has been suggested that Mayor Walsh had a conflict of interest in relation to his dealings with DEW, due to his ownership of property at Lucky Bay, I have not considered Mayor Walsh's conduct in relation to the conflict of interest provisions under the *Local Government Act 1999*, as none of the allegations appear to relate to any decisions or matters dealt with by the council during a council meeting.
64. I also note that documentation provided to my investigation by the council shows that Mayor Walsh has declared his interest in various properties at Lucky Bay in his primary and ordinary returns.

⁸ Letter dated 9 January 2020.

⁹ Conflict of interest declarations made by Mayor Walsh reflect that he owns 1/5th of this property.

65. Given that Mayor Walsh clearly declared his conflicts of interests, and it was in my view clear in his communications with external parties that he had a personal interest in Lucky Bay, both when he was communicating as a councillor and as Mayor, I do not consider that this issue warrants further investigation.

Opinion

In light of the above, my view is that Mayor Walsh did not improperly use his position as a Councillor or Mayor to influence decisions in relation to Lucky Bay, and therefore did not commit misconduct in public administration under section 5(3)(a) of the ICAC Act.

Whether Mayor Walsh committed misconduct in public administration by providing false and misleading information in a council report in order to obtain Commonwealth funding on a project in which he had a private interest

66. As highlighted above, it is alleged that Mayor Walsh:
- provided misleading information in the council's Better Regions Report which was used to secure funding from the Commonwealth Government
 - the report suggests that the council had approval for substantial reclamation work on the Cowell foreshore when in fact, the Coast Protection Board had refused approval for any such work
 - Mayor Walsh's actions caused work to be commenced on the redevelopment of the Cowell foreshore.

67. Conduct of the nature described above, if established, would likely be in breach of clause 3.1 of the Code, which sets out that council members must:

...Act honestly at all times in the performance and discharge of their official functions and duties.

68. In response to these allegations, Mayor Walsh submitted that:

I have no knowledge of providing information to the Better Regions Report...Mayor Rob Starr who progressed our Better Regions Report is deceased. I have no knowledge of work commencing prior to sufficient funding.

69. Mr Gill also provided the following submissions in regard to the allegations:

[Neither] Mayor Walsh nor any of the elected members are involved in the day to day management of Council and this includes the writing and submitting of Grant Applications. "The Report" was researched, written and authorised by the former CEO, Chris Smith. Mayor Walsh had no involvement in this. In response to the allegation of misleading content, the report does not say that the Coastal Protection Board approved the works, what it does say is:

"The Coastal Protection Board failed to provide a response within the required timeframe, which is considered by the Development Act as a concurrence" (Page 21 of "The Report" Attached)

...Mayor Walsh does not have the authority to direct employees to commence work on a project, this is the function of the CEO.

No work on the portion of the Foreshore Redevelopment related to the Building Better Regions Fund Round 3 has commenced to date. The marina development which has commenced is funded by a \$1.5 million grant from the South Australian Boating Facility Advisory Committee (Grant agreement signed 4/3/2010 - attached) and \$543k from the State and Local Government Infrastructure (Grant agreement signed 7/8/17- attached)

Work on the Marina commenced 24/09/2019 at which time all funding as in place.

70. In light of the response from Mr Gill highlighted above, I consider that the information in the report does not appear misleading, nor does it appear that Mayor Walsh had any role in preparing the Better Regions Report.
71. I also note the submission from Mr Gill that Mayor Walsh does not have authority to direct public officers to commence work on the projects of relevance to the allegations.
72. Accordingly, in the absence of any evidence to support the allegations, I do not consider that Mayor Walsh committed misconduct in public administration by providing false and misleading information in a council report in order to obtain Commonwealth funding on a project that he had a private interest in.

Opinion

In light of the above, my view is that Mayor Walsh did not commit misconduct in public administration by providing false and misleading information in a council report in order to obtain Commonwealth funding on a project in which he had a private interest

Whether Mayor Walsh committed misconduct in public administration by making repeated and inappropriate contact with the Department of Water and Environment

