



## Final Report

### Full investigation - *Ombudsman Act 1972*

Complainant	Kangaroo Island Plantation Timbers
Public Authority	Kangaroo Island Council
Ombudsman reference	2019/06227
Date complaint received	2 July 2019
Issues	<ol style="list-style-type: none"><li>1. Whether a decision was made at the Kangaroo Island Council's informal gathering of 7 May 2019 contrary to law</li><li>2. Whether it was wrong for the Kangaroo Island Council's informal gathering of 7 May 2019 to be held in confidence</li><li>3. Whether it was wrong for Kangaroo Island Council's Special Council Meeting of 16 May 2019 to be held in confidence</li></ol>

### Jurisdiction

The complaint is within my jurisdiction under the *Ombudsman Act 1972*.

The complaint was made by Mr Peter Lockett, Approvals Manager of Kangaroo Island Plantation Timbers (**KIPT**). The complaint was made on behalf of KIPT. For the purposes of this report, I will refer to the complainant as KIPT.

The complaint alleged that the Kangaroo Island Council (**the council**) had misused the confidentiality provisions of the *Local Government Act 1999* in order to discuss material provided by one party, in circumstances where there was not an appropriate basis to move the meeting into confidence under section 90 of the Local Government Act, and that the council had made a decision at an informal gathering, and thereby acted improperly under section 90(8) of the Local Government Act.

I consider it to be in the public interest that I investigate the complaint.

## Investigation

My investigation has involved:

- assessing the information provided by the complainant
- interviewing and otherwise seeking further information from elected members of the council
- interviewing and otherwise seeking further information from staff of the council
- seeking a number of responses from the council
- seeking more particulars from the complainant
- considering the Local Government Act
- considering the *Local Government (General) Regulations 2013*
- considering the *Local Government (Procedures at Meetings) Regulations 2013*
- considering the *Development Act 1993*
- providing numerous interested parties with my provisional report for comment, and considering their responses
- preparing this report.

## Standard of proof

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

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

## Procedural fairness

I provided my provisional report to the complainant, to Mr Greg Georgopoulos, Chief Executive Officer (CEO) of the council, to the Mayor and to each of the elected members, for consideration and comment. I received a response from Mr Graham Walkom<sup>3</sup> and from the CEO.

Mr Walkom's response is 'intentionally blunt' and critical of my decision to investigate this matter; I do not consider it necessary to reproduce it in this report. Mr Walkom also requested I remove one paragraph which related to comments he made in a telephone conversation with my Officer, prior to being approached formally to give evidence. I have accepted this submission and removed one paragraph from this report.

The CEO response indicated that the council was pleased with my provisional findings that no consensus was reached at the 7 May Workshop, and that the council did not err by holding the 7 May Workshop in confidence, but that the council was disappointed with my provisional finding that it acted in a manner that was wrong by moving into confidence at the council meeting on 16 May 2019. I address the submissions made in the CEO response later in this report. Ultimately, the CEO response did not persuade me to alter my conclusions.

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

<sup>2</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

<sup>3</sup> Shortly before the conclusion of my investigation, Mr Graham Walkom resigned from his role as a councillor.

## Background

### *The Smith Bay Seaport development application*

1. KIPT made a development application concerning a proposed deep-sea port at Smith Bay on the North Coast of Kangaroo Island (**the proposed development**).
2. The proposed development has been declared by the Minister to be a Major Development under Division 2 of the Development Act and is therefore being assessed by the State Commission Assessment Panel (**SCAP**).
3. A development is assessed as a Major Development if it is considered to be of major environmental, social or economic importance.<sup>4</sup> A Major Development is subject to the processes prescribed by the Development Act, including the requirement that an Environmental Impact Statement (**EIS**) be prepared for the consideration of the SCAP. After consideration of the application, the SCAP reports to the Minister.
4. An EIS is defined by section 4(4) of the Development Act as a document that includes a detailed description and analysis of a wide range of issues relevant to a development or project and incorporates significant information to assist in an assessment of environmental, social or economic effects associated with the development or project and proposes how those effects can be managed.
5. The EIS must be referred to the council and the council must provide a report back in response to the Minister.<sup>5</sup> The proponent (in this case KIPT) then has the opportunity to prepare a written response to matters raised by the council (and others) for the Minister. The Minister then prepares a report setting out the Minister's assessment of the development and any comments on the EIS as well as other matters.
6. Pursuant to section 48 of the Development Act the Governor makes the final decision on the approval of the development. To do so the Governor must have regard to a list of considerations prescribed by section 48(5) of the Development Act including the EIS.
7. Accordingly the council's response to the EIS is only one piece of information considered in the assessment of the development application and the decision making process. However, it is the only opportunity the council has to provide submissions in relation to the proposed development.

### *The council workshops*

8. The EIS and information relevant to the consideration of the EIS was considered at a number of council meetings and in a number of workshops. On at least one occasion, it appears that representatives from KIPT were present.<sup>6</sup>
9. A workshop took place on 30 April 2019. The attendees for this workshop were Mayor Pengilly, Cr Mumford, Cr Walkom, Cr Pledge, Cr Teasdale, Cr Liu and Cr Denholm, as well as four council staff members. At this workshop, the council members were briefed on several matters relating to the EIS.

<sup>4</sup> *Development Act 1993 (SA)* section 46(1a).

<sup>5</sup> *Development Act 1993 (SA)* section 46B(5)(a)(ii).

<sup>6</sup> The date on which KIPT representatives met with the council members is unclear. However, KIPT representatives were not present at the workshop of 30 April 2019 or 7 May 2019.

10. A workshop took place on 7 May 2019 (**the 7 May Workshop**). The attendees for this workshop were Mayor Pengilly, Cr Mumford, Cr Walkom, Cr Teasdale and Cr Denholm, as well as five council staff members. It is this workshop which largely forms the basis of KIPT's complaint.

*The council meetings on 14 and 16 May 2019*

11. Following the 7 May Workshop, the council administration produced a draft EIS response. This draft EIS response was provided to the elected members shortly before the council meeting on 14 May 2019, with the recommendation by the administration that the elected members endorse the proposed EIS submission as presented.
12. As the elected members felt they had not had enough time to properly consider the draft EIS response, the council meeting was suspended pursuant to regulation 20(1) of the *Local Government (Procedures at Meetings) Regulations 2013* in order to allow the elected members to fully consider the draft EIS response. The meeting was suspended for approximately one hour, noting that for 30 minutes of that time, the elected members adjourned for a lunch break.
13. The council then passed a series of motions, which are reproduced in full later in this report. In essence, the council voted to receive the draft EIS response. The council then passed a series of motions expressing various sentiments about the EIS and the EIS response, including a request that the council administration more fully assess possible alternative locations for the seaport.
14. The council also resolved to defer the finalisation of the EIS response to a Special Council meeting to be scheduled.
15. The council did not go into confidence to consider this matter at the council meeting of 14 May 2019. Two members of KIPT were in the gallery at this meeting.
16. The Special Council meeting was scheduled for 16 May 2019. Between 14 May 2019 and 16 May 2019, the proposed EIS response was redrafted.
17. As per the agenda for the 16 May 2019 meeting, the only matter to be considered was the council's response to the EIS. There is no evidence that it was premeditated that this matter would be considered in confidence, a point that I shall return to later in this report.
18. The council minutes reflect that shortly after the commencement of the meeting, the council determined to go into confidence to consider the matter of the EIS response. The council debated the matter in confidence for approximately one hour.
19. When the council resumed in open session, the elected members passed a motion that the council endorse the EIS submission presented, with minor formatting and additions.

*The KIPT complaint to the council*

20. On 9 May 2019 KIPT notified the council of its complaint by telephoning the Chief Executive Officer (CEO), Mr Greg Georgopoulos.<sup>7</sup> The CEO verbally advised KIPT that the action taken by the council was lawful.

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<sup>7</sup> I note that Mr Georgopoulos was in the role of Acting CEO as at 9 May 2019. He was appointed as CEO on 19 June 2019.

21. The CEO confirmed this advice in an email to KIPT on 23 May 2019. The email relevantly states:

**In-confidence items during Informal Gatherings:**

In accordance with Council's Informal Gathering Policy (attached), the ACEO can declare items within an informal gathering to be a 'confidential informal discussion' as it is a briefing session relating to information of a confidential nature within the ambit of section 90(3) of the Local Government Act.

The Council workshop held on the 7 May 2019 which considered the KIPT EIS, was a 'designated informal gathering' and followed the above, correct, procedures. A notice of the workshop was placed within the customer service area of Council and on its website, the notice detailed the in-confidence declaration by the CEO for this specific matter, in accordance with the Informal Gathering Policy (see attached).

I trust this addresses your concerns and confirms that Council has been acting in a proper and transparent manner.

22. On 24 May 2019 KIPT sent a letter to Mayor Pengilly raising the complaint. The letter relevantly states:

The purpose of this letter is to express Kangaroo Island Plantation Timbers' (KIPT) dissatisfaction with the process Council has adopted to determine its response to the draft Environmental Impact Statement for the proposed Kangaroo Island Seaport...

On Tuesday 7 May 2019 the Acting CEO, Mr Greg Georgopoulos, convened a four-hour 'Council Workshop' (that is, an informal meeting of Council members), for the sole purpose of allowing Council members to 'consider' the draft EIS for the proposed KI Seaport at Smith Bay.

As the notice of meeting makes clear, this meeting was held in camera in accordance with Council's Informal Gathering Policy because it was to be a briefing session relating to information of a confidential nature within the ambit of section 90(2)(3) of the Local Government Act, part (d); that is, commercial information of a confidential nature that could reasonably prejudice the commercial position of the person who supplied the information; or was commercial information which could confer a commercial advantage on a third party; and, on balance, Council believed the disclosure of this information would be contrary to the public interest...

A number of sources have suggested to us that the public were excluded from the meeting of 7 May so that Council could consider a six-page document (*Briefing note: EIS points of discussion*) prepared for Yumbah Aquaculture by a Melbourne public relations company. We understand this document had been provided to Councillor Walkom, who forwarded the document to all elected members.

On Tuesday 14 May, Council met and considered its response to the draft EIS (Item 11.9). This discussion was held in public and, as you are aware, Shauna Black and Peter Lockett were in the public gallery. Item 11.9 referred to a draft submission prepared by Council staff which was tabled at the meeting.

Councillor Walkom, who led the ensuing discussion, stated the draft submission '*doesn't reflect Council views from the informal gathering and needs quite a bit of modification*'; that the aim of the paper '*...is not to be polite*'; it should be '*clear and loud...a game changer*'.

In response, Aaron Wilksch, the staff member who wrote the report, asked: "*So what hasn't been reflected about the Council's position...what detail...where have we deviated from the position of Council?*"

Councillor Walkom replied, *'Some views have been included but have been watered down. The impacts on Yumbah and the transport impacts need to be front and centre. The paper is fairly mild'*. Councillor Walkom said Council had to be *'more strident'* in its response.

Council met again on Thursday 16 May 2019 at 4.00pm. This was a Special Meeting of Council, and the only item of special business listed was Council's response to the draft EIS. This referred to the revised version of Council's draft submission which was meant to express Council's views more robustly.

Three of KIPT's directors attended the meeting, together with our Approvals Manager. All were excluded from the meeting following a motion by Cr Teasdale, seconded by Councillor Liu that they be excluded in accordance with the provisions of Section 90(3)(d)...

It is our view that neither Section 90(3)(d) nor Section 90(3)(h) applied to Council's deliberations on its response to the EIS. Indeed, it is difficult to imagine a matter where the public interest in open meetings was more important. Section 90 makes it clear that in camera meetings cannot be held simply because a subject may be regarded as controversial...

In the light of Councillor Walkom's comments in leading the discussion on Item 11.9 at the meeting on 14 May, we believe any reasonable observer would conclude that the purpose of the informal gathering on 7 May was to achieve a consensus about the draft EIS - what else could 'Council's view' mean - and that the reason for excluding members of the public was to ensure no-one could see that this was what the participants were doing.

In our view, Councillor Walkom's comments show that the approach Council has taken to formulate its position on the draft EIS represents a breach of its own Informal Meetings Policy, as well as being directly contrary to obligations imposed on councils in the Local Government Act.

We have no objection to Yumbah or any other party making representations to Council about the draft EIS. They are entitled to their views and are entitled to express those views to whomever will listen.

However, we question Council's reliance on this material to justify excluding the public from its deliberations on the draft EIS on 7 May 2019. We do not believe the *Briefing Note* falls within the class of materials that would justify an in-camera discussion under Section 90(2). One cannot credibly argue that documents provided for public relations purposes are somehow private...

23. Mayor Pengilly provided a response by way of letter dated 12 June 2019. The letter relevantly states:

I confirm that Council has acted in accordance with its Informal Gathering Policy, which authorises the ACEO to declare items within an informal gathering to be a 'confidential informal discussion' as it is a briefing session relating to information of a confidential nature within the ambit of section 90(3) of the *Local Government Act 1999*.

