

Please note: a decision has been made on this matter not to publish the identity of the council. As such, it is a criminal offence pursuant to section 29A of the *Ombudsman Act 1972* to publish information suggesting that a person, officer, or council is the subject of this investigation report.



Final Report

Full investigation - *Ombudsman Act 1972*

Complainant/Reporter	Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>
Public Officer	The council's Chief Executive Officer (CEO)
Council	The council
Ombudsman reference	2020/01722
Date complaint received	9 April 2020
Issues	1. Whether the council committed maladministration in public administration by authorising excessive payments to the CEO for their use of a motor vehicle 2. Whether the council committed maladministration in public administration, or acted in error, by reimbursing the CEO at a mileage rate of 77 cents per kilometre

Jurisdiction

This matter was originally referred to the Ombudsman by the former Independent Commissioner Against Corruption pursuant to section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012* (the ICAC Act) (as it was then named), as raising potential issues of misconduct or maladministration within the meaning of that Act (the referral). At the time of the referral, section 14B of the Ombudsman Act provided that any referral by the ICAC to the Ombudsman was to be taken to relate to administrative acts for the purposes of the Ombudsman Act, and must be dealt with as if a complaint had been made under the Ombudsman Act. The investigation was commenced on that basis.

On 7 October 2021, amendments to the ICAC Act (now the *Independent Commission Against Corruption Act 2012*) and the Ombudsman Act came into effect, removing the Commissioner's jurisdiction over misconduct and maladministration pursuant to the ICAC Act. Misconduct and maladministration are now captured by, and defined in, section 4 of the *Ombudsman Act 1972*. Accordingly, this matter remains within my jurisdiction.

In light of the legislative changes, I have turned my mind to whether it is in the public interest to continue this investigation of my own initiative, for the purposes of section 13(2) of the Ombudsman Act. I consider that it is in the public interest to continue the investigation.

The original complaint attracted the protections of the *Public Interest Disclosure Act 2018* (PID Act), and on that basis I have not identified the original informant. The legislative

amendments do not cause me to change my view about the status of the informant for the purposes of the PID Act.

My investigation focused on whether there has been maladministration by the council. The definition of maladministration, now set out in section 4(2) of the Ombudsman Act, remains applicable to the allegations, and the council remains a 'public authority' as defined in Schedule 1 of the ICAC Act. I have also considered whether the council acted in error, by reimbursing the CEO at a mileage rate of 77 cents per kilometre (**cents/km**).

I have referred to the person who made the initial report to ICAC as the reporter throughout this report.

Investigation

My investigation has involved:

- assessing the information provided by the reporter
- seeking a number of responses from the CEO
- seeking a response from the Mayor
- seeking information and documentation from the council administration
- considering the ICAC Act, the Ombudsman Act and the *Local Government Act 1999* (including legislative amendments which came into effect on 7 October 2021)
- surveying other regional councils to obtain comparative data
- providing the CEO, the council (the Mayor), and the reporter with my provisional report for comment, and considering their responses
- providing the CEO, the council (the Mayor), and the reporter with my revised provisional report for comment, and considering their responses
- preparing this report.

Standard of proof

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

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

Procedural fairness

On 8 July 2021 I issued a provisional report (**the provisional report**). Copies were provided to the CEO, the Mayor on behalf of the council, and the reporter.

Following this I received and considered responses from the parties, and on 28 October 2021 I issued a revised provisional report (**revised provisional report**). A copy was provided to the CEO and the CEO's solicitor, the Mayor on behalf of the council, and the reporter.

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

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

I have again received and considered further submissions from the parties in response to the revised provisional report. Whilst I have carefully considered each submission made, in this report I have only addressed those to the extent that I consider necessary.

Ultimately, the responses persuaded me to alter one of my conclusions, and my previously foreshadowed recommendation.

I confirm that I maintain the following views reached in my provisional and revised provisional reports, albeit with slight amendments:

1. the council committed maladministration in public administration for the purposes of section 4(2)(a)(i) of the Ombudsman Act by providing the CEO with a fuel card in 2018, 2019 and 2020
2. the council acted in error, by reimbursing the CEO at a rate of 77 cents/km between 10 December 2019 and 30 October 2020, contrary to the resolution passed by the council.

I confirm that I no longer hold the following view, initially described in my provisional and revised provisional reports as:

3. the council committed maladministration in public administration for the purposes of section 4(2)(a)(i) of the Ombudsman Act, by reimbursing the CEO at a rate of 77 cents/km in 2018, 2019 and 2020, contrary to the resolutions passed by the council.

I have outlined the reasons for this change in my report below.

For ease of reference, and to distinguish the submissions received from the CEO and the CEO's solicitor, in this report I have referred to the submissions in the CEO's solicitor's letter dated 16 August 2021 as '**the CEO's solicitor's initial submissions**', and I have referred to the submissions in the CEO's solicitor's letter dated 25 November 2021 as '**the CEO's solicitor's further submissions**'.

Jurisdictional issues raised in submissions

I consider it appropriate at the outset of this report to discuss two arguments made by the CEO's solicitor in their further submissions dated 25 November 2021, regarding jurisdictional matters.

Pursuant to section 4 of the Ombudsman Act, the council as a public authority will have committed maladministration if 'a practice, policy or procedure' of the council results in the 'substantial mismanagement of public resources'.

Submissions regarding 'a practice, policy or procedure' of the council

The CEO's solicitor's further submissions argued that there was no 'practice, policy or procedure' in the council's payments to the CEO, as the vehicle allowance, mileage allowance and fuel card were part of the CEO's employment contract and subsequent variations, amounting instead to contract negotiations between the parties. The CEO's solicitor also argued that for something to be 'a practice, policy or procedure', it must be something that 'has previously been established, has been adopted as the way of dealing with particular issues and/or is repeated regularly'.

I do not accept this argument.

Contract negotiations for a council employee, including a CEO, do not occur in a vacuum - they occur within the remit of the Local Government Act, together with internal council

policies, practices and procedures. They are also not purely the result of negotiations, as any negotiated changes to the contract must be approved by elected members by way of council resolution.

I also note that the basis for the mileage payment and fuel card was in fact not the CEO's 2014 or 2017 employment contracts, as they do not refer to either benefit, but rather the motions passed by council and the subsequent letters from the Mayor to confirm the additional entitlements to the CEO.

Further, I consider that the council's actions do in fact amount to a 'practice' of the council. The Macquarie Dictionary definition of 'practice' includes 'the action or process of doing something (opposed to *theory* or *speculation*)'. Therefore I do not consider that an action must be repeated to be considered a 'practice' - a 'practice' can include a single act or decision. If it is the first time such an act has occurred, that single act or decision may in fact evidence the commencement of a practice. However, I note that it was not simply one occasion on which the council considered whether or not to amend or add to the CEO's entitlements, and passed a resolution to confirm the outcome of those considerations. The council first did so in January 2015, passing a resolution that provided for the CEO to be reimbursed for kilometres travelled for work purposes (**the mileage allowance**). The council subsequently passed further resolutions regarding the CEO's mileage allowance, and later passed resolutions to also provide the CEO with a fuel card.

As such, I consider that the council's actions in deciding to provide the CEO with a mileage allowance and a fuel card (in addition to the remuneration and benefits outlined in the CEO's contract), and passing council resolutions accordingly, do in fact amount to a 'practice' of the council. The council has demonstrated a practice of considering whether to increase or add to the CEO's entitlements, and passing a resolution once a decision has been reached.

Submissions regarding 'public resources'

The CEO's solicitor's further submissions also argued that even if the decision to provide the CEO with a mileage allowance and fuel card does amount to a 'practice, policy or procedure', which the CEO's solicitor denies is the case, there has been no mismanagement of public resources because they say there are no 'public resources' involved. The CEO's solicitor argues that the wording of section 4 of the Ombudsman Act makes a clear differentiation between 'public money' and 'public resources', that public resources are matters akin to a library, roads, parks, recreational facilities and the like, and as such the payment of money to the CEO cannot be 'the substantial mismanagement of public resources'. The CEO's solicitor further notes that the use of a petrol card by the CEO cannot be the 'substantial mismanagement of [a] public resource[s]', as a petrol card is not available for public use. As such, the CEO's solicitor argues that the actions of the council do not fall within the definition of maladministration in public administration provided by section 4 of the Ombudsman Act.

I do not accept these arguments.

Section 4 of the Ombudsman Act provides for a range of matters which amount to maladministration. I consider that the term 'public money', as referenced in a part of the section 4 definition not applicable to this matter, is limited to public money. However I consider that 'public resources' is a broader term. The Macquarie Dictionary definition of 'resource' includes 'money, or any property that can be changed into money; assets'. As such, I consider that 'public resources' are *inclusive* of money, not an alternative to money. I consider that it would contradict the wording and the spirit of the legislation if a public officer were allowed to substantially mismanage monetary resources, but not other forms of public resources.

I also consider that 'public resources' as contemplated by section 4 are not only resources that are available for the public to use, but rather, are any resources which are available and

used in the running of councils, government departments, agencies, etc. In my view, examples of public resources, aside from money, may also include items such as computer equipment and office equipment for employees.

It is my view that the money used to pay the wages and other entitlements of the CEO, as a council employee, amounts to 'public resources', which are capable of being substantially mismanaged.

Background

1. My Office originally received a referral from the former Independent Commissioner Against Corruption regarding allegations from a reporter about the Chief Executive Officer (CEO) of the council.
2. The CEO commenced in the role of CEO on 1 August 2014.
3. The reporter alleged that the CEO was being paid excessive allowances for a motor vehicle, comprising:
 - a flat fee of \$15,000 as part of the CEO's salary package
 - the provision of a fuel card
 - an allowance per kilometre travelled.
4. The reporter alleged that payment of an allowance based on kilometres travelled for business, as well as being provided with a fuel card, amounts to 'double dipping'.
5. It is also alleged that the mileage rate of 77 cents/km being paid to the CEO exceeds the rate set down by the Australian Taxation Office (ATO), which was 68 cents/km as at 1 July 2018.
6. The CEO did not have a council-provided vehicle until late 2020. These allowances were applied to the CEO's privately owned vehicle.

