

Final Report

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

Public Authority	District Council of Coober Pedy
Public Officer	Cr Paul Reynolds
Ombudsman reference	2017/05467
ICAC reference	2017/000572
Date of referral	26 May 2017
Issues	<ol style="list-style-type: none">1. Whether Cr Paul Reynolds committed misconduct in public administration by failing to declare and/or appropriately deal with a conflict of interest in a matter before the council arising from an association with the Coober Pedy Miners Association2. Whether Cr Paul Reynolds committed misconduct in public administration by failing to declare and/or appropriately deal with a conflict of interest in a matter before the council arising from an association with the Coober Pedy Gem Trade Show3. Whether Cr Paul Reynolds committed misconduct in public administration by failing to declare and/or appropriately deal with a conflict of interest in a matter before the council arising from an association with the Coober Pedy Opal Festival

Jurisdiction

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

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

14B—Referral of matter by OPI or ICAC

- (1) If a matter is referred to the Ombudsman under the ICAC Act, the matter—
 - (a) will be taken to relate to administrative acts for the purposes of this Act; and
 - (b) must be dealt with under this Act as if a complaint had been made under this Act and—

- (i) if the matter was the subject of a complaint or report under the ICAC Act—as if the person who made the complaint or report under that Act was the complainant under this Act; or
 - (ii) if the matter was assessed under that Act after being identified by the Commissioner acting on the Commissioner's own initiative or by the Commissioner or the Office in the course of performing functions under any Act—as if the Commissioner was the complainant under this Act.
- (2) In this section—

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

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

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

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

It is alleged that during a confidential meeting of the District Council of Coober Pedy on 19 January 2016, Cr Paul Reynolds failed to declare and appropriately deal with an interest in a motion that the council execute a Power Purchase Agreement with an energy supplier, Energy Generation Pty Ltd.

This issue concerns an alleged breach of clause 3.13 of Part 3 of the Code of Conduct for Council Members (**the Code**). Failure by a council member to comply with Part 3 of the Code constitutes misconduct. Contravention or failure to comply with the Code also constitutes grounds for a complaint under Chapter 13, Part 1 of the *Local Government Act 1999*, which, if substantiated, is a ground for disciplinary action.

I have therefore considered this matter under section 5(3)(a) of the ICAC Act, which provides that 'contravention of a code of conduct by a public officer while acting in his or her capacity as a public officer that constitutes a ground for disciplinary action against the officer' amounts to misconduct in public administration.

Investigation

My investigation has involved:

- assessing the information supplied to my Office
- seeking a response from the council
- seeking and considering a response from Cr Reynolds
- seeking further information from Cr Reynolds
- seeking and considering a response from Cr Boro Rapaic
- considering:
 - the Local Government Act
 - the *Associations Incorporation Act 1985*
 - the Code
- preparing a provisional report and seeking the views of Cr Reynolds and the council
- considering an additional complaint raised with my Office and seeking the views of that complainant about my provisional report
- preparing this final report

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have

considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.¹ It is best summed up in the decision as follows:

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

Response to my provisional report

1. I provided my tentative views to Cr Reynolds and the council by way of my provisional report dated 11 September 2017.
2. Cr Reynolds responded to my provisional report by email dated 1 October 2017. Cr Reynolds submitted, *inter alia*:
 - immediately prior to the 19 January 2016 meeting he was advised by the council's Interim Chief Executive Officer that he did not have a conflict of interest in the matter; section 74(4a)(d) of the Local Government Act at the time established that an elected member would not contravene section 74 'if the interest was unknown to the member at the relevant time'
 - the recipients of the community contribution were determined by EDL; this decision was made on 30 April 2015, prior to his election to the council
 - he is involved in numerous community organisations and it is 'not unreasonable that [he] saw opportunity' to promote a local event to the benefit of the community.
3. I have considered Cr Reynolds' submissions and responded to them where necessary in the body of this report.
4. By letter dated 6 October 2017 I also provided a copy of my provisional report to a member of the Coober Pedy community (**the complainant**) who wrote to my Office to raise, *inter alia*, a complaint concerning these same matters.
5. The complainant responded to my provisional report by email dated 27 October 2017. The complainant's submissions are extensive and touch upon various issues such as the probity of the PPA and the internal governance of the CPMA. These matters fall outside of the scope of the referral and, in the case of the CPMA, outside of the jurisdiction of my Office.
6. With respect to the matters forming the subject of the referral, the complainant submitted, *inter alia*:
 - Cr Reynolds 'benefits directly and indirectly from the success' of the CP Gem Trade Show
 - the CPMA and the CP Gem Trade Show 'may be separate associations but they are symbiotic'; the CP Gem Trade Show is 'in fact the creation of the CPMA and in particular Cr Reynolds'
 - the CPMA's financials demonstrate that it earns an income from the CP Gem Trade Show; these financials observe that the CP Gem Trade Show 'benefits all members of the [CPMA]'
 - the CP Gem Trade Show is not a community event 'and its own website does not promote it as a community event'

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.

- the motion to execute the PPA was timed 'to ensure that sponsorship would be received at a convenient time prior to the two events at Easter'; when the sponsorship funds were disbursed 'the CPMA charged the CP Gem Trade Show for two years' worth of booth hire'
 - Cr Reynolds' conduct in failing to declare a conflict of interest in the matter is more serious than as assessed by my investigation; my foreshadowed recommendation that the council reprimand Cr Reynolds is insufficient in the circumstances.
7. I have considered the complainant's submissions and responded to them where necessary in the body of this report.
 8. The council did not respond to my provisional report.

Background

The PPA

9. Coober Pedy is not connected to the national electricity grid and receives its power by way of eight 500kW diesel generators operated by Energy Generation Pty Ltd (**EnGen**), a subsidiary of Energy Developments Ltd (**EDL**).
10. Energy has historically been supplied by EnGen to the District Council of Coober Pedy (**the council**) pursuant to a 5 January 2004 Power Purchase Agreement between the council and EnGen.³ The terms of this Power Purchase Agreement provided for a supply period of 15 years.
11. In or around June 2013 representatives of EDL advised the council that EDL was interested in developing a hybrid renewable power generation facility to service the region.
12. At an ordinary meeting on 20 August 2013 the council resolved to offer 'in principle' support to EDL in its submission of an expression of interest to the Australian Renewable Energy Agency for funding to develop the hybrid renewable proposal. EDL secured this funding in July 2014.
13. Over the next eighteen months, the council proceeded to negotiate a new 20-year Power Purchase Agreement (**the PPA**) with EDL. This agreement was ultimately executed on 30 March 2016.

Cr Reynolds

14. Cr Paul Reynolds was elected to the council on 15 December 2015.
15. Cr Reynolds is the President of the Coober Pedy Miners Association (**CPMA**). According to its constitution, the CPMA is established, *inter alia*, to 'promote the development of the Coober Pedy opal mining industry.' Another elected member of the council, Cr Boro Rapaic, is Treasurer of the CPMA.
16. Cr Reynolds is a member of the committee of the Coober Pedy Gem Trade Show (**CP Gem Trade Show**), an annual trade show specialising in rough and cut opal. Cr

³ Then StateWest Power Pty Ltd.

Reynolds advised my investigation that the CP Gem Trade Show lacks a formal constitution.

17. The CP Gem Trade Show is held to coincide with the annual Coober Pedy Opal Festival (**CP Opal Festival**). I understand the CP Opal Festival is coordinated by the council, with the Mayor assuming the role of coordinator. Cr Reynolds advised my investigation that he is involved in the governance of the CP Opal Festival in his capacity as an elected member of the council.
18. Both the CPMA and the CP Gem Trade Show are associations incorporated under the Associations Incorporation Act. Each exists as a body corporate pursuant to section 20(3)(a) of that Act.
19. The CP Opal Festival does not appear to be a corporate entity. Cr Reynolds advised my investigation that he is not aware if the CP Opal Festival has its own constitution.
20. Cr Reynolds advised my investigation that he considers the CPMA, CP Gem Trade Show and the CP Opal Festival to each be non-profit associations for the purposes of the Local Government Act. My investigation has not received any information to suggest otherwise.