The Council workshop held on the 7 May 2019 which considered the KIPT EIS, was a 'designated informal gathering' and followed the above procedures...No decision was made or effectively made at this workshop. Council considers it has acted lawfully and properly in this regard.

In relation to your complaint concerning the Special Council meeting on Thursday 16<sup>th</sup> May at 4.00pm, you have correctly stated that Council went into confidence pursuant to Section 90(3)(d) of the *Local Government Act*, this was read out to the meeting prior to going into confidence and minuted accordingly. This is consistent with Council's approach when considering items relating to Kangaroo Island Plantation Timbers and has occurred previously at: Special Council Meeting 30 October 2017 and Council Meeting 12 June

2018. Council maintains that its decisions to enter confidence are correct and in accordance with the *Local Government Act 1999*..

Council maintains that it has acted consistently with the *Local Government Act 1999* and its Informal Gathering Policy, and has acted consistently when considering Kangaroo Island Plantation Timbers matters for more than 2 years. It would appear that KIPT may be receiving advice which is not necessarily correct.

For your information, Council has made its response to the Smith Bay EIS, public on its website.

24. KIPT was dissatisfied with the Mayor's response, and approached my Office with a complaint.

### Relevant law / policies

25. Section 90 of the Local Government Act relevantly provides:

#### **90—Meetings to be held in public except in special circumstances**

- (1) Subject to this section, a meeting of a council or council committee must be conducted in a place open to the public.
- (2) A council or council committee may order that the public be excluded from attendance at a meeting to the extent (and only to the extent) that the council or council committee considers it to be necessary and appropriate to act in a meeting closed to the public in order to receive, discuss or consider in confidence any information or matter listed in subsection (3) (after taking into account any relevant consideration under that subsection).
- (3) The following information and matters are listed for the purposes of subsection (2):
- (a) information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead);
  - (b) information the disclosure of which—
    - (i) could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the council; and
    - (ii) would, on balance, be contrary to the public interest;
  - (c) information the disclosure of which would reveal a trade secret;
  - (d) commercial information of a confidential nature (not being a trade secret) the disclosure of which—
    - (i) could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party; and
    - (ii) would, on balance, be contrary to the public interest;
  - (e) matters affecting the security of the council, members or employees of the council, or council property, or the safety of any person;
  - (f) information the disclosure of which could 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;
  - (g) matters that must be considered in confidence in order to ensure that the council does not breach any law, order or direction of a court or tribunal constituted by law, any duty of confidence, or other legal obligation or duty;
  - (h) legal advice;
  - (i) information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds will take place, involving the council or an employee of the council;
  - (j) information the disclosure of which—
    - (i) would divulge information provided on a confidential basis by or to a Minister of the Crown, or another public authority or official (not being an employee of the council, or a person engaged by the council); and
    - (ii) would, on balance, be contrary to the public interest;

- (k) tenders for the supply of goods, the provision of services or the carrying out of works;
- (m) information relating to a proposed amendment to a Development Plan under the *Development Act 1993* before a Development Plan Amendment proposal relating to the amendment is released for public consultation under that Act;
- (n) information relevant to the review of a determination of a council under the *Freedom of Information Act 1991*.

(4) In considering whether an order should be made under subsection (2), it is irrelevant that discussion of a matter in public may—

- (a) cause embarrassment to the council or council committee concerned, or to members or employees of the council; or
- (b) cause a loss of confidence in the council or council committee; or
- (c) involve discussion of a matter that is controversial within the council area; or
- (d) make the council susceptible to adverse criticism.

...

(7) If an order is made under subsection (2), a note must be made in the minutes of the making of the order and specifying—

- (a) the grounds on which the order was made; and
- (b) the basis on which the information or matter to which the order relates falls within the ambit of each ground on which the order was made; and
- (c) if relevant, the reasons that receipt, consideration or discussion of the information or matter in a meeting open to the public would be contrary to the public interest.

...

(8) The duty to hold a meeting of a council or council committee at a place open to the public does not in itself make unlawful informal gatherings or discussion involving—

- (a) members of the council or council committee; or
- (b) members of the council or council committee and staff, provided that a matter which would ordinarily form part of the agenda for a formal meeting of a council or council committee is not dealt with in such a way as to obtain, or effectively obtain, a decision on the matter outside a formally constituted meeting of the council or council committee.

#### **Examples—**

The following are examples of informal gatherings or discussions that might be held under subsection (8):

- (a) planning sessions associated with the development of policies or strategies;
- (b) briefing or training sessions;
- (c) workshops;
- (d) social gatherings to encourage informal communication between members or between members and staff.

(8a) In addition, an informal gathering or discussion under subsection (8) may only be held if—

- (a) the council has adopted a policy on the holding of informal gatherings or discussions; and
- (b) the informal gathering or discussion complies with the policy.

(8b) A policy adopted under subsection (8a) must comply with any requirements prescribed by the regulations, and the regulations may (for example) include requirements that the policy provide for—

- (a) the imposition of limitations on the holding of informal gatherings or discussions; and
- (b) procedures for approval of informal gatherings or discussions; and
- (c) the capacity of the council to impose conditions on an approval.

...



26. Regulation 8AB of the Local Government (General) Regulations provides:

**8AB—Informal gatherings and discussions**

- (1) For the purposes of section 90(8b) of the Act, a council must ensure that its policy on the holding of informal gatherings or discussions—
- (a) provides that designated informal gatherings or discussions must be held at a place open to the public, unless the designated informal gathering or discussion is one that the council or chief executive officer has declared may be held in confidence; and
  - (b) provides that the council or chief executive officer will only declare that a designated informal gathering or discussion may be held in confidence—
    - (i) on a case by case basis; and
    - (ii) if the designated informal gathering or discussion—
      - (A) is a planning session of a general or strategic nature; or
      - (B) is a briefing relating to—
        - information; or
        - a matter,
  - (c) provides for procedures relating to the holding of designated informal gatherings or discussions; and
  - (d) provides for publication on the council's website of details relating to designated informal gatherings or discussions, including—
    - (i) in all cases—
      - (A) the place, date and time at which the designated informal gathering or discussion will be held; and
      - (B) the matter that is to be discussed at the designated informal gathering or discussion; and
      - (C) whether or not the designated informal gathering or discussion is to be held at a place open to the public; and
    - (ii) in the case of a designated informal gathering or discussion that will be held in confidence—the reason for the designated informal gathering or discussion being held in confidence.

27. The council's *Informal Gathering Policy* relevantly states:<sup>8</sup>

**1. Introduction**

Under amendments made to the *Local Government Act* (1999) [the Act]...Councils must adopt a policy on the holding of 'informal gatherings and discussion' under section 90(8) of the Act.

...Informal gatherings, where appropriate, provide a valuable opportunity to enhance the decision-making processes by providing opportunities for Elected Members, Committee Members and Council Staff to become better informed on issues and seek further clarification.

**2. Policy Objective**

To ensure Elected Members, Committee Members and Council Staff have sufficient opportunity to conduct planning sessions, to receive informal briefings and educational sessions, and convene other informal gatherings without prejudicing the requirements for openness and transparency as required by the *Act*.

Section 90(8) of the *Act* allows informal gatherings to be held provided that the discussion does not lead to a decision, or effectively obtain a decision, on a matter that would ordinarily be dealt with at an Ordinary Meeting of Council. This policy reflects the intention of the legislation for informal gatherings to be used for briefing, planning and educational

<sup>8</sup> This policy has been superseded by version 4 of the council's *Informal Gathering Policy*, but is relevant to my investigation as it was in force as at 7 May 2019.

sessions and is aimed at avoiding any perception that informal gatherings will be used to obtain consensus for Council agenda items.

### 3. Definitions

...

**Designated informal gathering** or discussion means an event organized and conducted by or on behalf of the council or chief executive officer to which members of the council or council committee (as the case may be) have been invited and that involves discussion of a matter that is, or is intended to be, part of the agenda for a formal meeting of the council or council committee.

### 4. Scope

...

Informal gatherings and discussions of this kind will be used solely for the purpose of information sharing and not for the purpose of debating issues, building consensus positions or otherwise discharging Council's deliberative and decision-making functions.

### 5. Policy Statement General Business of the Council

Informal gatherings will not, and cannot, be used for the purpose of conducting the general business of the Council or to stifle debate on issues that may subsequently be dealt with by the Council at a formal meeting. However informal gatherings may be used to discuss issues that involve strategy or policy or matters of Council administration and to brief Elected Members on issues relating to their decision-making function.

#### Timing of, and Access to, Informal Gatherings of Council

**5.a.** Where informal gatherings, such as workshops and briefing sessions, are scheduled regularly to coincide with the Council's meeting cycle and to consider matters that will form part of the Council's meeting agenda, the gatherings will be advertised and the matters to be discussed will be communicated to the public. Any ad hoc informal gatherings or discussions that are convened to discuss items that will form part of the Council's meeting agenda will also be advertised and, when appropriate, communicated to the public. These types of informal gatherings are defined as *designated informal gatherings or discussion*'

**5.b.** *Designated informal gatherings or discussions* will be held at a place open to the public, except where the designated informal gathering or discussion has been declared by the Council or Chief Executive Officer to be held in confidence.

The Council or Chief Executive Officer may, on a case-by-case, declare a *designated informal gathering or discussion* to be a 'confidential informal discussion' where the designated informal gathering or discussion is either:

- (i) a planning session of a general or strategic nature; or
- (ii) is a briefing session relating to information or a matter of a confidential nature within the ambit of section 90(3) of the *Act*.

An informal gathering or discussion of the Council or a Council committee which is not a *designated informal gathering or discussion* will not be open to the public, unless otherwise determined by the Council or Chief Executive Officer.

If, during a *designated informal gathering* open to the public, a topic falls into a category that would normally be kept confidential within the ambit of section 90(3) of the *Act*, the item will be discussed last and the gathering will be closed when that item is reached.

**5.c.** Where discussion of an item is declared a 'confidential informal discussion' the reason for the designated informal gathering or discussion being held in confidence will be stated on the list of matters to be discussed in accordance with the relevant ground under section 90(3) of the *Act*.

## Agendas and Minute Taking

*Designated informal gatherings or discussions* will not involve a formal minute taking process. However, a list of the matters to be discussed at the designated informal gathering will be published on the Council's website in accordance with clause 5.a.

The CEO, or delegate, will maintain records of those invited and those that attended.

### 6. Informal Gathering Purpose and Conduct

An Informal Gathering provides an opportunity for Elected Members to engage with each other, Council Employees and/or other stakeholders, including technical specialists or community representatives, to gain information that would otherwise be unable to be delivered within the time constraints of an Ordinary Meeting of Council. This information can address a wide variety of subject matters including legislative requirements, financial and technical requirements, specialist input, operational implications, Community implications, etc. This information can then enable an Elected Member to make an informed decision during the process of responding to a Motion delivered during the course of an Ordinary or Special Meeting of Council.

28. The *Local Government (Procedures at Meetings) Regulations 2013* relevantly state:

#### 20–Short-term suspension of proceedings

(1) If the presiding member considers that the conduct of a meeting would benefit from suspending the operation of all or some of the provisions of this Division for a period of time in order to allow or facilitate informal discussions, the presiding member may, with the approval of at least two-thirds of the members present at the meeting, suspend the operation of this Division (or any part of this Division) for a period determined by the presiding member.

(2) The Guiding Principles must be taken into account when considering whether to act under subregulation (1).

(3) If a suspension occurs under subregulation (1)–

(a) a note of the suspension, including the reasons for and period of suspension, must be entered in the minutes; and

(b) the meeting may proceed provided that a quorum is maintained but, during the period of suspension–

(i) the provisions of the Act must continue to be observed

; and

(ii) no act or discussion will have any status or significance under the provisions which have been suspended; and

(iii) no motion may be moved, seconded, amended or voted on, other than a motion that the period of suspension should be brought to an end; and

(c) the period of suspension should be limited to achieving the purpose for which it was declared; and

(d) the period of suspension will come to an end if–

(i) the presiding member determines that the period should be brought to an end; or

(ii) at least two-thirds of the members present at the meeting resolve that the period should be brought to an end.

29. Section 6 of the *Local Government Act 1999* states:

#### 6–Principal role of a council

A council is, under the system of local government established by this Act, established to provide for the government and management of its area at the local level and, in particular–

(a) to act as a representative, informed and responsible decision-maker in the interests of its community; and

- (b) to provide and co-ordinate various public services and facilities and to develop its community and resources in a socially just and ecologically sustainable manner; and
- (c) to encourage and develop initiatives within its community for improving the quality of life of the community; and
- (d) to represent the interests of its community to the wider community; and
- (e) to exercise, perform and discharge the powers, functions and duties of local government under this and other Acts in relation to the area for which it is constituted.