The ATO mileage allowance rate

7. Throughout my report, there are various references to the 'ATO mileage allowance rate' and the 'ATO mileage rate'. This terminology comes from the documents provided to me by the council, in particular council resolutions and performance review documents (as summarised in the chronology outlined below at paragraphs 11 - 52, and at paragraph 148 below).
8. Based on the information provided by the council, I understand that this is a reference to the rates provided by the ATO as part of their 'cents per kilometre method'.
9. The ATO historically provided different rates based on the size and type of engine a vehicle had. For example, in the 2014/15 financial year the following rates applied:

Non-rotary engine	Rotary engine	Cents per km rate
Up to 1600cc	Up too 800cc	65
1601-2600cc	801-1300cc	76
Over 2600cc	Over 1300cc	77

10. In the 2015/16 financial year, the ATO implemented one standard rate for all work-related car expenses, regardless of the type of engine. The following table outlines the rate that applied in each subsequent financial year:

Financial year	Cents per km rate
2015/16	66
2016/17	66
2017/18	66
2018/19	68
2019/20	68
2020/21	72

Chronology and evidence obtained by my investigation

11. Schedule 1 to the CEO's first employment contract, dated 1 August 2014 (**the 2014 contract**) included a \$15,000 motor vehicle allowance, but none of the other allowances.
12. The 2014 contract relevantly provides:
 - 4.1 In consideration of the Officer's services under this Agreement, the Council shall pay the Officer a total remuneration package of not less than that contained in Schedule 1 to this agreement where the details of the remuneration package in the first year are also specified. The details of the remuneration package may be varied by mutual agreement between the parties in writing at any time.
 - 4.2 The Officer will receive salary adjustments, subject to performance outcomes, at the full discretion of the Council through the performance assessment as described in Clause 9. The Officer and the Council shall sign a performance agreement within three (3) months of the commencement of this Agreement and thereafter at the times described in Clause 9.
 - 4.3 The details for remuneration 'packaging' for subsequent years will be reviewed as part of the performance review process by the parties. Any variation to the package arrangements will be by agreement.
13. It is the position of the council that the vehicle allowance of \$15,000 was to recompense the CEO for not having a council-provided vehicle.
14. An email from the CEO to the council administration and the former Mayor dated 20 January 2015 states:

Following discussions with [the] Mayor...the arrangements in relation to my vehicle use are to be varied as follows:

 1. The BP Fuel Card that I have used from time to time in relation to work related travel is to be returned to Council.
 2. The current Novated Lease arrangements in respect to the vehicle are to remain, with the following variation.
 3. I will submit a claim for reimbursement for kilometres travelled for work purposes (noting the exclusion of commuter and private use).
The reimbursement is to be (sic) based on the industry standard applicable rate for a Prado 3L diesel.
 4. A log book will be maintained and (sic) submitted to verify claims.

I anticipate this arrangement to take effect as of today.
15. Despite the CEO's expectation that the new arrangement would take effect immediately, this change could not be implemented without the approval of the elected body.

16. An email from the former Director Corporate Services dated 20 January 2015 states:

Hi...can you do a small report "in confidence" to submit to Council along the lines of (sic). It can go up this Monday...so needs to be done by Thursday...

The CEO...has had ongoing discussion with the Mayor concerning salary arrangements in respect to use of [the CEO's] vehicle for Council purposes. The vehicle is currently on a novated lease arrangement with the CEO responsible for all arrangements for fuel and maintenance via the lease.

To simplify the arrangement for Council use of the vehicle and for the purposes of greater transparency, it is recommended that a clause be included in the CEOs contract noting that the CEO will submit a claim for reimbursement for kilometres travelled for work purposes (noting the exclusion of commuter and private use). The reimbursement is to be based on the industry standard applicable rate for a Prado 3L diesel (currently 77c per kilometre). A log book will be maintained and submitted to verify claims...

Impact on budget likely < \$10 year.³

17. The Report that was provided to the elected members titled 'Variation to Chief Executive Officer Salary Package' contains the following information:

The current Chief Executive Officer salary contract includes a Novated Lease arrangement for a Toyota Prado, with the Chief Executive Officer responsible for all fuel and maintenance.

To provide a simple arrangement for compensation of the work use of the vehicle and for the purpose of greater transparency, the Chief Executive Officer has requested that [they] submit a claim for reimbursement of kilometres travelled for work purposes (noting the exclusion of commuter and private use).

The reimbursement to be based on industry standard applicable rate for a Toyota Prado 3L Diesel (currently 77c per kilometre).

A log book will be maintained and submitted to verify claims.

...

Impact on budget less than \$10,000 per annum.

18. The meeting minutes from the council meeting of 27 January 2015 show that the following motion was carried:

That Council resolves to amend the Chief Executive Officer's salary contract to include a clause that provides for the reimbursement of kilometres travelled for work purposes with a log book to be maintained and submitted each month to verify all claims.

19. It is noted that the council resolution makes no reference to the rate of the reimbursement. I also note that I have not been provided with a copy of any signed amendments to the CEO's 2014 employment contract, to include a clause providing for the reimbursement of kilometres travelled for work purposes.
20. As outlined above in this report, in January 2015 the relevant ATO rate for the CEO was 77 cents/km. However, as at 1 June 2015 the relevant ATO rate for the CEO was the flat rate of 66 cents/km.
21. The 2015 CEO performance review report relevantly states:

³ Email reproduced verbatim.

In [the CEO's] case the vehicle lease and other associated costs [the CEO] incurs (including allowance for Fringe Benefits Tax) amount to approximately \$24,000 pa. On the other hand it is important to note that in recent months (but not originally) [the CEO] is reimbursed by [the council] on a per kilometre rate (in accord with Australian Tax Office guidelines) for business use of [the CEO's] vehicle. This is appropriate since technically the vehicle is [theirs], not Council's. Further research would be necessary to ascertain whether a material adjustment to the motor vehicle allowance (and therefore total remuneration) to take account of motor vehicle costs is justified but current arrangements appear reasonable.

22. My investigation was provided with a copy of a letter from the former Mayor to the CEO dated 1 December 2015. Whilst this letter advises of the outcome of the 2015 performance review process, including a 3% salary increase, it contains no mention of a fuel card or mileage allowance.
23. The 2016 CEO performance review report relevantly states '...the per km rate for use of own car will be 77 cents'. The report contains no reasoning as to why this rate was determined to be suitable.
24. The council meeting minutes of 26 September 2016 record that a motion was passed which, among other things, '[a]pproves the per km rate, for use of the Chief Executive Officer's private vehicle, to be 77 cents.'
25. The council provided my investigation with a document titled 'Amendment to employment contract' between the council and the CEO, dated 11 October 2016. This document amends three particular clauses of the employment contract, but contains no mention of a mileage allowance or any other vehicle related allowance.
26. However, I note that a letter sent from the former Mayor to the CEO on 11 October 2016 states that the council has resolved to approve the CEO's remuneration to include a '\$0.77 cents per kilometre rate', for use of the CEO's private vehicle.
27. Financial information provided to my investigation indicates that the CEO submitted an invoice monthly to the council. The descriptions all contain a variation of 'reimburse vehicle mileage - work purposes'. [REDACTED]
28. [REDACTED]
29. The 2017 performance review process made no changes to the mileage allowance and did not introduce a fuel card. However the following details are noted from the 2017 annual performance review report:
 - most, but not all, comparable council CEO remuneration packages include private use of a council motor vehicle
 - it is not always easy to compare motor vehicle arrangements between councils, as the stated value of this benefit in a remuneration package varies markedly between councils and may not reflect the actual long-run average cost to a council
 - rather than having a council-supplied vehicle, the CEO acquired a vehicle through a Novated Lease. The CEO chooses to lease a relatively expensive vehicle, and consequently their costs may exceed the \$15,000 allowance provided for in their employment contract
 - the CEO is reimbursed (in accordance with the Australian Taxation Office specified rate per kilometre) for use of their vehicle for business purposes

- for the 12 months ending in October 2017, under the mileage allowance the CEO was reimbursed \$13,591 for business travel
 - in the CEO's case it is understood that the vehicle lease and other associated costs incurred (including allowance for Fringe Benefits Tax) amount to well in excess of the allowance specified by the council. This reflects the value of the vehicle the CEO has selected
 - it is important to note that the CEO is reimbursed by the council at a per kilometre rate (in accordance with Australian Tax Office guidelines) for business use of the CEO's vehicle. This is appropriate since technically the vehicle is the CEO's (or they are least responsible for its costs).
30. At the council meeting on 18 December 2017 the council considered the final outcomes of the 2017 CEO performance review process. The motion that was passed did not make specific reference to the mileage allowance.
31. On 20 December 2017 the CEO entered into a new employment contract (**the 2017 contract**). This contract contained no mention of a fuel card or mileage allowance. It retained the \$15,000 motor vehicle allowance that was part of the 2014 contract.
32. The 2018 CEO performance review report relevantly states:
- The Panel also recommends that in addition to the \$15,000 motor vehicle allowance (paid in consideration of the personal benefit of a fully maintained motor vehicle) and the ATO mileage allowance for employees using vehicles for business purposes, that the CEO be provided with a fuel card which may only be used for the CEO's vehicle.
33. During the council meeting on 27 August 2018, as part of an in confidence session, a motion was proposed that the council:
- Resolves that in addition to the \$15,000 motor vehicle allowance (paid in consideration of the personal benefit of a fully maintained motor vehicle) and the ATO mileage allowance for employees using vehicles for business purposes, that the CEO be provided with a fuel card which may only be used for the CEO's vehicle for business use only.
34. The motion was put and lost. An amended motion was proposed, in the same terms, but without the requirement that the fuel card be 'for business use only'. The motion was carried. This is evidence of a clear intention by the elected members that the fuel card could be used for both business and personal use.
35. An internal council email dated 11 September 2018 states:
- As per the attached Council Resolution could you please arrange for the fuel card to be prepared for the CEO's vehicle.
- I also note the increase in base salary in line with the State Wage Index effective 1 August 2018. This advice for current budgetary purposes.
- [Council employee] will be forwarding the draft advice letter to the CEO to [the Independent Panel Member for the CEO Performance Review] for confirmation prior to being signed by the Mayor. This will also enable [the Independent Panel Member for the CEO Performance Review] to know that one of the recommendations was changed at the Council meeting in relation to the fuel card being used for business and personal use.
36. An email from the Director Corporate and Community Services to the CEO on the same day states:
- [Council employee] has provided the Council resolution in relation to your salary package.
- A BP Fuel Card has been ordered.