73. In considering whether Mayor Walsh committed misconduct in public administration by making repeated and inappropriate contact with DEW employees, I have considered whether his actions are in breach of clauses 2.2 and 2.3. of the Code of Conduct, which sets out that council members must:
 - 2.2 Act in a way that generates community trust and confidence in the council
 - 2.3 Act in a reasonable, just, respectful and non-discriminatory way when dealing with people.
74. I have turned my mind to the fact that Mayor Walsh appeared to have sometimes been acting in his personal capacity. I do not consider that clauses 2.2 and 2.3 are necessarily limited to official functions and duties, being aimed at conduct that does not meet community expectations. Overall, I consider that there is a sufficient nexus between Mayor Walsh's conduct and his role as a council member for clauses 2.2 and 2.3 to apply.
75. My Office received a substantial response and supporting documents from the DEW in regard to Mayor Walsh's conduct and interactions with the DEW from 2014 to the present day.
76. It is apparent from the information provided by the DEW that Mayor Walsh's behaviour has been difficult, and at times, could be considered inappropriate.
77. As noted above, Mayor Walsh sent over 100 emails to DEW employees over a two year period, in addition to numerous phone calls.
78. It is alleged that Mayor Walsh threatened a class action against DEW in the following SMS message that was sent to Ms Grieger on 8 October 2018:

hi gayle, hope you have read email this morning from tony irvine ceo ep lga. chris said at our council meeting yesterday that the cost of soi, dpa will be another 150,000. I have been advised a class action will be cheaper, and if your letter to me is an indication that

no support of ever changing zoning we may as well proceed with class action. rob walsh (sic)

79. It is also alleged that Mayor Walsh sought to have a DEW employee 'redirected', as highlighted in the following email dated 3 October 2018 from Mr Broom to Ms Grieger:

...He said his "ambition is to find out who" caused the land to be zoned coastal conservation, and that he would then "pass that information on to the Minister to have that person redirected". I said requesting an individual be offered up and sacked is inappropriate, that he direct any future telephone calls concerning this matter to my Director, and that the department will follow proper process and respond to his above-mentioned queries ASAP. I then ended the relatively brief conversation.

80. In regard to the threat of a class action against DEW employees, Mayor Walsh submitted in response to my notice of investigation that:

I have never emailed a threat of legal action to any department. I personally can take credit for never supporting the idea of a 'Class Action'. I tried to make Murray Townsend aware of the 'rumblings' on the zoning that has occurred to landowners- not shack owners. If this was considered a threat it obviously is not true. Previous CEO Chris Smith has repeated this also in Hansard to the ERD committee that landowners will not take this zoning much longer.

81. Mayor Walsh did not provide a response to my notice of investigation in regard to the allegation that he threatened to have an employee 'redirected', but did provide the following submissions in response to the allegations of inappropriate communications with DEW employees:

In Hansard ERD Committee in November last year Allan Holmes explained to the ERD committee of previous visits to my farm when CEO DEWNR. Allan after visiting my farm realised his department needed to allow existing rights to exist with my 7000acre perpetual crown lease that could no longer be transferred unless it is Freeholded (sic). This was called accelerated Freeholding. In the Freeholding process it was established that I must give to the crown 1640 acres of my best grazing land before remaining 5360 acres could be Freehold.

Allan Holmes allowed an exemption for my farm to be placed in a family trust allowing a once only transfer to my sons who manage our farm.

I appreciated Allan Holmes support until the final account from our chosen administrator of negotiation for our family trust and future advice on setting up a working business incorporating our new family trust come to \$23,000. I had to use my overdraft facility to pay account. (sic)

Frustration, do you understand the financial hardship Allan Holmes had placed on my family farm?

I advised Allan Holmes of this huge cost. Allan Holmes decided for the Government to buy the 1640 acres. A price of \$100,000 was valued in negotiations with DEWNR staff in Kadina. After nearly six or more months Allan Holmes changed his decision on purchasing this land. I still have Allan Holmes letter explaining why he changed his decision.

This occurred well before I was elected to the District Council of Franklin Harbour. In my negotiations prior to getting elected, Murray Townsend Coastal Protection also provided advice, this is when I formed a good relationship with Murray Townsend. Murray Townsend only recently did a representation to our EPLGA conference at Wudinna in February this year. We chatted, embraced a friendly hand shake and I have always relied on Murray for advice.

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82. It did not appear that Mayor Walsh fully understood the allegations in regard to his communications with DEW staff, as his response failed to address specific examples and questions put to him by my investigation.
83. As noted in my report above, however, Mayor Walsh provided further submissions in regard to his communications to DEW employees.
84. In regard to the SMS message to Ms Grieger, Mayor Walsh stated that he had initially sent the comments regarding the class action to Mr Townsend as a 'friendly heads up', and that he was unaware that Ms Grieger was in possession of Mr Townsend's phone. Mayor Walsh further explained that once he became aware that Ms Grieger was in possession of the phone, he resent the text to Ms Grieger, addressing her specifically.
85. Irrespective of this explanation from Mayor Walsh as to why he sent the SMS message, I nonetheless consider it was inappropriate and likely quite intimidating for the recipients.
86. Regarding the alleged threat to have an employee redirected, Mayor Walsh submitted in response to my provisional report:

To respond to Arron Broome in his complaint against myself is very disappointing that he would do this. I never direct staff, never have, never will. Once again I at the time rang what was Tony Huppatz phone number and Arron Broome answered. I had no knowledge that Tony Huppatz had left the department and would never have bothered to ring a complete stranger. I have great respect for Tony Huppatz and Murray Townsend. I have never met either Gayle Grieger or Arron Broome.