### Whether a decision was made at the Kangaroo Island Council's informal gathering of 7 May 2019 contrary to law

#### *The basis for the complaint*

30. In the complaint to my Office, Mr Lockett stated:

I believe this is a serious breach of the Local Government Act. The substantial matter (the Council's response to KIPT's planning application to build a port on KI) will have major implications for the company and the KI community. Council excluded the public from its meetings so that it could discuss the views of one objector, which were provided to all councillors in writing, away from public scrutiny. The evidence suggests the Council then came to a decision about its response to the proposed development in that meeting, which I believe is contrary to the Local Government Act.

31. Mr Lockett expressed the view that the council made a decision to oppose the proposed development at the workshop held on 7 May 2019. His reasoning was:

I believe this is evident from comments made by Councillor Walkom in the subsequent meeting held on 14 May, referred to in the letter of complaint submitted to Council on 24 May, and from other elected members including the Mayor, the Deputy Mayor (Bob Teasdale) and Councillor Denholm.

I believe Council's formal submission (the draft of which was presented, discussed, revised and endorsed at the in camera meeting of 16 May) was written by Councillor Walkom to ensure the decision arrived at in the meeting of 7 May was conveyed to the SA government without any of the counter-balancing favourable comments which appeared in the first draft prepared by Council's professional staff.

32. In response to a request to provide further details, Mr Lockett advised my investigation:

I refer to your letter to me of 13 March 2020, in which you seek further information about comments made by Mayor Pengilly, and Councillors Teasdale and Denholm.

I have reviewed my notes which were taken at the meeting on 14 May 2019. The comments made by all three were at the meeting of 14 May 2019. You will see from the minutes of the meeting the matter came before Council around 12.45 pm and Cr Teasdale moved a motion to have a 30 minute lunch break.

In moving his motion Cr Teasdale said: *"We only got this (i.e. the draft submission prepared by Aaron Willsch) this morning. This is mild and muted, and not hard hitting enough."*

The break allow elected members time to read the draft submission prepared by Wilksch. The Council resumed at 1:31, and there was a 10 minute discussion in open session before Cr Walkom moved four motions.

In the open discussion after the 30 minute break Councillor Teasdale said:

*"We need a separate report for elected members. Send this report as a report from the administration. We should have a committee to formulate our response, and not be*

*constrained by legal niceties, then have a special Council meeting. Councillor Walkom has four motions we can support.'*

Aaron Wilksch counselled elected members that sending two submissions to the Minister would weaken both.

Councillor Denholm spoke briefly in seconding Cr Walkom's first motion and said words to the effect that he supported every word Cr Walkom had said.

Mayor Pengilly interjected a comment during the interchange between Cr Walkom and Aaron Wilksch which is referred to in the letter of complaint sent to the Mayor on 24 May. Walkom had said the paper written by Wilksch *"doesn't reflect Councils views from the informal gathering and needs quite a bit of modification"*. Wilksch asked Walkom to be specific about what was in the draft submission he wrote that didn't reflect the position of Council from the informal gathering. Mayor Pengilly interjected "page 3". Page 3 (and page 4) sets out the planning arguments that favour building the KI Seaport at Smith Bay.

### *Evidence obtained by my investigation*

33. Much of the basis for KIPT's complaint stems from comments made by persons at the council meeting on 14 May 2019. The council meeting minutes are not a transcript and do not record statements made by elected members in debate. The council administration has advised that the council does not electronically record the council meetings.<sup>9</sup>
34. Mayor Pengilly provided a lengthy response to my investigation. The response includes the following submissions:

I deal with the questions you have raised in turn below. However, to further inform my response to you, I, firstly, set out the background to the Council's consideration of this matter, as well as a relevant summary of the operation of the informal gathering and discussion provisions under the Act.

#### **Background**

KIPT submitted a proposal to the Minister of Planning ('the Minister') to develop a seaport at Smith Bay on the North Coast of Kangaroo Island. The proposal has been described as a multi-user deepwater port facility at Smith Bay.

The application is to be assessed as a Major Development Proposal...the Council is provided with an opportunity to submit a response on the proposal.

The EIS, released on 28 March 2019, is 636 pages. This does not include the hundreds of pages of appendices included with the Statement...The EIS has been the subject of a public consultation process. Any person was able to make a submission on the EIS. The SCAP received 1372 public submissions in the first round of public consultation, completed in April 2019, including the submission made by the Council.

Following which, KIPT released an addendum to the EIS for public consultation in December 2019. This attracted hundreds of further submissions...

The proposed seaport is located in close proximity to Yumbah Aquaculture, which operates an abalone farm at Smith Bay.

It is a matter of public knowledge that the owners of Yumbah Aquaculture are opposed to the proposal. This has been reported in the media on numerous occasions. Yumbah Aquaculture has also made a comprehensive submission against the proposal, as part of the public consultation process...

<sup>9</sup> Email to my Office on 27 February 2020.

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## Informal Gatherings and Discussions

The Complainant has alleged that, in determining its response, the Council made a 'decision' at its workshop of 7 May 2019, contrary to section 90(8) of the Act and the Policy.

Section 90(8) of the Act provides that a duty to hold a meeting of the Council or a Council Committee at a place open to the public, does not make unlawful, informal gatherings or discussions involving members of the Council (or Council Committee)...and staff, *'provided that a matter which would ordinarily form part of the agenda for a formal meeting of the council or council committee is not dealt with in such a way as to obtain, or effectively obtain, a decision on the matter outside a formally constituted meeting.'* (my emphasis)

The Act sets out a (non-exhaustive) list of examples of informal gatherings or discussions that might be held under subsection (8). This list, relevantly, includes briefing sessions and workshops...

It is noted that the *Local Government (General) Regulations 2013* draw a distinction between a *'designated informal gathering or discussion'*, as defined under regulation 8AB(2) and other, *'non designated'* informal gatherings or discussions.

Informal gatherings or discussions which are held to consider matters that will, ultimately, form part of the Council's meeting Agenda at a later time, fall within the ambit of a *'designated informal gathering'*. Designated informal gatherings must be advertised on the Council's webpage and open to the public, unless that informal gathering or discussion deals with a topic that falls into a category that would be kept confidential if it arose at a Council (or Committee) meeting. In which case, the gathering will be closed when that matter is reached.

In determining then whether the gathering should be closed to the public, the considerations under section 90(3) of the Act are relevant...

There is no statutory requirement for the Council to make available copies of any documentation received and referred to by members at an informal gathering or discussion, such a gathering or discussion, by its very nature, **not being** a meeting or the Council or a Council Committee, to which section 91 of the Act [applies].

Accordingly, **sections 91(5) and (6) of the Act have no application** to the facts of the matter.

### Workshop of 30 April 2019

Prior to the workshop that was held on 7 May 2019, another workshop was held at the Council Chambers on 30 April 2019.

The following members attended this workshop: Mayor Pengilly, Crs Mumford, Walkom, Pledge, Teasdale, Liu and Denholm. Council staff in attendance were: Mr Greg Georgopoulos, Nicki Putland, Aaron Wilksch and Gerard Snowball.

There were a number of items for which elected members were to receive a briefing at that workshop, one of which included the KIPT EIS. This item was included for discussion at this workshop given the size of the EIS and so that members could be briefed in relation to issues of relevance for the community regarding the proposal.

A copy of the Notice for the workshop that was placed on the Council webpage, as well as a copy of the PowerPoint that had been prepared by Mr Aaron Wilksch, Manager Development & Environmental Services, for the purposes of briefing the members, are **attached**.

The title of the PowerPoint presentation is *'Smith Bay Timber Port Major Development Briefing'*. A portion of that briefing included alternative sites for the seaport proposal, specifically, DeMole, Snug Cove, Western River and Cape Dutton.

Importantly, through the Department of Planning, Transport and Infrastructure, the SCAP (formerly the Development Assessment Commission) is responsible for setting the level of assessment required for the proposal. The SCAP prepared a set of Guidelines for the preparation of the assessment document...The Guidelines, note, amongst other things (my emphasis):

*The proposal **should also include information on alternative locations** investigated and justification provided as to their potential suitability/unsuitability (page 9).*

*The current plan **does not provide any information on alternative locations or their merits**. No justification has been provided, besides ownership of the land, for the proposal to be at Smith Bay (page 14)*

*Lack of information and justification provided for proposed site. Further information required to enable a comparative basis for assessment = **CRITICAL** (Page 14)*

*Alternative location*

*Guideline 6: To enable a thorough assessment, and a comparative basis of the suitability of the location of the proposal, **information should be included on alternative locations that have been considered for the development**. This information should include investigations that have been undertaken and reasoning behind why the proponent has deemed them less suitable than the proposed location.*

*6.1 Provide information on alternative locations for the proposal that have been considered, with specific regard for:*

- sites nominated for ports*
- sites where the proponent owns the adjacent land*

*6.2 Identify the operational benefits and constraints for each alternative location*

*6.3 Provide evidence and/or justification (social, economic, environmental) as to the potential suitability or unsuitability of each alternative location. Include information on the ability of these sites to accommodate multi-users (page 26)*

That is, in requiring KIPT to prepare the EIS, the SCAP specifically noted that the proposal submitted by KIPT **failed to address** the issue of alternative locations, which information was critical for the assessment of the proposal.

Accordingly, it was incumbent of the Council to inform itself on this issue, amongst others, as it is an issue that goes to the planning merits of the proposal. This information would serve to inform any response that the Council may wish to make regarding the proposal.

As requested, I attach a copy of the notes made by Mr Wilksch of an internal meeting held on 1 May 2019 with the Acting CEO and Mr John Fernandez, Technical Programs Manager, the day following the workshop on 30 April 2019.

### **Workshop of 7 May 2019**

Given the importance of this issue for the Council, following the workshop held on 30 April 2019, a further workshop was held at the Council Chambers on 7 May 2019. The purpose of this workshop was to further consider the EIS but, more particularly, the issue of suitability of site location.

A copy of the Notice that was placed on the Council's website in accordance with the Act and its Policy is **attached**.

I attended at that [workshop], as did Crs Mumford, Walkom, Pledge, Teasdale and Denholm. Council staff in attendance included the Acting CEO (at that time) Mr Greg Georgopoulos, Mrs Nicki Putland, Director Council Services, Mr John Fernandez, Technical Program Manager, Mr Aaron Wilksch, Manager, Development and Environmental Services and Mrs Monika Matej, Development Services Officer.

There were a number of handouts distributed at the workshop including:

- KIPT Route comparison;
- Confidential Council report and minutes titled "Forestry Update" 12 June 2018;
- Suggested Approach to Road Funding;
- Binding Memorandum of understanding - Kangaroo Island Road Infrastructure Fund;
- KIPT Road Freight Options Assessment - prepared by Osman Solutions on behalf of KIPT;
- HDS Report - KIPT freight Access route options;
- Wallbridge & Gilbert Consulting Engineers report - Forestry Access Route Assessment;
- EBS ecology report - KIPT Transport Route Options - Ecological Assessment;
- and
- EBS ecology report - KIPT Transport Route Options - Limitations summary.

While the Porter Novelli briefing note titled '*EIS Points of Discussion*' was available, it **was not** distributed or discussed...

A copy of the PowerPoint presentation that was prepared by Mr Wilksch, for the purposes of briefing the members at this workshop, is also **attached**. The title of the PowerPoint presentation is '*Smith Bay Major Development Alternatives Workshop*'.

Accordingly, based on the above background, it is fair to characterise the consideration of an alternative site at that workshop as a significant part of the discussions had at that time. Site location was and is, a relevant and extremely important consideration in addressing the planning merits of the proposal. More importantly, however, this was not simply based on concerns that may have been raised by Yumbah Aquaculture (which are addressed in its own response) but, rather, by the SCAP in the Guidelines that it prepared for KIPT's consideration.

The Council was not and is not, a decision maker in relation to the proposal, but only an 'interested party', insofar as it had been invited to respond to the proposal.

In acting as a representative, responsible, informed decision-maker, as required under section 6 of the Act, it was incumbent on the Council to fully inform itself in relation to what, on any reasonable and objective basis, is a significant project...with the potential to have broad and far reaching environmental, economic and social impacts for its residents and ratepayers.

The Council was required to fully inform itself on the proposal, so that it could provide a considered response to the SCAP and in doing so, members were entitled to ensure that they were fully informed, including by way of attendance at workshops that had been arranged for this purpose.

I recall that members expressed individual positions with respect to the sufficiency, or otherwise, of the EIS, as well as to proposed site location of the proposal at this workshop. However, this does not mean and nor could it even be considered to be, evidence of the Council dealing with a matter in such a way as to obtain, or effectively obtain, a decision on the issue of its response to the SCAP, outside of a formally constituted Council meeting. Rather, members simply expressed various viewpoints, as informed by correspondence and communications they had with residents and ratepayers, as well as the information provided by Administration. The sharing of such information is entirely the point of an informal gathering or discussion.

At no time was a 'consensus' reached (or even sought to be reached) in relation to any particular position. Indeed, while I cannot recall which member may have expressed what view at the time (these workshops having been held some 12 months prior) I do recall that, as a result of the robust discussions being had, it was determined that these ideas should be captured. For this purpose, a rudimentary 'SWOT' analysis of the West of Stokes location and the site proposed by KIPT at Smith Bay was completed. A copy of those notes made on the whiteboard are **attached**.