Please note that due to the proposed wage increase being above what was budgeted for the 2018/19 financial year, a budget variation may be required.

I have estimated the variance to be \$10,500. This is based on fuel of \$200 per fortnight and the increase in salary including superannuation of 3.5%

If savings can be achieved within the CEO & Elected Members budget area, no variation will need to be recorded and approved by Council.

Also, please note that the mileage reimbursement as per the ATO is 68 cents per kilometre for business use.

37. By letter dated 14 September 2018, the former Mayor informed the CEO of the outcome of the 2018 performance review. The letter relevantly states:

Your remuneration will take effect from 1 August 2018 and will be made up as follows:⁴

Base salary
Vehicle Allowance
(+ ATO mileage allowance & fuel card)
9.5% superannuation.

38. A series of emails from 18 September 2018 have been provided to my investigation. In summary, the CEO stated that the council had previously resolved to retain the mileage reimbursement at 77 cents/km, which was the amount set at the time of the vehicle being leased. The Director Corporate and Community Services advised the CEO that the current council resolution was the reimbursement of mileage at the ATO rate. The CEO responded 'Throughout the process & the retention of the rate of 77 cents had been clear & it is consistent with previous resolutions. I don't believe further clarification is needed'.
39. Notwithstanding the position of the CEO, the Director Corporate and Community Services sought clarification from the then-Mayor on 27 September 2018. The former Mayor indicated that the recently passed resolution should be 'in line with' previous resolutions stipulating a mileage rate of 77 cents. The Director Corporate and Community Services suggested that the wording of the resolution 'needs to reflect that in future'.
40. On 8 October 2018 the former Mayor emailed the Director Corporate and Community Services stating 'to clarify the resolution from 2016 does state a specific 0.77 cents per km, and since no rescinded motion has been put, this motion would still stand'.
41. The council administration accepted the former Mayor's position that notwithstanding the terms used in the 27 August 2018 motion, the mileage rate would be treated as 77 cents. An internal email on 8 October 2018 states:

Hi [council employee]

Please trim on [the CEO's] file.

(the query related to the resolution regarding the CEO performance stating "the ATO mileage allowance for employees using vehicles for business purposes".

The ATO mileage allowance for 2018/19 is 68 cents per kilometre, however as per the Mayor's email payment will be made at 77 cents per kilometre.

⁴ Amounts omitted.

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42. Financial documentation provided to my investigation indicates that between 6 December 2018 and 4 December 2019, the CEO invoiced the council for, and was reimbursed for, the amount of \$18,188.17 under the mileage allowance.
43. In the same period of time, the council paid a total of \$6,155.20 under the fuel card.
44. Following a performance review process in 2019, at the council meeting on 10 December 2019, the council resolved that the CEO would be provided with a salary increase of 2.5% and recorded that the CEO is provided with 'the ATO mileage allowance for employees using vehicles for business purposes', as well as a fuel card. A letter from the Mayor to the CEO dated 13 December 2019 also noted this.
45. On 16 December 2019 the Manager Strategy and People emailed the current Mayor. A copy of that email has not been provided to my investigation. In response, the Mayor sent the following email:
- ... I am not sure the actual contract can be amended now that Council has voted I may need to seek advice.
- The issue if there is one should have been picked up during the review process.
- I am little surprised [REDACTED] did not mention anything and the previous [Independent Panel Member for the CEO Performance Review] actually agreed the fuel card should be implemented.
- Very confusing but the vote stands as what was presented I think unless other wise (sic) resolved by Council.
46. Further internal council emails in December 2019 indicate some members of the council administration and some elected members were concerned about the legality of the arrangement, and wished to seek advice. However, the emails provided to my investigation do not clarify whether any external advice was sought, or what that advice was if it was sought.
47. The council did however advise my investigation that the council had a meeting with a former independent advisor to the CEO performance review panel, who advised that in their opinion, the fuel card and the mileage allowance were potentially conflicting, as the mileage allowance includes the cost of fuel. This appears to be the main advice sought by council.
48. On 18 January 2020, the CEO emailed the Director Corporate and Community Services noting that their vehicle reimbursement had been adjusted 'down to the current ATO rate' and requesting 'could you please get this fixed'.
49. My investigation has not been provided with any evidence that there was a subsequent council resolution clarifying that the rate at which the CEO was to be reimbursed was to remain at 77 cents/km. Nevertheless, the council continued to pay the CEO at a rate of 77 cents/km.
50. At a special council meeting on 27 October 2020 a resolution was passed to approve, in relation to a vehicle for travel by the CEO, the provision of a Toyota Kluger GXL or equivalent with a fuel card for both work and private use.
51. Emails provided by the council indicate that when the car was provided to the CEO, the \$15,000 motor vehicle allowance, as provided for in the CEO employment contract, ceased to be paid (although as discussed at paragraphs 83 - 91 below, it appears that the \$15,000 figure has remained in the CEO contract as a 'non cash' item, so as to avoid decreasing the CEO's superannuation entitlements).

52. My investigation was also provided with the following email dated 30 October 2020:

Effective 28/10/20:

- Current fuel card to be returned to [council employee] and payment ceased
- Effective from when CEO receives new Kluger:
- A new fuel card to be supplied
 - Current mileage reimbursement arrangement at ATO rate ceases.

Evidence of the CEO

53. A number of questions were put to the CEO in the course of my investigation.

54. In response to a question about why it has been necessary to have a payment of mileage allowance as well as a fuel card, the CEO responded:

The CEO did not participate in remuneration deliberations by Council, was not prior consulted and is not aware of the rationale applied by Council. It is noted that the Council took external independent advice in respect to the CEOs performance reviews and remuneration. However; it is probable that the Council considered the actual vehicle running costs e.g. link below.

<https://www.racv.com.au/on-the-roadibuying-a-caricar-running-costs.html#rates>

The Council may also have considered the allowances as part of an overall assessment of remuneration taking into account the CEO's overall performance and the expenses incurred in the conduct of duties.

At the time of commencement of employment in August 2014, the [council] made no provision for a vehicle and the CEO received no reimbursement for use of a personal vehicle for work purposes. All vehicle expenses without reimbursement were covered by the CEO from late 2014 until later in 2015.

Council adjusted the remuneration in 2015 to include the ATO rate for mileage for a 6 cylinder vehicle @ \$0.77 cents per kilometre (for work purposes only). The 6 cylinder rate was subsequently removed by the ATO and the ATO rate reduced in 2016. The \$0.77 allowance was retained by Council and not increased since 2015.

The CEO did not participate in the remuneration discussions of the Performance Review Committee or Council. The Mayor at the time subsequently advised that the Council was seeking to obtain compatibility with the full private vehicle use employment conditions of Council's Senior Managers. The Performance Review Committee also advised that the Council did not wish to reduce the existing mileage rate, in the knowledge that the CEO had purchased a private vehicle for work purposes based on the known ATO rate at the time of purchase. It was also noted that the CEO does not claim mileage or receive the benefit of private use of a vehicle.

55. In response to a question about whether the CEO considers the provision of the allowances amounts to a duplication of payments, the CEO responded:

All Directors and several Senior Managers of Council receive full private use of Council supplied vehicles inclusive of the provision of a fuel card (full private use) as part of their employment contracts. These contract provisions are common throughout regional South Australia.

The CEO is required to purchase a private vehicle. The fuel card and kilometre allowance for work purposes offset some, but not all, of the vehicle expenses incurred by the CEO...

56. In response to a question about whether, in all the circumstances, the CEO considered that these allowances represented an appropriate use of public resources, the CEO responded:

The payment of a vehicle allowances [sic] represent a cost saving to the Council in comparison to the vehicle conditions of other Senior Council Officers and is only received for vehicle use for work purposes. The fuel card is only of benefit for private use, if used, and all vehicle running expenses are paid by the CEO.

The CEO has raised with the Mayor the potential to align the vehicle arrangements for the CEO with other Council Senior Officers and it is understood that this is an option that may be considered by Council. The CEO would welcome discussion and consideration of all options.

A comparative review of the vehicle was undertaken and is included below.

On this basis a review of [the CEO's] vehicle/fuel usage versus utilizing flights was considered and reviewed. This table demonstrates the actual usage costs over a 12 month period for the [council] CEO versus that of [the CEO's] local peers. The tyranny of distance exacerbates [the council's] costs as most meetings occur in Metropolitan Adelaide.