Correspondence between the CPMA and EDL

21. Cr Reynolds advised my investigation that during the development of the PPA, EDL initiated telephone contact with the CPMA's Vice President, Mr John Dunstan, concerning the issue of land clearance for the project's power line infrastructure.
22. Cr Reynolds advised that Mr Dunstan was primarily responsible for representing the CPMA in its dealings with EDL. Cr Rapaic submitted the same in separate correspondence with my investigation.
23. On 23 April 2015 the CPMA wrote to EDL's CEO (emphasis in original):

As previously, we understand that Energy Developments Ltd (EDL) is developing the Coober Pedy Renewable Hybrid Project.

[...]

1. We understand the project's publicly proposed Construct Start Date of October 2015. We agree in principle with the project and acknowledge your Project Group's consideration of our concerns relating to the loss to our miners of prospective opal bearing ground through this project's location. We thank EDL for considering our concerns and accepting the previously discussed Option 1 as the preferred solution to accommodate both the Coober Pedy Miners Association and EDL [sic] needs.
2. It is unfortunate that analyses similar to the Conclusion contained in [University of Wollongong publication] present a negative community view of electricity generation companies and their involvement particularly with rural and remote communities. We are pleased to note the EDL desire expressed in [EDL's website] to

Be part of the community Look for opportunities to involve the community – employ locals where practical, use local accommodation, buy food and beverages locally. Engage with community events.

We wish to suggest that a way to favourably engage with community in an ongoing manner would be for EDL to sponsor two significant community events annually for \$5,000 each. Such sponsorship would present Coober Pedy's local power generation supplier in a highly favourable light, by EDL being recognised as a Sponsor at the Coober

Pedy Gem Trade Show and at the Coober Pedy Opal Festival thereby receiving appropriate advertising at these community events. These sponsorships would be of direct benefit to the Coober Pedy Community, and neither the Coober Pedy Miners Association nor the District Council of Coober Pedy gain financial benefit from these sponsorships. Previously, mining companies operating within precincts of the Precious Stones Fields have engaged with the local community through similar sponsorships.

24. Cr Reynolds and Mr Dunstan signed this letter as President and Vice-President of the CPMA, respectively.
25. On 30 April 2015 a representative of EDL wrote to Mr Reynolds (identified in his capacity as President of the CPMA):

I refer to previous discussions between the Coober Pedy Miners Association (CPMA) and EDL with respect to the best route for the overhead power line for the CPRHP.

EDL is in the process of selecting the route for the overhead power line, which will depend on a number of factors including access, ground conditions and cost. Attachment 1 illustrates the routes under consideration. We note your objection to Option 2, and have therefore removed it from further consideration. However we are still considering Options 1 and 3. We also note that the power line design has been modified to allow mining equipment to pass under it without incident.

Could CPMA confirm its agreement to either Option 1 or Option 3 (or minor variations thereof) for the proposed overhead power line as soon as possible.

We thank the CPMA for its continuing support and assistance to deliver a successful, world-leading renewable hybrid project in Coober Pedy.

26. On this same day, EDL's representative sent a separate letter to Cr Reynolds (again identified in his capacity as President of the CPMA):

I refer to your letter of 23 April 2015 regarding the CPRHP being developed by Energy Developments Ltd (EDL). EDL appreciates the support provided by the Coober Pedy Miners Association (CPMA) for this project.

We thank you for your suggestions as to how EDL can engage with the Coober Pedy community and agree that a sponsorship arrangement where EDL is able to bring direct benefit to the community is appropriate recognition of the support of the community to the CPRHP.