There was, however, no 'outcome' of the workshop, that term denoting that a decision (including a consensus position) was made or arrived at by the Council on any matters. In particular, there was no 'consensus' reached on the Council's response to the EIS at this workshop, either explicitly or implicitly.

Rather, the workshops simply informed members in relation to not only the EIS, but also the viability of alternative site locations, KIPT having failed to undertake and advise on the same as required of it. Following which, it was Mr Wilksch's role, as Manager, Development & Environmental Services, to prepare the Councils' draft response to the SCAP, for the Council's formal consideration and decision at its meeting of 14 May 2019.

Of course, while the discussions in relation to alternative sites would have had an impact on the preparation of this response, an 'impact' on the preparation of the response, does not and could never...reasonably give rise to any suggestions that there was an agreement or consensus reached at those workshops regarding the content of the draft submission. The draft, once prepared by administration, was always to be considered and determined, by the Council at its meeting of 14 May 2019.

### Council meeting of 14 May 2019

Relevantly and also evidencing the above, the final submission, dated 22 May 2019, provided to the SCAP, is **substantially different** to the draft that the Council received for its consideration at its meeting of 14 May 2019.

The draft response was included with Agenda item 11.9 *Response to Environmental Impact Statement (EIS) - Smith Bay Wharf* (**attached**).

The recommendation by Mr Wilksch in the report for Agenda item 11.9 was as follows:

*Council receive the EIS submission*

*Council endorse the proposed EIS submission as presented*

Cr Graham Walkom had taken a keen interest in this matter and did communicate with Mr Wilksch in the intervening period between 7 May 2019 and 14 May 2019 regarding the draft report. However, at no stage did Cr Walkom seek to 'direct' Mr Wilksch. His enquiries did not 'drive' the draft and his interest in this matter did not sway or otherwise amend the content that was included by Mr Wilksch in the draft response.

For this reason, there was nothing unique or different regarding the preparation of the draft response. Elected members are always entitled to speak directly with Mr Wilksch regarding planning matters.

Cr Walkom proposed a series of motions without notice, which he intended to bring forward at the Council's consideration of Agenda item 11.9 at its meeting of 14 May 2019. These were as an alternative to the recommendations included in the Agenda report. This is his right as an elected member in accordance with regulation 12(5) of the *Local Government (Procedures at Meetings) Regulations 2013*.

The proposed motions sought to include additional material in the Council's response to the SCAP, further evidencing that there **had not**, in fact, been any decision or consensus reached on these issues at the informal gathering of 30 April 2019, nor any inappropriate involvement or direction by Cr Walkom in the preparation of the draft response. These draft motions **were not** prepared during the workshop of 30 April 2019, they were developed independently by Cr Walkom.<sup>10</sup>

You will need to enquire of Cr Walkom whether he had any assistance from any other elected member, and/or if he sought assistance from Administration in 'crafting' the same, noting, that if he did, this is not a breach of the Act.

<sup>10</sup> I understand the two references in this paragraph to the workshop of 30 April 2019 to be intended to be references to the workshop of 7 May 2019, as that is the workshop that is subject to investigation.

Again, evidencing that these proposed motions **were not** prepared by way of any decision or consensus being reach[ed], as noted in your letter of 13 March 2020, when they were moved and seconded at the meeting of Council on 14 May 2019, they were **carried in an amended form**.

The 'discussion' that took place in revising these motions was the debate on the proposed motions, at the meeting of Council on 14 May 2019, at a time when the meeting was open to the public. For the avoidance of doubt, when Cr Walkom sought to move the motions, in my capacity as presiding member, I allowed the same.

The material, the subject of the proposed motions, had been thoroughly canvassed in the discussions at the workshops that had previously been held, so members were fully informed and they did not otherwise offend the Guiding Principles. Following the Council's consideration of Agenda item 11.9, by reference to the Minutes of that meeting (**attached**), the Council it resolved as follows:

*11.9 Response to Environmental Impact Statement (EIS) - Smith Bay Wharf Proposal.*

*Moved Cr G Teasdale Seconded Cr S Mumford*

*12:47pm That meeting procedures be suspended pursuant to Regulation 20(1) of the Local Government (Procedures at Meetings) Regulations 2013 for a period sufficient to facilitate information discussion in relation to the item 11.9 Response to Environmental Impact Statement (EIS) Smith Bay Wharf Proposal. Meeting procedures will resume at the discretion of the Mayor.*

*CARRIED. Minute: C174:2019*

*Moved Cr G Teasdale Seconded Cr S Mumford*

*12:56pm That the meeting adjourn for a 30 minute lunch break.*

*CARRIED. Minute: C175:2019*

*1:31pm Meeting resumed in suspended procedures.*

*Moved Cr G Teasdale Seconded Cr L Irwin*

*1:40pm Meeting resumed in open session.*

*CARRIED. Minute: C176:2019*

*Moved Cr S Mumford Seconded Cr G Walkom*

*Council receive the draft Environmental Impact Statement EIS statement Smith Bay Wharf Proposal.*

*CARRIED. Minute: C177:2019*

*Moved Cr G Walkom Seconded Cr P Denholm*

*Council advise the Minister the requirement to provide a single Multi user port is not feasible and should be removed from the Guidelines so as to extend the range of site options for the intended timber harvest export port.*

*CARRIED. Minute: C178:2019*

*Moved Cr G Walkom Seconded Cr G Teasdale*

*Council views Yumbah Aquaculture as an industry that fits well with the image of Kangaroo Island, supporting the seafood, primary production and food industry sectors of the island. Council also views opportunities with the KIPT forests as having the potential to provide positive outcomes for the island. Both industries should be able to exist with quiet occupation of each other.*

*CARRIED. Minute: C179:2019*

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*Moved Cr G Walkom Seconded Cr P Denholm*

*Council do not view locating a seaport directly neighbouring the abalone farm at Smith Bay as providing co habitation, without the ongoing dissimilar land uses causing conflict and continued dispute for both industries.*

*CARRIED. Minute: C180:2019*

*Moved Cr G Walkom Seconded Cr G Teasdale  
Council request that possible seaport locations west of Stokes Bay Road be more fully  
assessed.  
CARRIED. 5 For 1 Against Minute: C181:2019*

*Moved Cr G Teasdale Seconded Cr S Mumford  
That Council defer the finalisation of the EIS response to a Special Council meeting to  
be scheduled.  
CARRIED. Minute: C182:2019*

### Legal Advice

Noting the Council's desire to include matters that were broader than simply the planning merits of the EIS, as evidenced in its resolutions above, Mr Aaron Wilksch obtained legal advice on 16 May 2019. The legal advice confirmed that the Council's response to the proposal **could and should** contain submissions on the relevant Development Plan and Planning Strategy **as well as** submissions on social, economic, community and environmental concerns, each of which were relevant to the assessment of the proposal.

It was further advised that a comprehensive report which covers all relevant matters and assessment criteria for the EIS would be more persuasive than one which did not cover all relevant considerations.

Following which, Mr Wilksch prepared an amended draft response for the Council's further consideration.

### Special Meeting of Council 16 May 2019

A Special Meeting of Council was called for 16 May 2019, so that the consideration of the content of the draft submission could be finalised, taking into account the matters resolved at the meeting of 14 May 2019.

This is also further evidence of the fact that Council **did not** come to any 'decision' or 'consensus' in relation to its response at either workshop of 30 April 2019 or 7 May 2019, or otherwise, by way of communications following.

The Agenda report for that meeting included the revised draft submission for the Council's consideration. By reference to the Minutes of that Special Meeting of Council, the Council resolved as follows:

*Moved Cr G Teasdale  
Council endorse the EIS submission presented with minor formatting and additions.  
CARRIED. Minute: SC46:2019* *Seconded Cr P Denholm*

The submission was then finalised and sent to the SCAP on 22 May 2019.

### Submission

In my view, the Council's submission presented a reasonable, balanced and thorough summary. It was noted that the proposal, in general, did not accord with the Coastal Conservation zone provisions which were applicable to the vast majority of Kangaroo Island's coastline but that **it did** demonstrate some merits when assessed against the provisions of the Development Plan.

It was noted that, beyond addressing the planning considerations against the Development Plan, the response also expressed the views of the elected members in reflecting community sentiment, which the Council believed must be considered in assessing the proposal.

The submission noted the failure of KIPT to satisfy the Council (or, indeed, the SCAP by reference to the Guidelines) that other sites had been adequately considered, necessitated that the Council resolve as it did at item 11.9 at its meeting of 14 May 2019.

Importantly, the issues of site location for the Council went **beyond** simply proximity to Yumbah Aquaculture. In its submission, the Council noted the following with regards to the undesirability of the proposed site:

*Smith Bay is further away from the product (supply) end than desirable or necessary and will impose a legacy of continual operation of logging trucks in the central island zone that is dangerous, costly and unnecessary. Much shorter distances to port will result in less kilometres travelled by less trucks and therefore a lower risk of serious incidents with road users and wildlife.*

*The current EIS fails to adequately address how to get the products to Smith Bay and the profound impact that it will have on the social and environmental island fabrics associated with that task. It is imperative that any road transport route for heavy forestry haulage avoids, as far as practicable, the existing tourism routes, and the major domestic traffic routes. If not, serious conflict and potential incidents with tourism traffic will become a substantial and severe risk, one which Council is not prepared to contemplate.*

*Beyond the physiological and safety issues associated with transport routes, that have not been effectively addressed as part of this EIS, the cost of constructing and maintaining Council road networks to appropriate standards for the proposed semi-trailers, B-double or A-double unit weight and frequency of traffic movement is a deeply serious concern to Council.*

*Defining heavy transport routes, and funding the construction and maintenance of the transport routes needs to be thoroughly considered by the State in assessing this Major Development proposal. Council cannot fund the necessary upgrades and maintenance nor should a small ratepayer base be required to meet such cost.*

Ultimately, it is a matter for the SCAP (and the Minister) as to the weight, if any, that the Council's views should be afforded under the planning assessment process.

## Conclusion

On any reasonable and objective review on the above and **attached**, the allegations made by the Complainant are baseless. They are without foundation or reasonable suspicion and cannot, reasonably, support any finding that the Council has failed to comply with its legislative obligations in its consideration of and its response to the EIS.

It is plain and apparent that the Council **did not** deal with this matter in a way to obtain, or effectively obtain, a decision on the matter outside of a formally constituted meeting.

Indeed, contrary to the allegations, it is evident that the Council is acutely aware of its statutory obligations under the Act.

If the Council had reached a 'decision' or 'consensus' in relation to its submission on the EIS, there would have been no requirement for the lengthy consideration or debate on the draft submission document at its meeting of 14 May 2019, or the requirement to hold a Special Meeting on 16 May 2019, called for the purposes of considering an amended draft response.

As to what Cr Walkom may, or may not, have stated during the Council's consideration of the draft response at its meeting of 14 May 2019, only Cr Walkom is in a position to explain what he meant. Given the passage of time, I am unable to recall what Cr Walkom submitted during the debate but am aware that considerable time was spent determining, this item.

In providing this response, it is also to be noted that the Complainant is not an impartial, disinterested, lay observer in this process. Rather, as the Approvals Manager for KIPT he is a servant of an entity with an absolute interest in a particular outcome in this matter. It is KIPT that has, demonstrably, failed to address the alternative site requirements as

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required under the Guidelines, thereby necessitating that Council considering and addressing this issue in its response.<sup>11</sup>

35. The CEO provided the following response in relation to a query about whether a decision was obtained, or effectively obtained, at the 7 May Workshop:

No and the ACEO, fully aware of the legal constraints that attach to all informal gatherings, whether designated or otherwise, did and would always ensure that the requirement to deal with the subject of the gathering in a manner so as not to obtain or effectively obtain a decision, was strictly observed. Accordingly, a decision (and/or an effective decision) was not obtained at the informal gathering. Rather, consistent with the objectives of this briefing, Elected Members were presented with a number of relevant and related documents (as advised above) which were reviewed, considered and discussed in relation to all aspects of the KIPT EIS. At no time was any proposition entertained or considered which could be taken to amount to a decision-making or an effective decision-making process. The subsequent dealings with these matters by the Council at formal meetings, where the actual decision-making actually occurred, serve only to reinforce this position.