57. The table provided indicates that the CEO travel expenses (with the inclusion of electronic expenses) total \$41,773.37 per year, whereas the costs allegedly being incurred by other regional CEOs total \$47,700 per year. Notably, it is alleged that other regional CEOs are frequently utilising flights for meetings in Adelaide (totalling \$19,500 per year) whereas the CEO spends only \$750 per year on flights to Adelaide. The table also assumes that the CEO takes 26 return trips to Adelaide per year, averaging one trip per fortnight.

58. The CEO's response also makes reference to the McArthur report. The McArthur report is titled 'South Australian Local Government Remuneration Survey Report - Chief Executive Officers 2016/2017' and appears to have been commissioned by the Local Government Association of South Australia. I make the following observations about the findings of the McArthur report:

- The report primarily considered 67 South Australian councils, although it did draw some data from over 200 local councils across Australia, including regional councils
- Across the 67 councils, the annual average cost of a vehicle package was \$12,394, with the average annual costs for 'regional' and 'small regional' councils being \$12,562 and \$12,333 (respectively)
- Under the heading 'Motor Vehicles', the report states:

The reported value of the motor vehicle component of TRPs [total remuneration packages] ranged from \$4750 to \$27,223, the average value being \$12394. For 2017 13% of CEOs reported not having a vehicle component as part of their TRP.

The value of this component varied considerably usually as a consequence of the type and conditions of use of the vehicle. The manner in which the value of the vehicle is determined also varied considerably, usually depending on Council policy and contractual arrangements.

59. I note that the McArthur report lists the 'vehicle' component of the CEO's total remuneration package at \$15,000. This therefore does not take into account the mileage allowance or the fuel card

60. The CEO also provided the following general submissions to my investigation:

It is problematic that there are few viable travel options for [the location] and that the distances involved are substantial. There are no public passenger flights from [the location] and the previous timetable for the few flights that were available from [airline] was practically unusable and expensive; hence only a single one way flight in twelve months. If air travel were available it incurs additional accommodation and expenses. An alternative option of driving to [location] for a flight and using taxis was

considered, but the additional time, lost productivity & increased cost eliminated it as a viable option.

Local travel is essential to development sites and issues within the Council's [size of area]. It is notable that most of the important [redacted] sites within and adjacent to the [council area] require on-site visits and meetings.

The CEO has raised and pressed the issue with the common expectation that regional Council personnel travel to Adelaide and the reluctance of State & Federal Officers to reciprocate and travel the [distance] to [council area]. This is particularly relevant when the issues to be addressed would clearly benefit from first hand observation.

During the COVID-19 pandemic all Council travel outside of the Council boundary has ceased. This obviously has reduced travel expenditure but also has considerable impact upon the progression of major projects and work for [redacted]

The CEO is a long term user of Skype and Zoom which reduce travel requirements. The recent take up and acceptance of on-line meeting platforms such as Zoom will further reduce face to face meetings and travel; however it is noted that face to face meetings [redacted] have been scheduled in Adelaide in June 2020.

Prior to the COVID-19 pandemic, travel to Adelaide increased in the past 12 months due to additional roles/duties.

1. [redacted]
2. [redacted]
3. [redacted]

61. My investigation also sought specific information from the CEO about the expenses the CEO personally incurred in the calendar year 2019, noting that this was the only calendar year in which the CEO had the benefit of the vehicle allowance, mileage allowance and fuel card for the full year.
62. The CEO indicated that in 2019 they travelled 22,255 kilometres for work, as well as 8,606 kilometres travelled for private use. The CEO submitted that the CEO and their spouse regularly use the spouse's car for private recreational use, and that no claims were applied to that vehicle.
63. The CEO also noted that during 2019 they were covering the vacant position of [redacted], which necessitated additional travel.
64. The CEO also advised that in 2019 they purchased two new vehicles. The CEO stated:

You will note that I purchased two vehicles in 2019 with work use very much in mind. For trips to and from Adelaide I tended to use the LandCruiser for its enhanced safety, especially for returning late in the evening and the risk of kangaroos. However, the

running expense of the LandCruiser are high and exceeded the reimbursement and fuel card use, as indicated in the attached vehicle running expenses links (note I could not find relevant information for 2019, so I have included information for 2017). This was one of the factors I took into account in purchasing a second vehicle for work which was more suitable for journeys around town.

It may be noted that with the conclusion the milage (sic) claims, vehicle salary reduction in 2020, the projected vehicle related income was foregone resulting in the inability to offset some of the vehicle running and purchase costs over the several years anticipated at the time of purchase.

You will be aware that the Council has now provided a vehicle for work and private use, which is a preferable arrangement for everyone, albeit for a period of time I am financially disadvantaged due to the purchase of the vehicles.

The vehicle insurance and registration costs as requested are listed below.

65. The CEO indicated that they had incurred the following vehicle expenses for the two vehicles:

Vehicle Expenses (excluding fuel) 2019

Purchase Toyota Landcruiser \$108,172.36
Vehicle Insurance \$1,1700
Registration (2020) \$786.39

Purchase 8th April 2019 \$14,690
Holden Sedan
Vehicle Insurance \$590.00 (2020)
Registration \$526.36

66. My investigation also sought information about other running costs, such as maintenance and servicing. The CEO was unable to provide specific amounts spent on the two vehicles. However, the CEO made reference to the information provided on the website autotrader.com.au, which lists the average yearly servicing costs for a Toyota Landcruiser 2017 as \$650.
67. The CEO also made reference to the website⁵ RAC Car Insurance which has a Car Running Costs Guide 2020.
68. The RAC Guide indicates that the running costs for a Toyota Prado (the CEO's former car) are \$18,748 per year. The running costs for a small car such as a Holden Sedan are estimated at \$7,316 per year. The Guide does not provide a price guide for a car of the value of \$108,172. However, it does list the running costs of a Toyota Landcruiser GX (valued at \$88,401) to be \$25,013 per year.
69. The average yearly running cost, out of all the cars listed in the RAC Guide, is \$13,244 per year.
70. As noted above in this report, following receipt of the provisional report, a letter was received from the CEO's solicitor dated 16 August 2021, advising that they act on behalf of the CEO and had been instructed to respond to the provisional report on behalf of the CEO (**the CEO's solicitor's initial submissions**). I considered these submissions, and issued the revised provisional report. In response, the CEO's solicitor provided further submissions in a letter dated 25 November 2021 (**the CEO's solicitor's**

⁵ <<https://www-cdn.rac.com.au/-/media/files/rac-website/car-and-motoring/running-costs/2020/car-running-cost-guide2020.pdf?la=en&modified=20201021031408&hash=C2E0B382EEDA8517337F38091F9044328126F92B>> Accessed 15 June 2021.

further submissions). These submissions reiterated the CEO's solicitor's initial submissions, and also made new submissions. I have considered all of the CEO's solicitor's submissions. I have addressed those as I consider necessary above on pages 3 - 4, under the heading of 'Procedural fairness', and further below, at the relevant points within the report.

71. I note that throughout the CEO's solicitor's responses, the CEO's solicitor has criticised my investigation. It is a matter for me to determine how to conduct my investigation, and I do so as I see fit.⁶ I sought a response from the current Mayor and from the council, which has provided documents and information. The council should be capable of providing information regarding council actions and decisions, regardless of staff changes, and I am entitled to rely on the wording used in council resolutions (such as 'ATO mileage allowance').

Evidence of the Mayor

72. Questions were put to the Mayor in the course of my investigation.
73. A number of questions pertained to the decision of the council in 2018 to provide the CEO with a fuel card for both business and personal use. The Mayor clarified that in 2018 they were not the Mayor of the council. However, they were an elected member, and a member of the 2018 CEO performance review panel.
74. The Mayor was asked to respond based on the Mayor's personal knowledge and recollection only. As such, they were unable to provide much detail in response to some questions put to him. This is understandable due to the passage of time.
75. In relation to the rationale behind the council's decision to provide the CEO with a fuel card for all vehicle use, both private and business, the Mayor indicated that their recollection was that the fuel card proposal was put forward by the former Mayor, and that the independent consultant had supported the proposal.
76. The Mayor was not able to provide any information regarding the basis upon which the mileage allowance was calculated. While noting that it exceeded the prescribed ATO rates, the Mayor indicated that they could not recall how the figure of 77 cents/km was determined. The Mayor noted they had taken advice from the former Mayor and the independent consultant, who was engaged to provide advice in relation to performance review and remuneration matters.
77. In relation to whether, in the Mayor's view, the provision of a mileage allowance and a fuel card represented a duplication of payments, the Mayor indicated that they felt comfortable with this at the time, and they had trusted the advice of the former Mayor and the independent consultant, who did not mention this as being an issue.
78. The Mayor indicated that the council did not seek any other external advice, apart from that of the independent consultant, to provide advice to the council on performance review and remuneration matters.
79. In relation to whether, in the Mayor's view, the allowances represented an appropriate use of public resources, the Mayor indicated that they did not believe anything illegal had transpired, and emphasised that the decisions made were those of the entire elected council, and not their decision alone.

⁶ *B v Lines* [No 2] [2019] SASC 196 (15 November 2019), paragraph 139.

80. Following receipt of the provisional report dated 8 July 2021, the Mayor responded as follows:
- expressing dismay that both the former Mayor and the CEO had requested council staff to continue to pay a greater amount of money than that of the resolutions passed
 - expressing concern at a lack of transparency and honesty
 - suggesting the CEO had not complied with section 99(1)(a) of the Local Government Act, and expressing concern at this
 - noting that the decision made by elected members (that the ATO rate should be paid) was a lawful resolution of the council
 - noting that as an elected member, and then as Mayor, they had no knowledge that council staff had been instructed to continue paying the rate of 77c/km after the council had resolved that the ATO rate should be paid
 - noting that the change in the vehicle allowance in the 2020/2021 financial year took place on the advice of the independent expert who had facilitated the last CEO performance review, and the panel had followed their advice
 - expressing that overall, the situation was very disappointing, and not something that 'sits well' with him as the current Mayor.
81. Following receipt of my revised provisional report dated 28 October 2021, the Mayor confirmed that they did not have any further comments to make.
82. I have considered the Mayor's views, and they did not change the views expressed in my provisional or revised provisional report.