EDL has reviewed the Coober Pedy Gem Trade Show and the Coober Pedy Opal Festival and is of the view that those two events provide benefit to the Coober Pedy community as a whole. EDL is therefore prepared to commit to a sponsorship arrangement on the following conditions:

1. The amount of the sponsorship will be \$10,000 each year for the Coober Pedy Gem Trade Show and the Coober Pedy Opal Festival (which we propose be divided equally between the two events). This support will be set out in a sponsorship agreement between ourselves and the organising entities for those events. In any year in which either event is not held, EDL will look at contributing the same level of sponsorship to another community event which has the objective of bringing direct benefit to the Coober Pedy community as a whole.
2. EDL receives prominent advertising at the sponsored events and in marketing material for the events.
3. EDL proposes that the term of the sponsorship continue for as long as EDL operates the power station in Coober Pedy. It is EDL's sincere hope that in the event EDL were no longer the power provider to the town that a subsequent provider would also see the benefit to the community of supporting community events.

Please confirm your acceptance of these conditions so we can move quickly to finalise the sponsorship agreement.

We look forward to continuing to work with all interested parties, including CPMA, to deliver a successful, world-leading renewable hybrid project in Coober Pedy.

27. On 6 May 2015 Cr Reynolds and Mr Dunstan wrote to EDL on behalf of the CPMA:

We refer to your letter of 30 April 2015 and are pleased to confirm the following:

1. We thank EDL for committing to sponsorship of both the Coober Pedy Opal Festival and the Coober Pedy Gem Trade Show for the duration of EDL's power supplier relationship with Coober Pedy. The community as a whole will benefit from this sponsorship which is gratefully appreciated.
2. We agree to both the reduction in size of the area reserved for the Wind Turbine emplacement, and to the increase in size of the area reserved for the Solar Panel emplacement.
3. We also agree to either Option 1 or Option 3 (or minor variations thereof) for the proposed overhead power line, the design of which has been modified to allow mining equipment to pass beneath it without incident.

We thank Energy Developments Ltd (EDL) for consulting with the Coober Pedy Miners Association on this important project in the Coober Pedy community.

We look forward to continuing the work with EDL though the life cycle of this project and any future relationship between your company and the local community.

28. I understand that the sponsorship agreement was not formalised by separate instrument.

The 19 January 2016 council meeting

29. At a confidential meeting on 19 January 2016 the council resolved to execute the PPA with EDL. The agenda for this meeting relevantly discloses:

3 Conflict of Interest

Elected Members shall declare any pecuniary and or beneficial interest in any matters to be considered during the meeting.

[...]

5 Hybrid Renewable Energy Project

5.1 Update on negotiations and final position

Item	Previous Position	Current and Final Position
EDL Community Grant	\$10,000 per annum	\$25,000 per annum plus adjustment for CPI for the period of engagement with EDL ⁴

[...]

⁴ I understand this figure to include a \$15,000 annual contribution by EDL to the council for ad hoc distribution to community projects.

5.2 Execution of the Power Purchase Agreement

Recommendation

The Council shall execute a Power Purchase Agreement between the District Council of Coober Pedy and Energy Generation Pty Ltd for the provision, installation and operation of a Hybrid Renewable Energy electricity generation plant in Coober Pedy and that the agreement be for a term of twenty (20) years.

5.3 Use of Council Seal

Recommendation

The Principal Member and Interim Chief Executive Officer be authorised to affix the seal of the District Council of Coober Pedy to the Power Purchase Agreement between the District Council of Coober Pedy and Energy Generation Pty Ltd.

5.4 Provision of Confidentiality

Recommendation

The determination of the Council shall remain confidential until a joint announced [sic] between the South Australian Government, District Council of Coober Pedy and EDL is developed and agreed that includes a photograph of the South Australian Government Treasurer and the Principal Member of the Council and supporting story in published [sic] in the Adelaide Advertiser, the Australian and The Coober Pedy Times newspapers.

30. The minutes concerning this meeting relevantly record:

5 Conflict of interest

Elected Members were invited to declare any pecuniary and or beneficial interest in any matters to be considered during the meeting.