36. As part of my investigation, numerous interviews were conducted during early 2020. I set out the evidence obtained by these interviews below.
37. I comment at the outset that some of the evidence obtained at interview is of limited value. Due to the passage of time and, at the time, the unremarkable nature of the 7 May Workshop, some of the persons I approached for interview were unable to recall any information at all about the happenings of the 7 May Workshop. Many interviewees were only able to recall information regarding the council's consideration of the EIS generally.
38. Mr John Fernandez, Technical Programs Manager, provided the following evidence:
- He did not remember who attended the 7 May Workshop. He thinks there were some elected members and possibly someone from KIPT
  - His involvement with the EIS Response was to do with roads, rather than the port or what is in the sea
  - His role at the council focuses on physical infrastructure. He advised the council on the impact of the proposed development on the road infrastructure from carrying a large volume of timber, and he offered advice on that subject alone
  - He recalled that at the 7 May Workshop, there was discussion of the different road routes available. A report had been done some time ago about alternate road routes for carrying timber. From this report, the council had narrowed down viability to two primary choices
  - He did not recall what documentation was provided in advance of the 7 May Workshop, or at the Workshop
  - In relation to the discussion that took place at the Workshop, he recalled a lot of discussion about the road network and the different options available
  - He did not recall any decisions being made
  - He recalled the meeting being broken into stages and that he may not have been there for all of it. He recalled that Aaron Wilksch had made a presentation, and ultimately Mr Wilksch prepared a report for Council that went to a subsequent Council meeting, from which a letter was sent to the state development panel
  - He did not believe Mr Wilksch received a direction at the 7 May Workshop, but his reports subsequently went through upper admin and the CEO
  - He remembered Mr Wilksch getting some negative feedback on the report, but recalled that Mr Wilksch ultimately expressed the desire of Council and their direction in regard to the matter in the report

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<sup>11</sup> The response is reproduced verbatim as provided by the author.

- He did not remember any of the council members expressing a position with regard to the EIS. He recalled some discussion of the land site area, how large it would be, the processes of refilling a ship, and the time it would take to do so
- He did not believe the Council made a decision at the informal meeting. The purpose was for an informal discussion, and for the elected members to take information from officers of Council so they can have an informed discussion. The purpose of these meetings is an open forum in which participants are allowed to have different opinions, and elected members may have come away from the meeting with divided opinions, rather than a collective decision
- He noted that this happened a long time ago, and that this was one of a series of meetings.

39. Ms Nicolla Putland, Director Council Services, provided the following evidence:

- She noted that there had been a number of informal gatherings on matters involving KIPT
- She had consulted her notes and knew that the 7 May Workshop had been a closed and confidential meeting
- Her understanding was the purpose of the meeting was for council employees to understand what the elected members wished to present in their response to the EIS
- Her feeling was that it was to reiterate with the elected members what the employees were to comment on, in relation to the proposed development; the council employees weren't commenting on it or offering alternatives, they were there to hear comments coming from elected members
- The elected members were given an opportunity to discuss some of the alternative sites that had been bandied about in the community. The elected members were given the opportunity to whiteboard the alternatives, to satisfy their thoughts
- She did not recall whether any documentation was provided either in advance or at the meeting
- The meeting was specifically about the KIPT EIS
- She did not think that the elected members came to an agreement on an approach. Whilst they discussed options, they did not come to a decision on them
- In relation to whether any of the participants at the meeting indicated a position with regard to the EIS, she thinks that some of the participants probably did. This is a controversial issue in the community, and there were some people who were supportive of aspects and unsupportive of other aspects
- She recalls the elected body had concerns about the road route to transport to the wharf. She believes this was reiterated in the council's EIS response - concerns about the road infrastructure and distance from the main forest. This was one of the reasons they wanted to thrash out alternative sites.

40. Cr Teasdale provided the following evidence:

- He did not recall specifics from the 7 May Workshop
- He recalled there were several discussions on the council EIS response. He recalled one workshop where a director of KIPT spoke at length to the council, as well as a number of other workshops and meetings.

41. Cr Mumford provided the following evidence:

- He recalled that there had been a few meetings. He believed the 7 May Workshop was to discuss the development application for the deep sea port
- He did not recall whether the Yumbah Briefing Note was discussed at the meeting
- He recalled the port proposal would have been the focus of the meeting. As it was an informal gathering, decisions are not allowed to be made, and a decision cannot have been made at the 7 May Workshop

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- In relation to whether any councillors indicated a position at the 7 May Workshop, he recalled that he put forward the position that the port was in the wrong spot, and he would like to see the port more west, as it would be closer to the plantation
  - He commented that KIPT had invested a lot on the current port location and so they were not interested in moving it
  - He noted that he is not anti-port, but he wanted KIPT to consider alternative locations
  - In relation to how the meeting concluded, he recalled it was a 'talk fest' and that having attended the meeting, he was clearer on the issues and knew more about them than when he went in. After the meeting he did not feel that there was a direction at all.
42. Cr Pledge provided the following evidence:
- She did not attend the 7 May Workshop as she was overseas at that time<sup>12</sup>
  - She described the issues involving the KIPT generally as being: with the proposed Smith Bay infrastructure, the road usage would be major, and the council would not have been in a position to undertake and keep up the necessary road infrastructure; concerns had also been raised about the interface on roads between logging trucks and tourists at prime times, and that many of these are gravel roads that will struggle to maintain that amount of traffic.
43. Cr Denholm provided the following evidence:
- He noted that generally, the issue with the proposed development related to the road network and the demands of the council in upgrading and maintaining the road network with tourist traffic mixing with 24 hour day timber haulage
  - He was unsure whether the 7 May Workshop was a 'designated informal meeting' but noted that if it was, it would have been publicly declared and open to the public, whereas an ordinary workshop would not
  - He recalled that representatives of KIPT were seeking to participate in discussions
  - He believed that each elected member wished to fully discuss the council's response to the EIS
  - He noted that the elected members had previously been provided with material from KIPT and Yumbah, and on the day of the 7 May Workshop they received further information from Yumbah
  - He believed the council's response to the EIS was a direct result of the 7 May Workshop because as an elected member, he was able to be fully informed to endorse, at a later date, the council's submission on the EIS.
44. Cr Walkom provided the following evidence:
- He recalled the 7 May Workshop
  - At the workshop, various documents were supplied and reports were heard from council staff about road suitability. They also heard from a current experienced heavy transport road user on KI
  - Those attending the meeting extensively workshopped in much detail the problem of the unsuitability of KI roads to heavy transports as wanted by KIPT
  - His belief was that this was a sobering and dreadful prospect for council and its roads
  - The councillors remained very receptive to harvesting the trees but heard no way of effectively transporting them to Smith Bay without untold damage to KI's social and environmental fabric

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<sup>12</sup> I note that whilst she was listed as an attendee in the response from council administration to my investigation dated 29 July 2019, she is listed as an apology in the minutes of the council meetings of 14 May 2019 and 16 May 2019. On balance I accept that the evidence indicates she was not present at the 7 May Workshop.

- The members were advised that key roads which were determined as suitable in numerous reports were in fact not suitable for continuous heavy logging vehicles, such as Stokes Bay Road
- Various alternatives were floated including a west end railway, internal forest roads direct to the deep-water on the north coast, and the potential savings in not having to build a jetty and offshore wharf at the shallow Smith Bay
- The workshop concluded with council administration advising members that they would prepare a response to the EIS, based on the issues apparent at the workshop
- In relation to the Yumbah Briefing Note, he recalled that the notes from Porter Novelli had been circulated prior to the meeting. He did not specifically recall any discussion on these, but accepted that there could have been some
- At the workshop, there were several aspects of the KIPT EIS discussed, but by far the two that were acknowledged as significantly affecting the council was no suitable roads to the port location, and the potential risk to Yumbah Aquaculture's existing abalone farm directly adjacent the proposed development
- The roads issue was the main issue. It was clear that council could be required to maintain all roads used by KIPT at council's risk and cost
- He perceived that KIPT had obviously disregarded the distance from forests to Smith Bay and the hazards along the way, such as tourists, farm vehicles, tourist buses and school buses, along narrow rubble roads
- In his view, it was obvious that other sites nearer the forests needed to be assessed. The EIS indicated that only desktop studies had been undertaken of some other sites in the EIS
- In relation to whether the council members indicated an individual position at the 7 May Workshop, he noted that he had formed a very clear view of the EIS after extensively reviewing the full document over many days and attending the KIPT public consultations. The issues were very significant.
- He noted that he related those apparent deficiencies at the workshop. He did not consider that he had a conflict of interest, but that he had formed his view from research and information provided to him
- At the workshop, he both spoke and read from his own prepared notes, made from his research, and cited deficiencies apparent in the EIS
- In relation to the outcome of the workshop, he stated that there was no consensus, but that several councillors had expressed concern about obvious deficiencies in the EIS, particularly roads
- There was no explicit consensus reached
- In relation to whether there was an implicit consensus reached, he stated it was 'hard to take out of that workshop that there was someone who attended it but did not understand there were major problems with the EIS regarding roads and the chosen location'
- The next steps to be taken after the workshop were to be that the administration would take on board all issues from the workshop and would include routine planning aspects and present it as a position for adoption by the council. There was no draft prepared to this effect. The expectations seemed to be that the workshop issues were obvious
- The three draft motions proposed at the 14 May 2019 council meeting were composed by him, following the workshop and his study of the KIPT EIS
- The draft motions were not developed during the 7 May Workshop
- In relation to how the draft motions were developed, he stated that he visited Smith Bay in person (but not Yumbah), he studied the draft EIS, he walked much of the deep-water northern coast from Stokes Bay to Cape Dutton, and he inspected and photographed the coast to ascertain its suitability for a deep-water alternative port
- In relation to the fact that the motions were actually carried in a modified form, he stated that he had reflected on the Notice of Motions submitted prior to the 14 May 2019 council meeting, and made these minor changes in the belief that they were



better. He recalled that he advised the council that he wished to amend them at the time he read them.

45. I set out Cr Walkom's remaining evidence in full below:

Question: During the Council meeting of 14 May 2020 you allegedly made a statement that the Kangaroo Island Council's draft response to the EIS 'doesn't reflect Council's views from the informal gathering and needs quite a bit of modification'. You allegedly stated that the aim of the paper 'is not to be polite', and that it should be 'clear and loud... a game changer'.

Answer: I do remember stating that the draft response does not satisfactorily represent the matters of the workshop/informal gathering and that it needed to more accurately represent them 'as workshopped'. These comments to council do not mean or imply any decisions were made at the workshop. I find it strange we are scrutinising what occurred in debate - something that has significant tone and body language inflections and conjugation rather than verbatim quotation. Surly it is the motion that needs to be scrutinised verbatim because that is what is voted upon. "Game changer" is probably not a term I like using and would not use again in similar debate. I would simply leave it out as the matter has always been very serious for KIC - never a game.

Question: In response, Aaron Wilksch allegedly asked what hadn't been reflected about the Council's position, to which you allegedly responded that 'some views have been included but have been watered down. The impacts on Yumbah and the transport impacts need to be front and centre. The paper is fairly mild'. You allegedly also said that Council needed to be 'more strident' in its response. Do you remember making these comments?

Answer: That is probably close to what I said in debate.

Question: If you did make these comments, can you please elaborate upon them? What did you mean by them?

Answer: I meant that a bureaucrat wrote them with a view to appeasement - having two bob each way. I meant that because councillors must be objective when workshopping and had been circumspect at the workshop to avoid making decisions, we were now in open council where we are required to frankly debate matters before us. (I note the High Court overturned a decision of a SA council because it did not adequately debate in open session) and I was advocating that council needed to demand that they be redrafted so as not to soft soap their meaning or make their interpretation flexible. Council subsequently adopted what it did want as its position on the EIS further to these resolutions.

46. Mr Aaron Wilksch, Manager Development and Environmental Services, provided the following evidence:

1. As discussed briefly with you by phone yesterday, I was present at and presenting briefing information at both the 30/04/2019 and 7/05/19 Informal Gatherings of Council. In terms of the Referral to make comment, the referral of all such matters is typically forwarded to me as the Manager of Development & Environmental Services either directly, or where addressed to the CEO, then referred through the KI Council Central Records systems / by the Records Management Officer. It falls within the delegated authority of myself, or members of my department with appropriate delegations to prepare responses.
2. On 30/04/19 I presented a 42 slide PP Presentation to guide the considerations / assessment of the proposal such that an informed response, cogent of the matters required to be assessed by the Governor in deciding the application (S.48 (5) Development Act 1993). The Council wished to further embark on considerations of alternate sites and comparative assessment as to greater or lesser suitability.