Evidence of reporter

83. Following receipt of my revised provisional report, the reporter provided a response outlining a number of matters, including the following:
- although the vehicle allowance of \$15,000 is no longer being paid to the CEO, at the Special Council Meeting held on 27 October 2020, a resolution was passed noting that the council 'approves the total remuneration to remain at the same level as in 2019/20 [REDACTED]'. The decision was not unanimous, and there was debate around the vehicle aspects. To balance out the removal of the vehicle allowance, it was replaced with a line item for 'non cash' items, which states that there is \$15,000 as a 'value of private use of Council vehicle'. As such, superannuation is still calculated inclusive of the \$15,000 figure. The reporter does not believe it qualifies as an item to be included, and considers that the CEO's superannuation has potentially been overpaid since 27 October 2020
 - that based on the comments such as those made at paragraph 16, it appears that the CEO did in fact discuss the fuel card with the previous Mayor
 - concerns around the efficacy of the current performance review process.
84. Based on the CEO's 2014 and 2017 employment contracts, and letters from the Mayor to the CEO outlining salary increases in between these dates, it appears that the superannuation paid to the CEO was initially calculated based on the CEO's base salary, and did not include their vehicle allowance. For example, in the CEO's 2017 contract, Schedule 1 provides for a base salary of [REDACTED], 9.5% superannuation of [REDACTED], and a motor vehicle allowance of \$15,000. While it notes that this amounts to a total remuneration of [REDACTED], the superannuation figure is calculated solely on the base salary of [REDACTED].

85. However, on 22 January 2018 the independent consultant sent an email to the former Mayor and the CEO, copied to the Human Resource Coordinator, as follows:

Gentlemen,
a query has been raised by Councils [sic] payroll manager through the HR Department about the applicability of Superannuation on the motor vehicle allowance component. I have checked the ATO definitions and allowances 'not fully expected to be spent' are considered to be part of wages, and therefore Ordinary Time Earnings subject to the superannuation guarantee.
As a result, the figures provided to you need to be adjusted to allow for 9.5% super on the motor vehicle allowance. the [sic] revised contract is attached with an increase to the total remuneration package of [REDACTED].

86. In response, the Human Resource Coordinator forwarded the email, and noted that the superannuation component for the CEO had been amended.
87. I was not provided with a copy of the amended contract, however I accept that this was the point at which the CEO's superannuation began being calculated on the basis of their base salary plus the vehicle allowance.
88. This is confirmed in subsequent correspondence. For example, in a letter dated 13 December 2019 from the Mayor to the CEO, [REDACTED] entitlements are outlined to comprise of a cash component of [REDACTED], a vehicle allowance of \$15,000, subscriptions of [REDACTED], and superannuation (9.5%) of [REDACTED], amounting to a total package value of [REDACTED]. The letter notes that in addition, the CEO is provided with a fuel card for use of their own vehicle, and the ATO mileage allowance.
89. As noted above at paragraph 50, at the Special Council Meeting held on 27 October 2020, the council passed a confidential resolution in which the CEO's \$15,000 vehicle allowance ceased. Instead, the CEO was to be provided with a Toyota Kluger or equivalent, with a fuel card for both work and private use. The confidential resolution also stipulated that the CEO's total remuneration would remain at the same level as in 2019/2020 [REDACTED], although it does not comment on how this was to be accounted for. I have not received any documents outlining the CEO's entitlements after this date.
90. The council did not have a legal obligation to continue paying the CEO superannuation based on the ceased \$15,000 vehicle allowance. It appears that the council was aware of this, but elected members decided to maintain the \$15,000 as a non-cash item, in order to maintain the same superannuation contribution for the CEO.
91. I have considered the submissions made, however given the late stage at which this point has been drawn to my attention, I am not of the view that I should make further enquiries into this issue. However, I note that when considering this report, elected members may wish to consider this matter further in future, weighing up the factors outlined below at paragraph 142.
92. I have considered the other views expressed by the reporter. I note that there are concerns regarding the performance review process, however this is not an issue which I would usually investigate. Elected members should consider whether the policies in place regarding the performance review process are sufficient, and allow all elected members to raise any concerns. If the issue is a cultural issue, consideration should be given to rectifying this, and/or allowing for alternatives. For example, if elected members are uncomfortable openly raising queries or concerns, a process might be introduced allowing elected members to raise queries or concerns anonymously.
93. Other than as noted above at paragraphs 91 and 92, the reporter's comments have not changed the views expressed in my revised provisional report.

Relevant law

94. Section 4(2) of the Ombudsman Act provides:

(2) ***Maladministration in public administration–***

(a) means–

(i) conduct of a public officer, or a practice, policy or procedure of a public authority, that results in an irregular and unauthorised use of public money or substantial mismanagement of public resources; or

(ii) conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions; and

(b) includes conduct resulting from impropriety, incompetence or negligence; and

(c) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions.

95. Section 99 of the Local Government Act relevantly provides:

99 – Role of chief executive officer

(1) The functions of the chief executive officer include–

(a) to ensure that the policies and lawful decisions of the council are implemented in a timely and efficient manner;

Whether the council committed maladministration in public administration by authorising excessive payments to the CEO for their use of a motor vehicle

96. The council as a public authority will have committed maladministration if 'a practice, policy or procedure' of the council results in the 'substantial mismanagement of public resources' (the payments made to the CEO).
97. The arrangement provided for the CEO was different from the arrangement that is often provided for Chief Executive Officers and senior management within a regional council. It is a common entitlement under an employment agreement to be provided with a fully paid for council car, including a fuel card for both public and private use. The council shifted to such an arrangement following the Special Meeting held on 27 October 2020.
98. According to the McArthur report, the average annual cost to a council of providing a CEO with a motor vehicle is \$12,394. Looking at regional and 'small regional' councils more specifically, the McArthur report finds that the average cost is \$12,562 and \$12,333 (respectively). This largely corresponds with the figures provided in the RAC Car Guide which lists the average running cost of a vehicle to be \$13,244.
99. The actual running costs of a car vary enormously depending on the make and model of a car. However, I consider that there is a public expectation that local councils, including regional councils, are not spending exorbitant amounts of money on the running costs of cars, or by purchasing cars which have a particularly high purchase price and high running costs.
100. For the purposes of comparison across the industry, in addition to considering the McArthur report, my investigation also canvassed a sample of other regional councils to determine what vehicle allowances were being made.
101. The McArthur report concluded that vehicle allowances, as part of a total remuneration package, ranged from \$4,750 to \$27,223. I note this report was from 2017.
102. My investigation found that the most common arrangement amongst regional councils appears to be that CEOs and senior executives have the use of a council-owned car. The value of this car varies across councils, but ranges between \$24,000 and \$60,000.

One council does not provide either a council-owned car or a vehicle allowance, but does provide a fuel card to the CEO.
103. Two councils provided a vehicle allowance to an employee in lieu of the use of a council owned car. These allowances were for \$12,000 and \$15,000 respectively. Whilst I am mindful my investigation contacted only a sample of regional councils and did not conduct a full audit, my investigation did not encounter any other regional councils that provide multiple allowances (eg a vehicle allowance, mileage allowance, and a fuel card).
104. As noted above in this report, the CEO purchased a car of the CEO's choice. As per their original employment contract, the council then paid the CEO a \$15,000 vehicle allowance each year, between 2014 and 2020.
105. In addition, in January 2015 the council commenced paying the CEO a mileage reimbursement. As a result, the CEO was paid the following amounts:
 - \$13,735.39 in 2015
 - \$15,481.89 in 2016
 - \$14,425.18 in 2017
 - \$13,733.72 in 2018
 - \$18,327.54 in 2019

-
- \$8,815.73 in 2020.
106. Finally, during the council meeting on 27 August 2018, a resolution was passed to also provide the CEO with a fuel card.
 107. In 2019, the council paid \$6,155.20 on the fuel card. The CEO also had the benefit of the fuel card for part of the year 2020, prior to being assigned a council-owned car after 27 October 2020.
 108. While my investigation has not specifically considered the figures associated with Fringe Benefits Tax, I comment that in addition to the allowances paid directly to the CEO, the council was also obliged to pay Fringe Benefits Tax to the ATO, as a result of the allowances.
 109. The council has been unable to provide me with a clear rationale as to why it determined to provide the CEO with a mileage allowance, in circumstances where the CEO was already receiving a vehicle allowance. The council has also been unable to provide a clear rationale as to why it subsequently introduced a fuel card, in addition to the other two allowances. Based on the CEO's email dated 20 January 2015, the CEO was to return the fuel card, which they used 'from time to time', and instead would receive the mileage allowance. As such, it appears that the fuel card and mileage allowance were considered by the council to be alternatives at that point in time.
 110. It would appear that the purpose of the vehicle allowance of \$15,000 was to recompense the CEO for not being provided with a council owned vehicle. This would align with the processes being followed by other councils, for senior executives who are driving their own privately owned vehicles.
 111. Internal emails would suggest that the mileage allowance was introduced to 'simplify the arrangement' and 'for the purposes of greater transparency'.
 112. If these were the aims of the elected body in approving the mileage allowance, I do not consider these aims were achieved. By introducing a second type of allowance, the council complicated the arrangement rather than simplifying it. It is clear from internal council documents that the new arrangement had implications for both the CEO and the council, in terms of payroll, taxation matters and superannuation matters. The council on occasion had to seek advice on taxation, including Fringe Benefits Tax, and it is evident the CEO also had to seek private taxation advice.
 113. I also do not consider that the arrangement led to greater transparency. The CEO's employment contract is not a public document, and the decision of the elected body to introduce the mileage allowance was made in confidence. It is not clear what was lacking in transparency, and how that was improved by the introduction of the mileage allowance.
 114. The members of the CEO performance review committee appear to have relied heavily on the advice of the independent advisor to the committee. Over the period of years being considered by my investigation, three different persons served as the independent advisor to the committee.
 115. I have considered the CEO performance review reports to determine whether they provide any guidance as to the rationale behind the decision making.
 116. The 2015 performance review report indicated that the CEO incurs approximately \$24,000 in vehicle-related costs per year.
 117. The 2016 performance review report contains no useful commentary.