6 Hybrid Renewable Energy Project

6.1 Execution of the Power Purchase Agreement

Recommendation

Cr Boro Rapaic moved and Cr Paul Reynolds seconded that;

The Council execute a Power Purchase Agreement between the District Council of Coober Pedy and Energy Generation Pty Ltd for the provision, installation and operation of a Hybrid Renewable Energy electricity generation plant in Coober Pedy and that the agreement be for a term of twenty (20) years

Carried

6.2 Use of Council Seal

Recommendation

Cr Boro Rapaic moved and Cr Peter Pantelis seconded that;

The Principal Member and Interim Chief Executive Officer be authorised to affix the seal of the District Council of Coober Pedy to the Power Purchase Agreement between the District Council of Coober Pedy and Energy Generation Pty Ltd

Carried

6.3 Provision of Confidentiality

Recommendation

Cr Peter Pantelis moved and Cr Kyle [sic] Hay seconded that;

The determination of the Council shall remain confidential until a joint announced [sic] between the South Australian Government, District Council of Coober Pedy and EDL is developed and agreed that includes a photograph of the South Australian Government Treasurer and the Principal Member of the Council and supporting story in published [sic] in the Adelaide Advertiser, the Australian and The Coober Pedy Times newspapers.

Carried

31. The council advised my investigation:

the Council's records show that no conflict of interest was declared by [Cr Reynolds]. From recent enquiries, the Council was aware that [Cr Reynolds was a member] of the Miners' [sic] Association but unaware of any direct relationship with EDL in a personal sense whether as employee, agent, consultant or other form.

Response from Cr Reynolds

32. In his response to my investigation, Cr Reynolds acknowledged that he did not declare an interest in the motion to execute the PPA. Cr Reynolds further acknowledged participating in the discussion concerning this motion.
33. Cr Reynolds submitted that his actions were appropriate in the circumstances as he 'had no interest' in the motion. Cr Reynolds submitted that he complied with the conflict of interest provisions of the Local Government Act and the Code in this instance.
34. Cr Reynolds advised my investigation that the CPMA did not receive or disburse any of the funds supplied by EDL to the CP Gem Trade Show or the CP Opal Festival under the sponsorship agreement. Cr Rapaic submitted the same in separate correspondence with my investigation.
35. When asked to clarify the precise nature of the relationship between the CPMA, the CP Gem Trade Show and the CP Opal Festival, Cr Reynolds advised:
- i. [The CPMA] is a forum for advocacy of miners/mining. Any person with a current Precious Stones Propecting [sic] Permit is a member – it came about as an off shoot of CP Progress & Miners Association which later became [the council], I believe in 1987.

Initially, 2005, the [CPMA] provided voluntary manpower to erect and dismantle Hired Booths obtained from Expo Hire, Adelaide and transported by McArdle Freight for the [CP Gem Trade Show].

In 2014 [the CPMA] purchased Booth Panelling, with intention to hire to [the CP Gem Trade Show], until the Booth panelling is purchased – which will take approximately 14 years.

This came about as:

 - a. Volunteer workers to assist in the erection/dismantling of Booths and preparation of venue became almost non existent
 - b. Booths remain permanently erected considerably reducing the need for human resources needed

- c. Transportation costm [sic] facilitating the delivery of booth panelling to/from CP was approximately \$2000 - \$2500pa
- d. Cost of hire \$3600 and increasing each year
- e. Hire of panelling revolved around a tight timetable of:
 - Day 1 erection
 - Day 2 erection
 - Day 3 event
 - Day 4 event
 - Day 5 dismantle

- The timing was inflexible due to transport times and additional \$3500.00 would be invoiced should [the CPMA] fail to load on time
- f. Decision was made during a meeting of [the CPMA] as the common interest of both parties was to support the promotion and sale of Opal. And small committees had small budgets. A saving of \$2500 is significant to a small committee.
- ii. [The CP Gem Trade Show] is an opportunity for the promotion and wholesale of opal. It was established in 2005 in association with CP Business Association and [the CPMA]. Both parties provided finances of approximately \$5000 each year between 2005 – 2013. In 2014 the event became financially self-supporting via sponsorship of major agencies being; OZ Minerals, Imparja, [the council], Mines Department, Austrade, CP Times, Northern Regional Development Board, McArdles Freight & REX Airlines. Smaller contributors also exist.
- iii. [The CP Opal Festival] is a historical community town / social event.
In 2017 [the CPMA] was aware of financial difficulties of [the CP Opal Festival] and purchased 3x marques [sic] for approximately \$3500.00 for use at [the CP Opal Festival] and other community/public events.