3. On 7/05/19 I presented a 36 slide PP Presentation as a workshop to discuss conceptual alternative locations for the development, even though, and clearly conveying that there were no alternatives 'on the table for assessment' (Slide #3).
4. Evidence of #2 & #3 - See Items in attached Image.
5. On 7/05/19 within the Informal Gathering there was a 'SWAT analysis carried out 'on whiteboard', which was used as a tool to help illustrate Strengths, Weaknesses, Opportunities & Threats apparent to the Smith Bay Site and to an nominal alternative location 'West of Stokes Bay'. I have electronic & Hard copy files of this SWOT analysis as it was used to guide the drafting of a response and to ensure that I had addressed all of the Councillors issues raised. The attached copy is as I have marked it up as I eliminated each point addressed in the first iteration of the Draft response to the State Planning Commission. (**Attachment 1**)
6. In the period from 8/5/19 to 13/5/19 which followed the *second* of the abovementioned Informal Gatherings of Council, I had produced four (4) iterations of the DRAFT response to the Commission, produced on 8/5/19, 10/5/19, 10/5/19 and 13/5/19 respectively (*the 'created date' can only be seen in the file properties*) each being amended on the basis of proof reading / peer review to refine the response generally in line with the tone of the 7/5/19 Informal Gathering to contemplate alternative sites.
7. Version 4 (V4) was presented at the Ordinary Council Meeting of 14/5/19. - I recall Cr. Walkom referred to the response to the effect of being 'patently inadequate to illustrate Council's concerns' and 'used weak language', despite reiterating that a valid response must necessarily providing a balanced form of assessment, addressing *Planning, Strategic, Social, Economic* and *Environmental* principles.
8. The V5 final version of the letter was presented to the Special Meeting of Council on 16/5/19. The final draft is compiled largely upon my V4 DRAFT, but was not prepared by myself. I attended the meeting on 16/5/19 and provided Council an email containing Legal advice from KelledyJones Lawyers also obtained on that same morning (email title 'Section 46 Advice KJ180366', KI Council Record Number E2019/3147). (All copies of DRAFT correspondence are attached individually in **Attachments 2 - 6** & Legal Advice from KelledyJones Lawyers is contained in **Attachment 7**).
9. Evidence of #6 to #8 - various versions of DRAFT response
10. I have obtained a copy of the final response as submitted, today from the CEO's Personal Assistant, which is provided in **Attachment 8**. The latter 13 pages of the response attached beyond the 4 page written response, which appears as a form of checklist, I had not realised formed part of the formal response before today.
11. Between versions 4 and 5 of the DRAFT response, I had both emailed and discussed with the CEO the concern I was feeling for the 'evolving' response becoming more heavily 'opinion based' and less 'technically assessed' with respect to being a response *cogent of the matters required to be assessed by the Governor in deciding the application* as I have foreshadowed in #2 above. An email containing my concerns over 'putting my signature on the document', is in **Attachment 9**.
12. The email which initiated the communications with the CEO mentioned above in #11 was initiated by Cr. Walkom on 15/5/19 and this email can be construed as creating a direction for drafting the response in a more aggressive or extreme tone.
13. Further exchange of emails occurred with Cr. Walkom, myself and CEO from 17/5/19 to 20/5/19 in which I was involved, but had largely withdrawn myself from the drafting of an incomplete (in the planning sense) or compromised / unbalanced form of response. I have attached the five (5) emails from 17/5/19 to

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20/5/19 in **Attachments 10 to 14** which are entitled 'KIPT Comments List' and 'Annexe to KIPT resolution', as attached.

14. An email from Cr. Walkom on 8/5/19 entitled 'KIPT Workshop', is included also in **Attachment 15**, however I don't believe this is a concern to the enquiry as it only discussed wording well before the final draft was arrived at.
  15. The final response referred to in #11 is dated 22 May 2019 and I understand that this was finalised by the CEO in accordance with Council's resolution at the 16/5/19 Council meeting.
47. Mr Wilksch's evidence includes a number of attachments. One of those attachments is an email from Cr Walkom to numerous recipients, including Mr Wilksch, the CEO, the Mayor, and five of the eight elected members. The email was sent on 15 May 2019 and states:

It was unfortunate that councillors did not have a little time to consider the prepared draft prior to the meeting.

It certainly struck me as a purely planning aspects response.

having now had time to 'decode' it from its planning 'lingo' and format, there are clearly some well put arguments capturing the aspects council is concerned about.

But the overall bland, even nondescript total of the document needs to be modified to be much more concise and impacting. I also think we need to respond in the same vane as the guidelines and DIES reference - Economic, Social and Environmental.

We should acknowledge only (in very brief form) that the DEIS appears to contribute positively to most of the 100 plus Provisions of the KIDP. The draft has these as a distraction. - this would remove almost all of the first three pages of the draft. Retain only:

First line of first para p1

First sentence of para 7 on p3

Eighth para (single sentence) on p3

fourth para p4

Then workshop through the wording of the remainder of the document with an emphasis on being concise

As early as possible in our composite response we need to dot point our key concerns (intro/heading) to highlight

Suggest if we can list all our points under Economic, Social and Environmental with relevant resolutions included within those.

Greg, could you advise if we should have a formal resolution to amalgamate our position.

48. This email concerns me. It can be construed as a direction as to the content of the EIS response, as it makes explicit suggestions about which content should be included and which should be deleted.

#### *Consideration*

49. I have considered all of the available evidence, including documentation as well as evidence obtained through interview.
50. The strongest evidence in favour of the allegation that a decision was made at the 7 May Workshop is the information submitted by the complainant, referring to comments allegedly made by Cr Walkom, Mayor Pengilly and Mr Wilksch at the council meeting on 14 May 2019. I note that there is no audio recording of this meeting and it has not

been possible for me to verify, with confidence, the precise words that were spoken at this meeting.

51. The evidence obtained through interview, whilst having some deficiencies in reliability, consistently indicated that no decision was made at the 7 May Workshop. All of the elected members appeared to understand the legal obligation that no consensus may be reached at an informal gathering.
52. In my view, the purpose of the 7 May Workshop was twofold. First, to enable council staff members to provide information to the elected members, in order to assist them in making an informed decision when the matter of the council's EIS response was considered in a council meeting. Secondly, to provide an opportunity for elected members to raise general concerns and issues which they wanted to be included in the council's EIS response. I do not consider either of these purposes to be contrary to the Local Government Act or to the council's Informal Gathering Policy.
53. Even if it is the case that Cr Walkom did make those comments, or comments to that effect, while I can appreciate that they could have led to a reasonable perception by the complainant that a decision had been made at the 7 May Workshop, without more, those comments do not prove that such a decision was made. Cr Walkom's comment to the effect that the draft response did not reflect the 'council's views' from the informal gathering is not necessarily referring to a council decision having been made. They can also be construed as either that the draft response did not adequately cover all of the issues which the elected members had mentioned in the informal gathering, or that Cr Walkom felt that his personal views were not adequately reflected and he spoke carelessly in attributing his views to that of the entire council.
54. The complainant has expressed a belief that in fact, Cr Walkom drafted the final council EIS response which ultimately was sent to the Minister. I have reviewed the email correspondence on the matter between Cr Walkom and the council staff members. I am satisfied that Cr Walkom, whilst providing assertive suggestions as to the content and tone of the response, did not actually draft the response. The council administration has confirmed that the EIS response was finalised by Mr Georgopoulos.
55. I also note that the council's EIS response was subject to amendment on a number of occasions, including following the council meeting on 14 May 2019 and at the council meeting on 16 May 2019. If the council had in fact reached a consensus at the 7 May Workshop and had instructed the council administration of such a decision, it is unlikely that such detailed consideration and amendment would have been necessary, in order for the elected members to be satisfied with the EIS response.
56. On the available evidence, the outcome of the 7 May Workshop was that the council administration would draft a response based on technical knowledge and experience, endeavouring to include the matters of concern raised by the elected members, and would put that response to the elected members at the next council meeting. There is insufficient evidence for me to conclude that a consensus was reached on any part of the EIS response at the 7 May Workshop.

## Opinion

In light of the above, in my view the council did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

## Whether it was wrong for the Kangaroo Island Council's informal gathering of 7 May 2019 to be held in confidence

### *The basis for the complaint*

57. The complaint alleged that the council had misused the confidentiality provisions of the Local Government Act in order to discuss material provided by Yumbah Aquaculture, in circumstances where there was not an appropriate basis to move the meeting into confidence under section 90 (and in particular, section 90(3)(d)) of the Local Government Act).
58. The complainant has expressed concern about the council's alleged consideration of a document titled 'EIS Points of Discussion' (**the Yumbah briefing note**). This document was a briefing note prepared for Yumbah Aquaculture by Porter Novelli, a public relations firm.
59. The Yumbah briefing note contests many of the statements made in the EIS prepared by KIPT for the proposed development at Smith Bay, a site at which Yumbah Aquaculture has a facility. My investigation has not considered the relative merits of either the proposed development or the arguments made against it.

### *Evidence obtained by my investigation*

60. The public notice announcing the 7 May Workshop includes the reasons the workshop was held in confidence. The public notice relevantly states:

In accordance with Council's Informal Gathering Policy, the ACEO has declared that item 1<sup>13</sup> in this Council Workshop to be a '**confidential informal discussion**' as it is a briefing session relating to information of a confidential nature within the ambit of section 90(2)(d) of the Local Government Act:

- (d) commercial information of a confidential nature (not being a trade secret) the disclosure of which -
- (i) could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party; and
  - (ii) would, on balance, be contrary to the public interest.

This matter relates to commercial information and as such represents matters that are commercial in confidence and should not be divulged in the public realm.

61. Mayor Pengilly provided the following information regarding the reason the 7 May Workshop was held in confidence:

There were a number of handouts distributed at the workshop including:

- KIPT Route comparison;
- Confidential Council report and minutes titled "Forestry Update" 12 June 2018;
- Suggested Approach to Road Funding;
- Binding Memorandum of understanding - Kangaroo Island Road Infrastructure Fund;
- KIPT Road Freight Options Assessment - prepared by Osman Solutions on behalf of KIPT;
- HDS Report - KIPT freight Access route options;
- Wallbridge & Gilbert Consulting Engineers report - Forestry Access Route Assessment;
- EBS ecology report - KIPT Transport Route Options - Ecological Assessment;
- and

<sup>13</sup> I note that there was only one item considered at the 7 May workshop.

- EBS ecology report - KIPT Transport Route Options - Limitations summary.

While the Porter Novelli briefing note titled '*EIS Points of Discussion*' was available, it **was not** distributed or discussed.

As a number of the documents referred to above were confidential Council documents at the time of the workshop, the Acting CEO declared that the workshop was to be a 'confidential informal discussion'. This declaration was in accordance with the Policy, on the basis that members were to consider information that fell within the ambit of section 90(3)(d) of the Act, namely, commercial information of a confidential nature, the disclosure of which could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party and would, on balance, be contrary to the public interest.

While sections 90(2) and (3) of the Act have application at a formally constituted meeting of the Council (or Committee), the matters contained in section 90(3) of the Act are relevant considerations for the Acting CEO to take into account in determining whether to make a declaration that the designated informal gathering or discussion be held in confidence.

Importantly, this **was not** a determination made by the Council, as the governing body, but the Acting CEO, whose decision was reasonably made based on the nature and content of the information that the members had received.

As above, there is no statutory requirement for the Council to make available copies of any documentation received and referred to by members at a workshop held in accordance with section 90(8) of the Act. Such a gathering or discussion, by its very nature, is not a meeting of the Council or a Council Committee. Accordingly, sections 91(5) and (6) of the Act are irrelevant and of no application.

62. The council administration provided the following information regarding the reason the 7 May Workshop was held in confidence:

The public notice for the 7 May 2019 Informal Gathering stated: *KIPT - EIS consideration*. There were a number of handouts distributed for this informal gathering as follows:

- KIPT Route comparison
- Confidential Council report and minutes titled "Forestry Update" 12 June 2018
- Suggested Approach to Road Funding
- Binding Memorandum of understanding - Kangaroo Island Road Infrastructure Fund
- KIPT Road Freight Options Assessment - prepared by Osman Solutions on behalf of KIPT
- HDS Report - KIPT freight Access route options
- Wallbridge & Gilbert Consulting Engineers report - Forestry Access Route Assessment
- EBS ecology report - KIPT Transport Route Options - Ecological Assessment
- EBS ecology report - KIPT Transport Route Options - Limitations summary

The Porter Novelli briefing note - 'EIS Points of Discussion' was available but was not distributed or discussed.

The purpose of the gathering was to brief elected members on the current status of matters with regard to the above documentation and to respond to questions. It was intended to be and it was a gathering strictly for briefing purposes in respect of information pertaining to a matter that had various confidential components. In particular, as a number of the above documents were confidential documents at the time of the gathering, it was considered both prudent and appropriate for the gathering to proceed as declared by the ACEO so as not to cause (directly or indirectly or by perception) any commercial detriment to a third party. Accordingly, the recommendation/declaration of the ACEO was for Council to hold this informal gathering in confidence, which it is entitled to under the relevant legislation and its Informal Gathering Policy.

63. In relation to a query about whether the Yumbah briefing note is considered by the council to be 'commercial in confidence', the council administration advised:

As advised above the Novelli's 'EIS Points of Discussion' document was available but was not distributed or discussed. The reason for the Informal Gathering to go into confidence under section 90(3)(d) was that a number of the documents that were presented, were in fact commercial in confidence documents at the time of the Informal Gathering, I attach a copy of a confidential document that was distributed at the meeting.