Will forward email sent to Gayle Grieger to confirm date 11/October/2020 of text asking if she had received my email...

87. I do not find Mayor Walsh's assertion that he did not request to have an employee redirected persuasive. I have found Mayor Walsh's recollection of his communications with DEW employees disingenuous, or unreliable at best.
88. Further, I have no reason to doubt Mr Broom's recollection of this conversation with Mayor Walsh, particularly given that he recorded it contemporaneously in his email to Ms Grieger. I am persuaded therefore, on balance, that Mayor Walsh did request to have an employee redirected.
89. It is apparent that Mayor Walsh has at times felt frustrated by DEW employees, which is compounded by the fact that he has a personal interest in the matter, as highlighted above.
90. Mr Gill provided the following response to my investigation regarding Mayor Walsh's conduct:

I have heard the story from Mayor Walsh himself about the alleged intimidating behaviour made to a DEW employee and he was quite embarrassed by it as he genuinely thought he was doing the right thing by DEW. The context is Mayor Walsh and Chris Smith (former CEO) were involved in a meeting with a substantial local business that was being frustrated by the Coastal Protection Board and at that meeting it was intimated by one of the business leaders present that all other avenues had been exhausted so perhaps the only option left was litigation against the Coastal Protection Board. Mayor Walsh was rather horrified by this prospect and thought he was doing the right thing by telling the Coastal Protection Board of this conversation so that they might reopen the discussion to avoid this "unsavoury outcome".

It would seem that this was interpreted as a threat from Mayor Walsh rather than a friendly “heads up” ...

...I have clearly advised Mayor Walsh to “pull back” from all dealings with government agencies as I believe he is being unfairly targeted.

91. Although some of Mayor Walsh’s communications may have been misconstrued, I hesitate to accept that the threat of class action was framed as a ‘friendly heads up’. I am of the view that his conduct was inappropriate and would have been seen as intimidating to DEW employees.
92. I also note that numerous requests were made by DEW employees for Mayor Walsh to direct requests for information to the council’s case manager through the council’s Chief Executive Officer. For example, I note the following exchange between Ms Grieger and Mayor Walsh on 5 October 2018:

Dear Robert,

As indicated in my response, could you please direct any further requests for information through the CEO of DCFH who will discuss these with the case manager for the Council.

Regards, Gayle

From: Robert Walsh [<mailto:robbobwalsh@icloud.com>]
Sent: Friday, 5 October, 2018 12:40 PM
To: Grieger, Gayle (DEW) <Gayle.Grieger@sa.gov.au>
Subject: Re: Response to your enquiries [SEC=Government, DLM=Sensitive]

Hi Gayle,

Thank you for your kind response.

I promise you I am never rude to any staff, and am quite hurt by this comment. Can I ask you as Acting Manager to send me the letter, recommendation, advice or what ever occurred to alter the BDP from Coastal Settlement for Luckybay to Coastal Conservation. Surely you would like to find out as well.

It’s a complete mess and may even have been a mistake.

Hope to hear from you.

Robert Walsh

Sent from my iPad

On 5 Oct 2018, at 11:44 am, Grieger, Gayle (DEW) <Gayle.Grieger@sa.gov.au> wrote:

Sensitive

Dear Robert,

I am currently the acting Manager, Coastal Management and replying on behalf of Arron Broom who has supplied the answers below to your latest emailed questions.

However, in light of the number of emails you have been sending and the tone of the phone conversations with staff, and as you have previously been instructed, all further enquiries you have about any issue regarding the DCFH development plan and related issues need to be directed to the CEO of DCFH. He can then contact the Dept of Industry and Skills Case Management services unit for advice. Any further communication by you to DEW staff is unlikely to be responded to. [my emphasis]

The Department of Environment and Water (DEW) provides the following response to your concerns related to Lucky Bay tenure, the seawall development application, sea level rise and the District Council of Franklin Harbour Development Plan.