118. The 2017 performance review report notes that the CEO chooses to lease a relatively expensive vehicle, and consequently their costs may exceed the \$15,000 allowance provided for in their employment contract. However, this report also states that providing the ATO mileage allowance is appropriate.
119. The 2018 performance review report does not contain any new information which would indicate a rationale for having multiple allowances. It also recommends the introduction of a fuel card. Relevantly, it describes the original vehicle allowance as being 'paid in consideration of the personal benefit of a fully maintained motor vehicle'.
120. The CEO has advised my investigation that at no stage did the CEO make a profit from the vehicle allowances. That is, at no point did the CEO receive more in allowances and reimbursements than the CEO actually incurred in vehicle running costs.
121. Whether or not this is the case depends on the interpretation of the purpose and operation of the allowances, particularly whether the allowances are intended to include the purchase price of a privately owned vehicle.
122. In 2019, the total amount the CEO was paid by the council for their vehicle was \$39,482.54 (\$15,000 vehicle allowance; \$6,155 fuel card; \$18,327.54 mileage allowance).
123. This is significantly more than the costs incurred by the average council to either provide a vehicle allowance (approximate average \$12,394) or to operate a reasonably priced council owned vehicle (approximate average \$13,244).
124. I accept that the area of vehicle reimbursements and entitlements lacks clarity, with arrangements largely being at the discretion of employers. This is an area where there is inconsistency across both the public and private sectors.
125. I am willing to accept it was a reasonable use of public resources to provide the vehicle allowance and the mileage allowance. Whilst it was a particularly generous arrangement, there is no outright duplication or overlap in the payments, and I accept that regional councils may have to offer generous salary arrangements in order to entice skilled individuals to relocate to the area, as well as to account for the large distances that may need to be travelled. It is within the bounds of ordinary practice that a vehicle allowance may be applied as part of a salary arrangement, and thus may be spent as the CEO chooses, including by being applied to the purchase price of a vehicle.
126. I have specifically considered whether it was a reasonable use of public resources to provide the fuel card, in addition to the vehicle allowance and the mileage allowance.
127. A mileage allowance covers the running expenses of a vehicle, including registration, servicing, insurance and fuel costs.
128. In my view, my investigation has not been provided with any evidence which provides a rationale for providing a fuel card in addition to the mileage allowance. The CEO was already benefitting from a generous arrangement, which included a component which includes the cost of fuel, as this is incorporated into the mileage allowance. It was a duplication of payments to provide a separate fuel card, for which it does not appear there was any additional benefit to the council or ratepayers.
129. As a result, my provisional and revised provisional reports outlined my preliminary view that the provision of both the fuel card and the mileage allowance in 2019 and 2020 constituted the mismanagement of public resources by the council.

130. The CEO's solicitor's initial submissions argued that the comments contained at paragraphs 124, 125, and 128 of this report (being paragraphs 107, 108, and 111 of the provisional report dated 8 July 2021) are inconsistent with my finding of mismanagement of public resources, and therefore could not support such a finding. I disagree with this argument. The views outlined in the abovementioned paragraphs accept that there is a level of discretion available to councils when determining motor vehicle provisions; however, the provision of both a fuel card and a mileage allowance to the CEO in 2019 and 2020 results in the outright duplication of payments for fuel costs. The CEO was already benefitting from a generous arrangement, and there was no additional benefit to the council or ratepayers in providing him with the fuel card in addition to the mileage allowance. It is not inconsistent to find that the duplication goes too far, and amounts to the mismanagement of public resources by the council.
131. As noted earlier in this report, the CEO's solicitor's further submissions also argued that there was no 'practice, policy or procedure' in the council's payments to the CEO. The CEO's solicitor argued that the vehicle allowance, mileage allowance and fuel card were part of the CEO's employment contract and subsequent variations, amounting instead to contract negotiations between the parties, and not to maladministration. I do not accept this argument, and have addressed this point above on pages 3 - 4 of my report, as a jurisdictional matter.
132. Taking all arguments into consideration, I maintain my preliminary view as expressed at paragraph 129 above - that is, it is my view that the provision of both the fuel card and the mileage allowance in 2019 and 2020 constituted the mismanagement of public resources by the council.
133. Having found that there was the mismanagement of public resources, I have considered whether the mismanagement was substantial, and thus would constitute maladministration in public administration.

Consideration of substantial mismanagement

134. The council initially anticipated that the costs which would be incurred under the mileage allowance would be less than \$10,000 per year. Evidently, the actual costs incurred by the CEO, and reimbursed by the council, were higher (excluding the year 2020 in which travel was limited due to the global pandemic).
135. The CEO's solicitor argued in their initial submissions that I had found that the mismanagement of public resources was substantial *because* the council had initially anticipated that the costs would be less than \$10,000 per year, but then were higher. I disagree that this was my reasoning. I accept that the 'less than \$10,000 per year' figure was an estimate. However the fact remains that in 2019 the CEO was reimbursed over \$18,000 via the mileage allowance (which, as outlined above, includes a provision for fuel usage). This is not an insignificant amount. In addition, the CEO was also provided with \$6,155.20 in fuel cards in 2019. This additional \$6,155.20 is not an insignificant amount, especially when taken in conjunction with the \$18,000.
136. I note that the CEO was also in receipt of both the mileage allowance and fuel card from August - December 2018, as well as January to October/November 2020, resulting in duplicated payments beyond the figures discussed in paragraph 135 above (which relate only to 2019). This includes the mileage allowance figures outlined at paragraph 105 above, and approximately a further \$4,000 - 5,000 in fuel cards.
137. The CEO's solicitor's initial submissions also argued that the lack of a finding that the council's actions 'results in an irregular and unauthorised use of public money', as part of the definition of maladministration, means that there cannot be a 'substantial

mismanagement of public resources' nor can it be 'wrong' pursuant to section 25(1)(g) of the Ombudsman Act.⁷ In my view, this interpretation of the definition is incorrect. Section 4(2) of the Ombudsman Act (previously section 5(4) of the ICAC Act), provides as follows:

- (2) Maladministration in public administration—
 (a) means—
 (i) conduct of a public officer, or **a practice, policy or procedure of a public authority, that results in** an irregular and unauthorised use of public money **or** substantial mismanagement of public resources; [emphasis added]

The use of 'or' clearly sets up two alternatives for finding maladministration in public administration by a public authority. As a result, an 'irregular and unauthorised use of public money' is not a prerequisite for a finding of maladministration.

138. In addition, the CEO's solicitor's initial submissions argued that I have not had any or proper regard to the fact that the use of incentives such as mileage allowances and fuel cards are commonplace to attract quality employees to work in regional councils. The CEO's solicitor argues that the provision of the fuel card is best and properly categorized as an incentive being offered to keep the CEO working at the council.
139. I disagree with these arguments. I have clearly accepted that regional councils may have to offer generous salary arrangements in order to entice skilled individuals to relocate to the area, and that it is within the bounds of ordinary practice that a vehicle allowance may be applied as part of a salary arrangement, as outlined at paragraph 125 above. However a generous salary arrangement is distinct from what is essentially a duplicate reimbursement for the same expense - fuel, via the provision of both a mileage allowance (which includes fuel costs) and a fuel card.
140. In the CEO's solicitor's further submissions, they also argued that the only possible duplication of payment for fuel costs relates to the payment of fuel for business purposes, as the mileage allowance did not provide for private travel, however the fuel card did. As such, the CEO's solicitor argues that the figures contained within the revised report are not a true representation of any duplicated payment, and any duplication is less than has been currently calculated.
141. While I note these submissions, I consider that this distinction is somewhat artificial. I have found that there was duplication in providing both the fuel card and the mileage allowance - the CEO should have received one entitlement or the other, but not both.
142. While there is no specific test as to what is considered substantial mismanagement, I have based my conclusion on a number of considerations (in accordance with previous investigation reports),⁸ including:
- the appropriateness of the amount of the expenditure
 - the benefit (real or perceived) gained by the public from the expenditure
 - the public's expectations of government agencies
 - whether the expenditure was reasonably necessary for the carrying out of the council's functions.
143. Considering the information obtained through my investigation, and the submissions received from the CEO's solicitor and the Mayor, I am of the view that I do not consider that there was any public interest in providing the CEO with a fuel card, in

⁷ As in place at the time of the provisional report.