36. Cr Reynolds later clarified that the CPMA's hire of booth panelling to the CP Gem Trade Show is pursuant to a verbal agreement between the two entities.

Relevant law

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

(3) *Misconduct in public administration* means—

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

38. As at 19 January 2016, section 73 of the Local Government Act relevantly provided:

73—Conflict of interest

- (1) A member of a council has an interest in a matter before the council if—
 - (a) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, receive or have a reasonable expectation of receiving a direct or indirect pecuniary benefit or suffer or have a reasonable expectation of suffering a direct or indirect pecuniary detriment; or

- (b) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, obtain or have a reasonable expectation of obtaining a non-pecuniary benefit or suffer or have a reasonable expectation of suffering a non-pecuniary detriment,

(not being a benefit or detriment that would be enjoyed or suffered in common with all or a substantial proportion of the ratepayers, electors or residents of the area or a ward or some other substantial class of persons).

- (2) A person is closely associated with a member of a council—
 - (a) if that person is a body corporate of which the member is a director or a member of the governing body; or
 - (b) if that person is a proprietary company in which the member is a shareholder; or
 - (c) if that person is a beneficiary under a trust or an object of a discretionary trust of which the member is a trustee; or
 - (d) if that person is a partner of the member; or
 - (e) if that person is the employer or an employee of the member; or
 - (f) if that person is a person from whom the member has received or might reasonably be expected to receive a fee, commission or other reward for providing professional or other services; or
 - (g) if that person is a relative of the member.

39. As at 19 January 2016, section 74 of the Local Government Act relevantly provided:

74—Members to disclose interests

- (1) A member of a council who has an interest in a matter before the council must disclose the interest to the council.
- (2) A member in making a disclosure under subsection (1) must provide full and accurate details of the relevant interest.
- (3) A disclosure made under subsection (1) must be recorded in the minutes of the council (including details of the relevant interest).
- (4) A member of a council who has an interest in a matter before the council must not—
 - (a) propose or second a motion relating to the matter; or
 - (b) take part in discussion by the council relating to that matter; or
 - (c) while such discussion is taking place, be in, or in the close vicinity of, the room in which or other place at which that matter is being discussed; or
 - (d) vote in relation to that matter.
- (4a) The following qualifications apply:
 - (a) subsections (1) and (4) do not apply—
 - (i) to questions relating to allowances or benefits that a council is empowered to pay to, or confer on, members, their spouses, domestic partners or members of their families; or
 - (ii) to matters of a class exempted by regulation from the provisions of those subsections; or
 - (iii) to matters in relation to which the Minister has granted an exemption from the provisions of those subsections;
 - (b) a member of a council who has disclosed an interest under subsection (1) may, by permission of the council, attend during proceedings of the council on the relevant matter in order to ask or answer questions, provided that the meeting is open to the public, the member withdraws from the room after

asking or answering the questions, and the member does not in any other way take part in any debate or vote on the matter;

- (d) a member does not contravene this section if the interest was unknown to the member at the relevant time.

(4b) In addition, subsection (4) does not apply in a case where the interest of the member arises because of 1 or both of the following circumstances:

- (a) the member or a person closely associated with the member is a member of, or director or member of the governing body of, a non-profit association;
- (b) the member or a person closely associated with the member is a member of a body (whether incorporated or unincorporated) comprised of or including, or having a governing body comprised of or including, a person or persons appointed or nominated by the council.