The Coast Protection Board (CPB) directed that DCFH refuse the seawall application because it did not comply with CPB policy. The proposed seawall was not considered environmentally acceptable nor practical in the longer term. The final recommendation in the Coastal Processes and Concept Design Report (p.39 SMEC 2013, p.39) prepared for the DCFH, was for a beach nourishment/replenishment strategy. This is also the CPB's preferred coastal management solution for Lucky Bay.

The abovementioned CPB response discussed tenure and the current zoning arrangements for context only. The CPB response states that the settlement was not made freehold, which is accurate and remains the case. However, the Board acknowledges that DEW and DCFH are currently working together to consider appropriate tenure options.

With respect to your concerns regarding Sea Level Rise (SLR), CPB policy currently allows for 0.3 metres of SLR to the year 2050 and a further 0.7m to 2100. The SLR allowance is consistent with the State Planning Policy Library and the DCFH Development Plan. The National Tidal Centre's SEAFRAME project has been using a network of satellite calibrated tidal stations to accurately measure SLR since early 1990s. The SEAFRAME gauges in South Australia are Thevenard and Port Stanvac. These confirm that sea level is rising at nearly 5mm per year, which is expected to accelerate. The Board and State Government's policy on SLR is consistent with the United Nations Intergovernmental Panel on Climate Change (IPCC) Fifth Assessment Report (2014), which found that SLR is rising and will accelerate further in this century.

CPB policy acknowledges that the rate of rising sea levels may differ at some locations because of local land subsidence or uplift. If DCFH choose to carry out detailed investigations to determine the extent of localised subsidence or uplift, DEW will consider this information.

With respect to the DCFH General and Coastal Development Plan Amendment (DPA) gazetted in April of 2015. DEW raised concern with respect to the proposed Coastal Settlement Zone provisions. However, neither DEW or the CPB recommended the transfer of the Lucky Bay area from the Coastal Zone to the Coastal Conservation Zone.

As indicated above, please direct any further queries to the CEO of DCFH.

Regards,
Gayle

93. In light of the above, it is clear that there were direct requests from DEW for Mayor Walsh to direct communications through their case manager via the council's CEO, that were ignored by Mayor Walsh.
94. Given the volume and tenor of Mayor Walsh's communications, I do not consider that Mayor Walsh acted in a reasonable and respectful way in his communications with DEW employees. I consider that such conduct does not generate community trust and confidence in the council.
95. Accordingly, I am of the view that Mayor Walsh's conduct was in breach of clauses 2.2 and 2.3 of the Code of Conduct, and on that basis amounted to misconduct in public administration.

Opinion

In light of the above, my view is that Mayor Walsh committed misconduct in public administration by making repeated and inappropriate contact with the Department of Water and Environment, in breach of Part 2.2 and 2.3 of the Code of Conduct.

I recommend under section 25(2) of the Ombudsman Act and section 263B of the Local Government Act that the council require Mayor Walsh to issue a public written apology to the DEW and its employees affected by his conduct.

Summary and Recommendation

In light of the above, my view is that Mayor Walsh:

- did not commit misconduct in public administration by using his position as Mayor to influence decisions and actions regarding rezoning and tenure of properties in Lucky Bay
- did not commit misconduct in public administration by providing false and misleading information in a council report in order to obtain Commonwealth funding on a project in which he had a private interest
- committed misconduct in public administration by making repeated and inappropriate contact with the Department of Water and Environment.

I recommend under section 25(2) of the Ombudsman Act and section 263B of the Local Government Act that the council require Mayor Walsh issue a public written apology to the DEW and its employees affected by his conduct.

Final comment

I now report Mayor Walsh's misconduct to the principal officer of the council, as required by section 18(5) of the Ombudsman Act.

In accordance with Part 3 of the Code of Conduct for Council Members, this report must be provided to a public meeting of the council within two ordinary meetings of the council receiving my report.

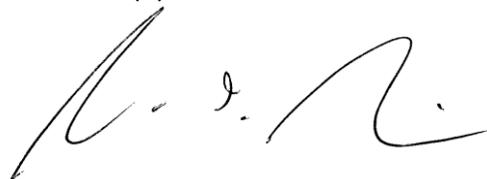
In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by **6 January 2021** on what steps have been taken to give effect to my recommendation/s above; including:

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

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

Pursuant to section 263B(2) of the Local Government Act, if a council member fails to comply with a council requirement made as a result of an Ombudsman recommendation such as that above, the council member will be taken to have failed to comply with Chapter 5 Part 4 of the Local Government Act. In this event, the council is to ensure that a complaint is lodged against the member in the South Australian Civil and Administrative Tribunal.

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



Wayne Lines
SA OMBUDSMAN

4 November 2020