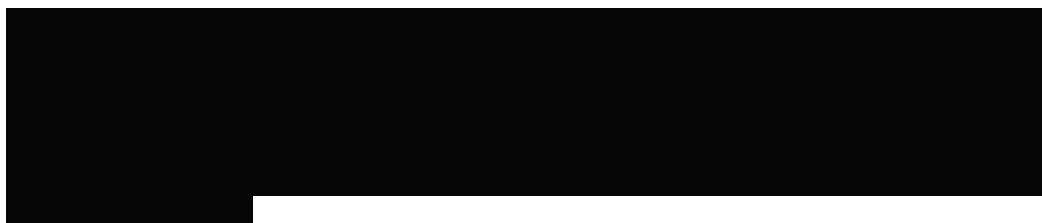
⁸ Ombudsman SA - Investigation into use of corporate credit cards by the City of Onkaparinga, November 2019, at paragraph 37 <<https://www.ombudsman.sa.gov.au/publication-documents/investigation-reports/2019/City-of-Onkaparinga-Use-of-Corporate-Credit-Cards.pdf>>.

circumstances where the CEO was already benefitting from a generous arrangement which included provision for fuel usage. I am prepared to accept that it would have been within the council's discretion to have a mileage allowance or a fuel card, however it was not appropriate to have both. The provision of a mileage allowance and fuel card meant that there was a duplication of payments, and therefore it was not reasonably necessary for the carrying out of the council's functions, and it does not provide any benefit to the public. I also consider that it would not meet the public's expectations of government agencies and their expenditure - there was an unnecessary duplication in the payments, that persisted for a significant period of time.

144.



145.



146. I therefore consider that by providing both the fuel card and the mileage allowance in 2018, 2019 and 2020, the council committed maladministration by substantially mismanaging public resources.

Opinion

In light of the above, I consider that the council committed maladministration in public administration for purposes of section 4(2) of the Ombudsman Act.

Whether the council committed maladministration in public administration, or acted in a way that was wrong, by reimbursing the CEO at a rate of 77 cents/km

147. The council has confirmed that, notwithstanding the various council resolutions about the rate of the mileage allowance, between 2015 and 2020 the council has consistently paid the CEO the mileage allowance at the rate of 77 cents/km.
148. The following is a summary of the various commentary and decisions made which related to the mileage allowance:
 - the mileage allowance was introduced by council resolution on 27 January 2015. The council resolution made no reference to the reimbursement rate. However, the accompanying report made reference to the rate being 77 cents/km. At this time, the relevant ATO rate for the engine type of the CEO's vehicle was 77 cents/km
 - as at 1 June 2015 the ATO rate was reduced to a flat rate of 66 cents/km
 - the 2015 CEO performance review report made reference to the CEO being reimbursed in accordance with ATO guidelines
 - the 2016 CEO performance review report recommended that the per km rate should be 77 cents
 - on 26 September 2016 the council passed a resolution that the per km rate will be 77 cents
 - the 2017 CEO performance review report made reference to the CEO being reimbursed 'in accordance with Australian Taxation Office specified rates per kilometre' and that the CEO was 'reimbursed by [the council] on a per kilometre rate (in accordance with Australian Tax Office guidelines)'
 - the 2018 CEO performance review report made reference to the CEO being reimbursed the ATO mileage allowance
 - on 27 August 2018 the council passed a resolution introducing the fuel card and imposing the ATO mileage allowance for employees using vehicles for business purposes
 - by letter dated 14 September 2018, the former Mayor advised the CEO that the CEO was entitled to the ATO mileage allowance
 - on 10 December 2019 the council passed a resolution that the CEO was provided with the ATO mileage allowance
 - on 27 October 2020 the council passed a resolution to approve the provision of a Toyota Kluger to the CEO
 - an internal council email dated 30 October 2020 stated that the current mileage reimbursement at the ATO rate ceases.

Cents per km rate

149. I am willing to accept that the council was correct in paying the 77 cents/km rate from 27 January 2015 until 27 August 2018. Whilst the intention of the elected body as at 27 January 2015 was somewhat unclear, and it would have been preferable if the motion passed had specified the relevant rate, the evidence suggests it was intended that the rate would be 77 cents/km. I note this was the relevant ATO rate at that time.
150. Whilst the 2015 CEO performance review report made reference to the CEO being paid the ATO rate, when considering the evidence as a whole it appears likely that this arose as a result of the CEO performance review committee members being unaware that the ATO rate had recently changed to a flat rate of 66 cents/km. I also note that the CEO performance review report cannot, in itself, change the CEOs entitlements. Only a resolution of the council can change the CEOs entitlements.
151. It would appear that in 2016, the change in the ATO rate came to the attention of the CEO performance review committee and the elected body. The resolution passed on

- 26 September 2016 did not refer to the ATO rate, but specifically imposed a rate of 77 cents/km.
152. It is not inherently wrong for a public authority to offer a more generous arrangement than the ATO rate. It is at the discretion of the council if it wishes to provide a higher rate of reimbursement.
153. However in both 2017 and 2018, the CEO performance review report reverted to referring to the CEO being reimbursed at the ATO rate. Given the ATO rate had been set at 66 cents/km on 1 June 2015, some several years prior, I find it difficult to believe it was unknown to the members of the CEO performance review committee (including the independent expert) that the ATO rate had changed.
154. On 27 August 2018, the elected body passed a resolution that the CEO would be reimbursed at the ATO rate. In my provisional and revised provisional reports, I found this to be a valid resolution of the council, which altered the CEO's entitlement. As such I found that the CEO was no longer entitled to be reimbursed at an amount above the current ATO rate, which at that time was 68 cents/km.
155. All subsequent CEO performance review reports, and council resolutions, referred to the ATO rate, including the resolution passed by the council on 10 December 2019.
156. Despite the change in language in the council resolution of 27 August 2018, from 27 August 2018 until 30 October 2020 the council administration continued to reimburse the CEO at the rate of 77 cents/km. It appears the main reason this continued to occur was the insistence of the CEO and the then Mayor that 77 cents/km remained the correct rate.
157. An email from the CEO on 18 September 2018 indicated the CEO's clear view that they remained entitled to the rate of 77 cents/km, and that they did not believe any further clarification was needed.
158. The council administration nevertheless sought clarification from the then Mayor. The former Mayor initially indicated their opinion that the resolution should be in line with the previous resolution, which had stipulated a rate of 77 cents/km.
159. The former Mayor later advised the council administration of their view that the council resolution of 26 September 2016 was still applicable, on the grounds that it had not been rescinded.
160. In my provisional and revised provisional reports, I noted that this did not appear to be a correct interpretation of the situation. It was my view that while the resolution of 26 September 2016 set a particular rate of 77 cents, the resolution of 27 August 2018 then set a different rate - the 'ATO mileage allowance', the ATO rate at the time being 68 cents. I considered that the resolution of 27 August 2018 superseded the older resolution, and therefore that it was not necessary that the older resolution be rescinded. However, following the receipt of further submissions from the CEO's solicitor, I have reconsidered this view further below.
161. In the CEO's solicitor's initial submissions, the CEO argued a number of matters, including (but not limited to) the following:
- the council's reference to 77 cents and the 'ATO mileage rate' is not a reference to the ATO cents/km rates
 - the mileage allowance was never intended to be tied to the ATO rates
 - the council was not bound to the ATO cents/km rates
 - the language used by the council was vague and uncertain. This was the case because the council had in fact made the decision to use a rate of 77 cents/km,

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- as agreed between the council and the CEO, to be a reasonable rate as the prevailing ATO rate at the time
 - the idea was to use an 'industry standard' rate, rather than be bound by the ATO rate
 - the Performance Review Committee had advised the CEO that the council did not wish to reduce the existing 77 cents/km rate, in the knowledge that the CEO had purchased a private vehicle for work purposes based on that rate. This confirmed to the CEO that the 77 cents/km rate was an 'agreed' rate rather than one subject to change by reference to the ATO rate
 - I have based my findings on an erroneous understanding of the term 'ATO mileage allowance', which is not an ATO used term, and may have been terminology created by this office and/or the council.
162. My provisional and revised provisional reports noted that whilst I had considered these submissions, I did not agree with them. I have outlined a summary of the various decisions made by the council in relation to the mileage allowance at paragraph 148 above. Bearing this in mind, I formed the provisional view that when the 77 cents/km rate was initially discussed and agreed upon in 2015, that was in clear reference to the rates outlined in the ATO's cents/km method, with the rate between January to June 2015 being 77 cents/km. This rate was then specified in the council resolutions passed in 2015 and 2016.
163. My provisional and revised provisional reports observed that from 27 August 2018 there was a clear shift in the language used in the council resolutions from specific statements to approve a rate of 77 cents, to the 'ATO mileage allowance'. This terminology was also used in The CEO 2018 performance review, which refers to the 'ATO mileage allowance for employees using vehicles for business purposes'. As it is the language of the council resolutions that is relevant for establishing the CEO's entitlements, I advised that I was of the provisional view that 27 August 2018 was where the entitlement changed.
164. As noted at paragraph 8 above, and considering the discussions and decisions made by council as outlined at paragraph 148 above, it is my view that references by the council to the 'ATO mileage allowance' and the 'ATO mileage rate' are references to the cents/km rates provided by the ATO.
165. Whilst the council was not of itself bound to follow the ATO rates (which change each year), it is my view that elected members made a clear choice to use the ATO rates, as captured in the wording of the resolutions passed from 2018 onwards, regardless of any desire to retain the CEO. As a result, the council administration was bound to reimburse the CEO at the ATO mileage rate from the point at which a valid council resolution was passed in these terms. In my view, if this was not the council's intention, they would have maintained the specific references to reimbursement at 77 cents/km.
166. In the CEO's solicitor's further submissions, they raised a number of new arguments, including the following:
- that my view expressed at paragraph 142 of my revised provisional report (paragraph 160 of this final report) is incorrect. The CEO's solicitor submitted that regulation 12(3) of the *Local Government (Procedures at Meetings) Regulations 2013* provides that '[a] motion the effect of which, if carried, would be to revoke or amend a resolution passed since the last general election of the council must be brought by written notice of motion'. As such, the CEO's solicitor argued that for the 27 August 2018 resolution to have rescinded any previous council resolution dealing with the CEO's remuneration package, it needed to have been brought by written notice of motion. The CEO's solicitor