*Consideration*

64. Based on the evidence before me, it is evident that the then Acting CEO did not determine that the 7 May Workshop would be held in confidence in order to secretly discuss the Yumbah briefing note. There is significant evidence of the material that was available as part of the information sharing at the 7 May Workshop. I accept that the Yumbah briefing note was available at the 7 May Workshop, but it was not the only piece of information available.
65. I accept that various documents which were discussed at the 7 May Workshop were, at that time, confidential documents. It does not appear that the then Acting CEO erred by declaring the 7 May Workshop to be confidential.

**Opinion**

In light of the above, in my view the council did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

**Whether it was wrong for the Kangaroo Island Council's Special Council Meeting of 16 May 2019 to be held in confidence**

*The basis for the complaint*

66. KIPT complain of a 'misuse of the confidentiality provisions under the Local Government Act', in relation to the council meeting of 16 May 2019.
67. KIPT has submitted that section 90(3)(d) of the Local Government Act does not apply to the council's deliberations on its response to the EIS, submitting that 'it is difficult to imagine a matter where the public interest in open meetings was more important'.

*Evidence obtained by my investigation*

68. The meeting minutes for the council meeting on 16 May 2019 state:

Moved Cr G Teasdale

Seconded Cr K Liu 4:03pm

That Council approves under the provisions of Section 90 (2) of the Local Government Act 1999 an order be made that the public be excluded from attendance at the meeting, with the exception of ACEO, DCS, PA, MDES, TPM in order to consider, in confidence, a matter on the grounds of Section 90 (3)

(d) commercial information of a confidential nature (not being a trade secret) the disclosure of which (i) could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party; and (ii) would, on balance, be contrary to the public interest;

This matter relates to a commercial matter and as such represents matters that are commercial in confidence and should not be divulged in the public realm. CARRIED.  
Minute: SC44:2019

69. Mayor Pengilly provided the following response:

You are correct in that the Council minutes for the meeting show only that the Council relied upon section 90(3)(d)(i) and (ii), in general terms, without specifying whether it could, reasonably, be expected to prejudice the commercial position of the person who supplied the information or whether it would confer a commercial advantage on a third party, being the 'limbs' of the section.

The reason why the Council did not differentiate between the options set out in section 90(3)(d)(i) of the Act is because both were considered to be relevant. The Council holds the view that consideration of the response on the Environmental Impact Statement (EIS) for Smith Bay Wharf contained commercial information and considerations of a confidential nature, the disclosure of which -

- 1. Could reasonably be expected to prejudice the commercial position of the person who supplied the information*

Council considered this to be relevant because its position on the response to the EIS Smith Bay Wharf, involved consideration of commercial information relevant to KIPT that, depending upon Council's position on the EIS, could reasonably be expected to prejudice the commercial position of KIPT. This did not involve consideration of information in the nature of financial or technical data, but information relevant to KIPT's business operations. This is because the EIS response is directly relevant to the business operations of the proposed KIPT Smith Bay Timber Port Major Development. The nature, location, multi-use, design and size of the port is relevant to KIPT's commercial position. It is reasonable to expect that the Council's consideration of such commercial information provided to the Council at various times over the course of a matter of months could, reasonably, be expected to prejudice the commercial position of KIPT.

The proposed response on the EIS considered the following commercial issues -

- the desirability of the Port to have capacity to be used by multiple-users. Council holds the view that the lack of design flexibility and location options meant that no other import or export users could be identified;
- the location of the Port has multiple commercial considerations for KIPT. The Council considered that alternate options had not been considered. The location could prejudice KIPT's commercial position because it is relevant to distances that would need to be travelled, that could increase or decrease the supply line, that would have a 'flow-on' effect to KIPT's logging trucks, including associated risk, danger, environmental and cost implications, given more kilometres travelled with, potentially, the need for more trucks to service the supply line. This would come at a cost (and, potentially, other risks) to KIPT's operations. This is opposed to the position of less kilometres travelled, less trucks and lower associated risks and costs to KIPT; and
- the proposed road transport route also raised commercial considerations for KIPT. This is because if the route used for heavy forestry haulage needs to avoid existing tourism routes, the central island zone and major domestic traffic routes (as proposed by the Council), it is reasonable to say that the disclosure of such matters could reasonably be expected to prejudice the commercial position of KIPT.

Accordingly, it was considered that disclosure of the Council's position of these issues could, reasonably, be expected to prejudice the commercial position of KIPT.



2. *Conferred a commercial advantage on a third party*

The proposed response could confer a commercial advantage on a third party if disclosed and not treated in confidence, because -

- depending upon Council's position and the ultimate approach taken to the EIS, other businesses, such as Yumbah (being a third party) could be conferred with a commercial advantage;
- the cautious approach by the Council to take reasonable steps to protect industry of significant economic value and to minimise adverse impacts to the on-shore aquaculture activities of Yumbah, meant that a commercial advantage was conferred upon them. Such considerations need to be protected and occur in confidence as they did at the meeting of 16 May 2019; and
- whilst the Council did not quantify the economic impact if Yumbah ceases to operate, clearly it would receive a commercial advantage if there was minimal disruption to its operations, which could secure the ongoing commercial viability and feasibility of Yumbah's commercial operations, given the proximity of the proposed Port to the existing aquaculture business;

The Council accepts that the Council minutes do not, adequately, explain the above reasons and, it is fair to say, the minutes are deficient in this regard. However, the Council did not differentiate between the preferred limb to be relied upon based upon the above considerations, which are, in any event, ascertainable from the Administration report and proposed response.

70. The council administration provided the following response:

...

As you are aware, pursuant to section 99(1)(c) of the *Local Government Act 1999* (the Act), the CEO is responsible for providing advice and reports to the Council on the exercise and performance of its powers and functions under the Act. This function includes the responsibility to ensure that the Council, as the governing body, does not, inadvertently, breach its legal obligations either at common law, or under the Act, including its obligations to retain certain information in confidence on the basis of commercial in confidence considerations, as well as to ensure that the Councils' decision making functions are lawful and not open to challenge.

This position is codified at section 83(5) of the Act, in the provision of reports and documents for the consideration of members at an ordinary or special Council meeting.

In giving effect to my obligations, I advised members at the commencement of the Special Meeting of Council of 16 May 2020 that it was open for them to consider whether the section 90(2) and (3) were applicable. The decision in this regard was and remains, a decision of the Council, as the governing body...

71. Cr Teasdale provided the following information:<sup>14</sup>

My recollection was that it was late in the day. The meeting was called to finalise the response to the government about the proposal to build the port at Smith Bay.

The Council wanted to hammer out the fine tuning of its response to government.

All elected members felt a lot of disquiet about the proposal, and there were a lot of feelings about the proposal.

<sup>14</sup> This is a record of a telephone interview which was not electronically recorded. Whilst every effort has been made to accurately transcribe Cr Teasdale's comments, this is not a transcript.

It was a public meeting, although it was not expected that there would be a lot of public attendance. 3 representatives from KIPT came to the meeting and sat very close to the councillors' table. KIPT had had ample opportunity to discuss their views at length throughout the process. The entire group of elected members felt intimidated by their presence, and did not feel they could achieve their purpose with them present, as the Council was trying to prepare the final draft for government.

There was some discussion, and a decision was taken to make the meeting confidential. In retrospect may have been better to close the meeting, but there was a deadline. It was a very unfortunate set of circumstances, and their [the KIPT representatives'] behaviour was reprehensible in coming and sitting so close as they did was making a statement. They know how we felt and the report we could be trying to draft, and they came along to intimidate us. I don't think we should have gone into confidence, but rather closed the meeting and work out a new plan for the meeting.

KIPT has a very aggressive stance towards the council. They are determined to go ahead with the wharf despite the fires and to replace the plantation despite the fires. The Council will be making submissions to the Bushfire Royal Commission about the fire load that the plantation adds to the Island.

72. A response was sought from Cr Liu, who indicated he was unable to remember the specifics of the council meeting of 16 May 2019 and could not recall why the meeting went into confidence, or why he seconded the motion to move the meeting into confidence. Cr Liu stated his belief that he would only have seconded the motion to go into confidence if the council administration had given advice that the meeting ought to move into confidence.
73. Cr Denholm provided information to my investigation that he 'can recall representatives of KIPT seeking to participate in our discussions' and there 'was often noticed conflict between KIPT and our Mayor and in the interest of harmony, the proceedings were declared to be of a confidential nature. KIPT therefore [was] unable to participate in the meeting.'

#### *Consideration*

74. The meeting minutes of the council meeting on 16 May 2019 do not reflect that the council properly turned its mind to the application of section 90(3)(d) of the Local Government Act. The minutes record the reason the meeting moved into confidence to be 'This matter relates to a commercial matter and as such represents matters that are commercial in confidence and should not be divulged in the public realm'. This does not address either of the two limbs in the test as set out in section 90(3)(d), nor does it indicate a weighing up of whether or not it was in the public interest to go into confidence.
75. Section 90(7)(c) of the Local Government Act specifically provides that if a confidentiality order is made, the minutes must record, if relevant, the reasons that receipt, consideration or discussion of the information in a meeting open to the public would be contrary to the public interest. Given that section 90(3)(d) contains a public interest test, I do not consider that the council has adequately discharged the requirement under section 90(7)(c).
76. The agenda for the meeting on 16 May 2019 makes no reference to the matter being considered in confidence. In my view, it is usual practice for a council to be aware in advance whether a particular matter will be required to be considered in confidence, and such information to be included in the council agenda. It is unusual (although possible) for a council meeting to move into confidence without forethought. I particularly note that this was a Special Council meeting and the only matter to be considered was the EIS response.

77. Cr Teasdale's evidence is pertinent, as he moved the motion to move the matter into confidence. Cr Teasdale's evidence is that the council moved into confidence because it felt intimidated by the presence of the three KIPT representatives.
78. Cr Denholm provided evidence which is relevant to this issue. I note that Cr Denholm included in his evidence that he found it difficult to specifically answer the questions I had put to him, given the passage of time. I note that the questions I had initially asked Cr Denholm related to the 7 May Workshop, not the council meeting of 16 May 2019. A number of the councillors I approached for evidence provided a response which purported to relate to the 7 May Workshop, but from the context and information provided, it was evident that they were recalling either the 14 or 16 May 2019 council meetings.
79. In my view, given the information provided by Cr Denholm, he was recalling events which had happened on 16 May 2019, rather than 7 May 2019. In reaching this conclusion, I note that KIPT representatives did not attend the 7 May Workshop, and the council meeting on 14 May 2019 did not move into confidence to discuss this issue. It follows that Cr Denholm can only have been recalling the council meeting of 16 May 2019.
80. Cr Denholm's evidence, therefore, can be interpreted as evidence that the council meeting of 16 May 2019 moved into confidence 'in the interest of harmony', in order to avoid a conflict between Mayor Pengilly and the representatives of KIPT.
81. Clearly, a desire to avoid confrontation is not a lawful basis to move a council meeting into confidence under section 90(3) of the Local Government Act.
82. I am unconvinced by the submissions made by Mayor Pengilly. Two drafts of the council's EIS response were already publicly available, in the agendas of the 14 May and 16 May 2019 meetings respectively. The council's proposed position on the EIS was already public knowledge. Therefore the submissions that 'disclosure of Council's position' could either prejudice the commercial operation of KIPT, or confer a commercial advantage on Yumbah Aquaculture, appear to be misplaced.
83. The council has made submissions that it has treated matters involving KIPT consistently in the past by going into confidence. I do not accept that the council has been consistent in this regard. I note that the council did not go into confidence under section 90(2) of the Local Government Act at the council meeting on 14 May 2019, for example. Further, I am concerned that the council appears to have automatically assumed it has a reasonable basis to go into confidence, merely because the matter of KIPT's proposed development is being discussed. The council is obliged to thoroughly turn its mind to whether section 90(2) applies to an individual item at each council meeting, and not seek to apply a 'blanket approach'.
84. The council has provided further submissions on this issue following receipt of my provisional report, by way of a letter from the CEO. The letter relevantly states:

#### **Special Meeting of Council - 16 May 2019**

Mr Lockett, on behalf of KIPT, has complained that the Council mis-used the confidentiality provisions of the *Local Government Act 1999* (the Act), as they were applied at the Special Meeting of the Council on 16 May 2019 (Special Meeting of Council).

KIPT has submitted that section 90(3)(d) of the Act did not apply to the Council's deliberations on its response to the EIS at that time, submitting that 'it is difficult to imagine a matter where the public interest in open meetings was more important'.

Undoubtably, the KIPT representatives present at that Special Meeting of Council had an 'interest' (being a direct commercial interest) in, firstly, understanding what the Council's proposed response to the EIS was to be at the earliest opportunity and, secondly, being appraised of the Council's consideration of confidential material in making that decision.

The Council remains firmly of the view that KIPT has and had, **no lawful entitlement** to be appraised of the Council's decision, prior to it, as well as other parties in the process, being appraised of the same through the ordinary channels as part of the Major Development process undertaken by the State Commission Assessment Panel.

Indeed, such prior 'early notification' of the Council's position **in and of itself** would constitute an unfair commercial advantage for KIPT, being a 'third party' to the Council's decision for the purposes of section 90(3)(d)(i) of the Act.