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- argues that no such written notice of motion was ever prepared, and as such, the resolution was invalid and of no effect
 - that the rate of reimbursement was part of the CEO's remuneration package, and if it was to be altered the CEO's employment contract needed to be varied by agreement. As the CEO did not agree to the change, the rate could not have been reduced. The CEO's solicitor argues the 27 August 2018 resolution alone was not enough to mean that the CEO was no longer entitled to receive the 77c/km rate.
167. In response to the CEO's solicitor's first point, I note that council elections occurred in November 2014 and November 2018, and therefore the council resolutions passed on 26 September 2016 and 27 August 2018 were passed in the same term (that is, both were passed after 'the last general election of the council'). The resolution passed on 26 September 2016 was the first resolution to specifically stipulate what rate the CEO was entitled to (77 c/km). If the CEO's solicitor is correct, then the August 2018 resolution should have been brought by written notice of motion, in order to amend the 2016 resolution from 77c/km. I have considered the agenda for the council meeting held on 27 August 2018, and there does not appear to be any item relevant to the CEO listed under the Notices of Motion (listed under item 14), nor does the confidential item relating to the CEO (item 24.4) contain any reference to a notice of motion. As such, it appears that the council may not have complied with regulation 12(3), and therefore it is arguable that the 27 August 2018 resolution is invalid.
 168. I put the CEO's solicitor's argument to the Mayor to provide the Mayor with the opportunity to respond. The Mayor considered that the council's intention that the CEO be paid at the ATO mileage rate was clear from the wording of the August 2018 resolution, however the Mayor did not provide clarity regarding how this intention fitted with the requirement imposed by regulation 12(3) of the Local Government (Procedures at Meetings) Regulations.
 169. Considering all of the information, I accept that it is arguable that despite the council's clear intention that the CEO be paid at the ATO mileage rate, the resolution passed by council on 27 August 2018 is invalid. It is of concern that the council may have failed to properly bring the resolution it desired.
 170. The following year, at the council meeting held on 10 December 2019, the council again passed a resolution which stated that the CEO would be paid a mileage allowance at the 'ATO mileage rate'. As this motion was the first such motion passed following the 2018 general election of the council, I do not consider that regulation 12(3) of the Local Government (Procedures at Meetings) Regulations applies, and therefore no written notice of motion was required. Accordingly, I consider that as at 10 December 2019, the council's intention that the CEO be paid in accordance with the current ATO mileage rate came into effect, and the CEO's entitlement changed.
 171. In relation to the CEO's solicitor's second argument, that the rate of reimbursement was part of the CEO's remuneration package and therefore needed to be varied by agreement, I note that the CEO's entitlement to the mileage rate was not mentioned in their 2014 or 2017 contracts. The entitlement was created via the relevant council resolutions that were passed, not through the CEO's contract. Upon the conclusion of the CEO's annual performance review, they received signed letters from the Mayor confirming the outcome. These letters refer to the provision of the mileage allowance and the fuel card, as a result of the council resolution. I have not been provided with information or documents to suggest that the CEO disputed the letters, or the changed reference to the ATO mileage rate, and the CEO appears to have accepted the benefits they received as a result of the council resolutions passed.

Mileage cap

172. In my provisional report dated 8 July 2021, I had also noted that under the ATO guidelines, the mileage allowance goes up to a limit of 5,000 km. All of the relevant council resolutions relating to the CEO mileage allowance are silent on the matter of whether the mileage allowance has a limit. I was tentatively willing to accept that it may have been the intention of the council as at 26 September 2016, that the mileage allowance would be unlimited. The council had resolved to set its own rate and did not follow the ATO rate at that time. However, I expressed the view that from 27 August 2018 onwards, it appeared to be the clear intention of the council that the ATO rate *and* guidelines would apply, including the limit of 5,000km, in the absence of any evidence that the council intended a more generous arrangement to apply.
173. The council administration evidently did not apply the ATO limit of 5,000 km. Whilst my investigation has not audited the logbooks and claim forms for each month, my investigation has considered a small sample. For example, the CEO was reimbursed at the rate of 77 cents/km for 1,791 km for September 2017 and 1,547 km for November 2019. It would appear likely that the CEO exceeded the annual limit of 5000 km approximately 3-4 months into the year.
174. In their initial submissions, the CEO's solicitor argued that the 5,000 kilometre limit would only apply if the CEO was claiming a tax deduction for the motor vehicle, that my inclusion of the 5,000 kilometre limit is based on an erroneous understanding of the term 'ATO mileage allowance', that the council never informed the CEO that there was to be any limit on the number of kilometres that it would reimburse the CEO for, and that there was no evidence to support that such a cap was intended to apply.
175. Following the CEO's solicitor's initial submissions, I accepted in my revised provisional report that there is a lack of evidence to suggest whether or not any reference by the council to the ATO mileage rates was to include a cap of 5,000 kilometres. Accordingly, I confirmed that I am tentatively willing to accept that it may have been the intention of the council that the mileage allowance would be unlimited.
176. I comment that it was open to the council, at any point from 27 August 2018 onwards, to pass a subsequent resolution which clarified its position, if it was the case that the resolution of 27 August 2018 did not accurately reflect the intention of the elected members to amend the rate to the current ATO cents/km rate. I note in particular the internal correspondence provided to my investigation which indicates various members of the council administration, as well as some elected members, had concerns over the allowances, and did not feel the wording of the council resolution reflected the interpretations of the CEO and the former Mayor.

Consideration of substantial mismanagement

177. I have considered whether the act of the council, in reimbursing the CEO at a higher rate than had been authorised by the elected body, constitutes the substantial mismanagement of public resources.
178. As noted above at paragraph 142, there are a number of factors I consider when assessing whether a matter amounts to substantial mismanagement, including:
 - the appropriateness of the amount of the expenditure
 - the benefit (real or perceived) gained by the public from the expenditure
 - the public's expectations of government agencies
 - whether the expenditure was reasonably necessary for the carrying out of the council's functions.

179. In my provisional and revised provisional reports, I concluded that notwithstanding my tentative acceptance that it may have been the intention of the council that the mileage allowance would be unlimited (and not capped at 5,000 kilometres), the conduct did in fact amount to substantial mismanagement. The conduct clearly amounts to the mismanagement of public resources. I considered that the council administration had no authority to pay the CEO at a higher rate than had been authorised by the elected body, and therefore it was inappropriate expenditure with no benefit to the public. The incorrect expenditure was not reasonably necessary for carrying out the council's functions. It was ongoing over several years. Concerns were raised about the practice from time to time, but it does not appear that the council administration took sufficient steps to seek independent advice or resolve the matter with elected members. I considered that the amount of the overpayment did not appear to be insignificant, and such errors do not meet the public's expectations of government agencies.
180. However, I have considered this further in light of my acceptance that it is arguable that the change in the CEO's entitlement to payment of the mileage allowance at the ATO mileage rate did not validly occur (despite the intention of the elected council members) until the council resolution of 10 December 2019.
181. It remains my view that the conduct amounts to the mismanagement of public resources, and my views as outlined above at paragraph 179 remain substantially the same. However, accepting that the CEO's entitlement did not change until 10 December 2019 (instead of 27 August 2018), the overpayments were made over a shorter time period than I initially considered, and as such, the extent of the overpayment has decreased.
182. While I consider that there can be substantial mismanagement for a relatively small amount of money, in the circumstances, I am unable to conclude that the mismanagement was substantial. As such, it is my final view that the council did not commit maladministration in public administration.

Error of the council

183. It is self-evident that resolutions of a council must be complied with. It is also self-evident that legislation and regulations must be complied with; as well as council policies and contractual obligations.
184. The council administration took minimal steps to verify whether it was correct and lawful to continue to pay the mileage allowance at the rate of 77 cents/km. The council administration sought the opinion of the then Mayor. In my view, the matter should have been returned to the full council for further consideration and clarification.
185. I am therefore of the view that the council erred in paying the CEO the mileage allowance at the rate of 77 cents/km, from 10 December 2019 until 30 October 2020. This was not authorised by the elected body, and was contrary to the council resolution of 10 December 2019.
186. I also note that while the elected members indicated an intention that the CEO be paid at the ATO mileage rate, they appear to have failed to comply with regulation 12(3) of the Local Government (Procedures at Meetings) Regulations in passing their resolution dated 27 August 2018. This is concerning.

Opinion

In light of the above, I consider that by continuing to pay the CEO the mileage allowance at the rate of 77 cents/km, from 10 December 2019 until 30 October 2020, the council acted in error for the purposes of the Ombudsman Act.

[REDACTED]

[REDACTED]

Therefore, I do not make any recommendations.

Summary and Recommendations

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

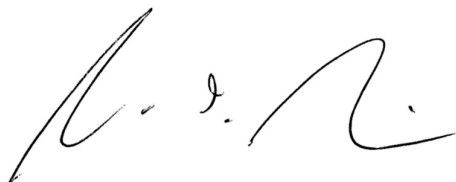
1. the council committed maladministration in public administration for the purposes of section 4(2)(a)(i) of the Ombudsman Act by providing the CEO with a fuel card in 2018, 2019 and 2020
2. the council acted in error, by reimbursing the CEO at a rate of 77 cents/km between 10 December 2019 and 30 October 2020, contrary to the resolutions passed by the council.

I have not made any recommendations under section 25(2) of the Ombudsman Act. However there is commentary throughout my report on a number of matters that elected members should carefully consider, in particular paragraphs 91, 92, 169, and 183 - 186.

I note that it was very difficult to ascertain what had taken place while investigating this matter. It should not be so difficult to clarify a council employee's entitlements, and what the elected members intended for those entitlements to be. Such matters should be clear, transparent, well-documented, and should always be in accordance with the relevant legislation, regulations, as well as any applicable council policies and procedures. That was not the case in this matter, and I urge the council to ensure such matters are conducted in a clearer manner in future.

Final comment

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 June 2022