Notwithstanding this, it is to be recalled that the consideration of this item at the Special Meeting of Council, was for the purposes of determining a settled response to the EIS. In determining this response, the Council was required to receive and consider commercial information of a confidential nature, the disclosure of which could, reasonably, be expected to prejudice the commercial position of the person who supplied the information, **as well as** to confer a commercial advantage on a third party, the disclosure of which would, on balance, be contrary to the public interest.

While it is true that drafts of the Council's response were publicly available at that time and the Council's proposed position was public knowledge, this **was not** determinative for the purposes of the consideration of the application of sections 90(2) and 90(3) of the Act at that time. Rather, the issue for determination at the commencement of the Special Meeting of Council was whether, or not, the members would refer to confidential information in their discussion and debate on the matter, which information they had received and discussed at the informal gathering on 7 May 2019, **only nine (9) days prior**.

On any reasonable and objective consideration of this matter, the Council, in deliberating its response to the EIS, **was entirely likely** to canvas the same matters that served to give rise to the confidential considerations at that informal gathering, which gathering was determined to have been appropriately held in confidence.

That is, just because the Council had not received an Agenda report with a recommendation from me that consideration ought be given to dealing with the matter in confidence pursuant to section 83(5) of the Act, did not mean that the Council was not going to transverse those confidential matters again at its subsequent Special Meeting.

Indeed, it, was **entirely likely to do so**, which is why, as set out in my further submission that I advised as follows:

*In giving effect to my obligations, I advised members at the commencement of the Special Meeting of Council of 16 May 2019 that it was open for them to consider whether section 90(2) and (3) were applicable. The decision in this regard was and remains, a decision of the Council, as the governing body... (my emphasis) [70]*

Whilst it was noted that the agenda for the Special Meeting of Council: *makes no reference to the matter being considered in confidence. In my view, it is usual practice for a council to be aware in advance whether a particular matter will be required to be considered in confidence, and such information to be included in the council agenda [76]*

there is **no lawful requirement** for the same.

Indeed, as noted in the provisional report [76]:

*It is unusual (although possible) for a council meeting to move into confidence without forethought.*

Accordingly, it was not the disclosure of the **Council's position** that gave rise to the confidential considerations at its Special Meeting of Council but, rather, the confidential information that had been provided, which served to inform that position in its response to

the EIS that was to be protected pursuant to sections 90(2) and 90(3)(d)(i) and (ii) of the Act.

These confidentiality considerations, must and did, arise on **entirely the same basis** upon which the informal gathering of 7 May 2019 was held in confidence, a gathering that you have determined was appropriately held in confidence.

### Evidence Received

In addition, your provisional findings have relied heavily on matters discussed during an un-recorded, un-transcribed telephone conversation with Cr Teasdale, as the mover of the motion that the public be excluded from the Special Meeting of Council.

[The response sets out Cr Teasdale's evidence in full]

However, the Council's decision to exclude the public under sections 90(2) and 90(3) of the Act **must be** a decision of the Council, as the governing body, made by resolution of the Council. Further, it was not otherwise possible to 'close' the meeting in any manner other than by reliance upon the powers that the Act provides to the Council.

Further, while Cr Denholm provided information that he 'can *recall representatives of KIPT seeking to participate in our discussions*' and there '*was often noticed conflict between KIPT and our Mayor and in the interest of harmony, the proceedings were declared to be of a confidential nature*', this does not and could not, constitute a submission that these were matters taken into account by the Council, as the governing body, in determining to exclude the public from the Special Meeting of Council.

Considered in this light, the state of mind of two (2) members, in moving a motion to exclude the public, which motivations were never expressed by Cr Teasdale at that time and Cr Denham in voting for the motion, could never act to bind the Council, or be evidence of the collective state of mind of the Council, as the governing body. This is specifically so when assessed against the associated finding that Cr Denholm found it difficult to answer the questions put to him. Understandably, given the passage of time, Cr Denholm was confused with regards to the dates on which certain decisions were made by the Council and also confused the Special Meeting of Council with the informal gathering held on 7 May 2019.

In which case, it is entirely unsafe and unsatisfactory to 'interpret' Cr Denholm's evidence, set out at paragraph [80], as supporting any finding against or contrary to the interests of the Council.

The weight of the evidence of Crs Teasdale and Denholm simply does not meet the standard required for the purposes of *Briginshaw v Briginshaw (1938) 60 CLR 336* as constituting 'proof' of the matters as alleged by Mr Lockett. This is particularly in circumstances where such a finding is inconsistent with the very clear and detailed recollections of both the Mayor, and myself.

Indeed, and as noted by the evidence you have received from Cr Liu; *A response was sought from Cr Liu, who indicated he was unable to remember the specifics of the council meeting of 16 May 2019 and could not recall why the meeting went into confidence, or why he seconded the motion to move the meeting into confidence. Cr Liu stated his belief that he would only have seconded the motion to go into confidence if the council administration had given advice that the meeting ought to move into confidence.* [72] (my emphasis)

Cr Liu's evidence is entirely consistent with my submission, which submission is corroborated by the further submission of the Mayor.

Taking the above into account, the Council **does not** agree that it failed to turn its mind to the application of sections 90(2) and 90(3)(d) of the Act, or that it did not, both reasonably and appropriately, apply the same at its Special Meeting of Council.

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Further, for reasons already canvassed by the Mayor in his further submission, the Council determined that both 'limbs' of section 90(3)(d)(i) and (ii) of the Act applied to the Council's deliberations at that time.

85. The issue is not whether KIPT had a right to be advised of the council's decision in advance. The issue is that the Local Government Act requires that all council meetings be held in public, unless one of the provisions in section 90(3) is applicable. The default position by law is that all members of the public (including members who happen to work for KIPT) have an entitlement to be present at a public council meeting. I remind the council that the objects of the Local Government Act include 'to provide a legislative framework for an effective, efficient and accountable system of local government in South Australia' and 'to ensure the accountability of councils to the community'.<sup>15</sup> Transparency and accountability are the cornerstone of representative local government and contribute to public trust in the institution of local government.
86. I do not find the CEO's submissions regarding *Briginshaw* to be persuasive. This is not a matter in which there are grave consequences. Not every investigation involves issues of importance and gravity in the *Briginshaw* sense.<sup>16</sup> I am satisfied with the conclusions I have reached based on the balance of probabilities.
87. I note that the submissions I received in response to my provisional report differ markedly from the submission provided previously to my investigation. The submissions provided to my investigation were that the council had a lawful basis to go into confidence because the disclosure of the council's position on certain issues (the desire for a multi-user port, the location of the port, and the proposed transport route) could reasonably be expected to prejudice the commercial position of KIPT. The council also submitted that disclosure of the council's general position regarding the EIS could reasonably be expected to confer a benefit on Yumbah Aquaculture.
88. In contrast, the council's submissions in response to my provisional report are that the council received and considered commercial information of a confidential nature at the Special Council Meeting, and thus it was lawful for the council to go into confidence. The council's submissions in response to my provisional report in fact directly contradict its submissions to my investigation, as the CEO stated in his letter:
- Accordingly, it was not the disclosure of the **Council's position** that gave rise to the confidential considerations at its Special Meeting of Council but, rather, the confidential information that had been provided, which served to inform that position in its response to the EIS that was to be protected pursuant to sections 90(2) and 90(3)(d)(i) and (ii) of the Act.
89. It is not clear to me why these submissions were not raised previously, and I have taken this into account as to whether I am satisfied that this view was held at the relevant time.
90. I am unable to accept that the elected body received any new confidential, commercial information during the Special Council Meeting. My investigation has encountered no evidence which would support this assertion.
91. The elected body first considered the draft EIS response, prepared by the council administration, at its meeting on 14 May 2019. Importantly, the council did not go into confidence under section 90(2) of the Local Government Act to consider this item at its meeting on 14 May 2019. Given that its Workshop was held just seven days prior, it seems more likely that at the 14 May 2019 council meeting, being the first opportunity

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<sup>15</sup> *Local Government Act 1999* section 3(c)-(d).

<sup>16</sup> *G v H* (1994) 181 CLR 387 per Deane, Dawson and Gaudron JJ at [11].

- the elected members had to discuss and consider the draft response, that the elected members might have made reference to confidential documents.
92. I further note that the CEO has submitted the council was 'entirely likely' to have considered confidential material at the Special Council Meeting. The council has not submitted that it did consider confidential material. I also comment that if the council administration had been of the opinion, prior to the Special Council Meeting, that the elected members would need to refer to confidential documents, the council administration would have included within the agenda of the Special Council Meeting a recommendation that the elected members vote to move into confidence.
  93. Each iteration of the draft EIS response has been carefully considered by my investigation, noting that it went through a series of drafts and the draft that was finally approved by the council was the sixth draft. The draft that was brought before the council at the Special Council Meeting was the fifth draft. There are minor differences between the fifth draft and the sixth draft, relating to grammar and stylistic language choices. There are no substantive differences in the council's position. Given this, it would be reasonable to conclude that debate at the council meeting of 16 May 2019 was centred around small details.
  94. The CEO has submitted that he advised the council that it was open for it to go into confidence, and this should be a factor in determining whether it was lawful for the council to go into confidence.
  95. The CEO's advice to the council was 'it was open for them to consider whether section 90(2) and (3) were applicable'. In my view, this is not actually advice that the council ought to go into confidence, nor is it advice that in the CEO's opinion it would be lawful to go into confidence. Rather, the CEO essentially reminded the elected members to turn their minds to whether the council ought to move into confidence. It is always open to council members to consider whether the council should move into confidence.
  96. Even if I were to accept that the section 90(3)(d)(i) had been made out - that is, if I accepted the council discussed or considered commercial information of a confidential nature which could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party - this still leaves the question of whether section 90(3)(d)(ii) has been adequately discharged.
  97. Section 90(3)(d)(ii) required that it would, on balance, be contrary to the public interest for the council to consider the commercial information of a confidential nature in a public meeting.
  98. In both its submissions to my investigation and its response to my provisional report, the council has not addressed the public interest element. There is no evidence before me of a weighing up of the public interest. The council has not provided factors it considered in reaching a decision regarding whether it was contrary to the public interest to continue the meeting in public.
  99. In my view, even if the council could demonstrate that it had discussed or considered commercial information of a confidential nature, I do not consider that it was, on balance, contrary to the public interest for the council to proceed in public. A significant amount of information was already available in the public arena. KIPT's EIS was public knowledge. The council's draft response to the EIS was public knowledge.
  100. The proposed development for a deep-sea port is a matter of significant public interest. This is self-evident. It is a large project being assessed as a Major Development at the state level. Whilst the council's views on the project cannot be determinative as to

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whether the project is ultimately approved, I consider it likely that the council's EIS response would have more weight in the Minister's eyes than a submission from a member of the public.

101. First and foremost, a council must be accountable to its ratepayers. Local individuals and businesses have a right to attend council meetings and be apprised of the council's consideration of matters which affect them, unless one of the provisions in section 90(3) applies. The small possibility that an elected member could have made reference to a document which was not public knowledge, but had been considered in confidence at the 7 May Workshop, does not in my view outweigh the public interest factors in favour of the council meeting taking place in public.
102. I further emphasise that section 90(2) of the Local Government Act provides that a council may order that the public be excluded from attendance at a meeting to the extent **(and only to the extent)** that the council considers it to be necessary and appropriate, in order to receive, discuss or consider confidential information.
103. The majority, if not all, of the council's consideration of the EIS draft response did not require the council to be in confidence. Even if the council did have a legitimate reason to move into confidence for part of the meeting, the council would then have been obliged to resume in public session, to continue the process of fine-tuning the EIS response.
104. I am satisfied that there was no lawful basis for making the order to move into confidence.

## Opinion

In light of the above, my view is that the council 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 under section 25(2) of the Ombudsman Act that the council administration organise further training for the elected members on the correct application of section 90 of the Local Government Act.



## Summary and Recommendation

In light of the above, my final view is that:

1. A decision was not made, contrary to law, at the informal gathering of 7 May 2019.
2. The council did not act in a manner that was wrong by holding the informal gathering of 7 May 2019 in confidence.
3. The council acted in a manner that was wrong by holding the Special Council Meeting of 16 May 2019 in confidence.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council administration organise further training for the elected members on the correct application of section 90 of the Local Government Act.

## Final comment

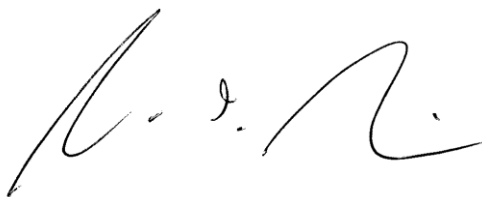
I now report the error to the principal officer of the council, as required by section 18(5) of the Ombudsman Act.

In accordance with section 25(4) of the Ombudsman Act the council should report to the Ombudsman by 2 April 2021 on what steps have been taken to give effect to the recommendations 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.

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

9 March 2021