(5) The fact that a member or members of a council have failed to comply with this section in relation to a particular matter does not, of itself, invalidate a resolution or decision on that matter but, if it appears that the non-compliance may have had a decisive influence on the passing of the resolution or the making of the decision, the District Court may, on the application of the council, the Minister or a person affected by the resolution or decision, annul the resolution or decision and make such ancillary or consequential orders as it thinks fit.

(6) In this section—

non-profit association means a body (whether corporate or unincorporate)—

- (a) that does not have as its principal object or one of its principal objects the carrying on of a trade or the making of a profit; and
- (b) that is so constituted that its profits (if any) must be applied towards the purposes for which it is established and may not be distributed to its members,

and includes the LGA.

40. Sections 73 and 74 of the Local Government Act have since been amended. Unless otherwise stated, all references to these sections in this report are to the provisions that operated on 19 January 2016.

41. Section 63 of the Local Government Act provides:

63—Code of conduct for members

- (1) The Governor may, by regulation, prescribe a code of conduct to be observed by the members of all councils.
- (2) Council members must observe the code of conduct.

42. Clause 3.13 of Part 3 of the Code provides:

Conflict of interest

3.13 Council members must be committed to making decisions without bias and in the best interests of the whole community and comply with the relevant conflict of interest provisions of the Local Government Act 1999.

Whether Cr Paul Reynolds committed misconduct in public administration by failing to declare and/or appropriately deal with a conflict of interest in a matter before the council arising from an association with the Coober Pedy Miners Association

43. Cr Reynolds has acknowledged that he was President of the CPMA at the time of the council's 19 January 2016 confidential meeting.

44. I am therefore satisfied that Cr Reynolds was a 'director or a member' of the CPMA's governing body within the meaning of section 73(2)(a) of the Local Government Act.
45. I am also satisfied that the CPMA is a body corporate for the purposes of the Local Government Act.
46. Pursuant to section 73(2)(a) of the Local Government Act, I am therefore satisfied that the CPMA was a 'person' with whom Cr Reynolds was 'closely associated' at the time of the council's 19 January 2016 confidential meeting.
47. Sections 73 and 74 of the Local Government Act both speak of an elected member's interest in 'a matter before the council'. Per *Petrovski v Dolling*, the question of whether a section 73 interest exists 'must be determined by a consideration of the terms of the resolutions' at issue.⁵ The 'matter' in question 'must be linked to an actual or potential decision of the Council.'⁶
48. In this case, the 'matter' under consideration is the motion before the council to execute the PPA.
49. Accordingly, it falls upon me to consider whether, per section 73(1)(a) of the Local Government Act, Cr Reynolds or the CPMA:
- (i) received or would have had a reasonable expectation of receiving a 'direct or indirect pecuniary benefit'; or
 - (ii) suffered or would have had a reasonable expectation of suffering a 'direct or indirect pecuniary detriment'
- if the motion to execute the PPA was decided in a particular manner.
50. Additionally, or in the alternative, I must also consider whether, per section 73(1)(b) of the Local Government Act, Cr Reynolds or the CPMA:
- (i) obtained or would have had a reasonable expectation of obtaining a 'non-pecuniary benefit'; or
 - (ii) suffered or would have had a reasonable expectation of suffering a 'non-pecuniary detriment'
- if the motion to execute the PPA was decided in a particular manner.
51. On the information before me I am satisfied that, notwithstanding his involvement in negotiating the sponsorship agreement with EDL, Cr Reynolds did not himself stand to receive a benefit or suffer a loss based on the outcome of the relevant motion.
52. I do not consider the fact of EDL's consultation with the CPMA regarding the size and location of EDL's infrastructure to mean that the CPMA stood to receive a benefit or incur a detriment (whether direct or indirect) as a result of the 19 January 2016 motion within a manner contemplated by section 73(1) of the Local Government Act. It is evident from the correspondence that the CPMA did not oppose the configuration adopted by EDL. Nor is there anything before me to suggest that the CPMA stood to benefit from this configuration.
53. Although it might be contended that EDL's funding of the CP Gem Trade Show and CP Opal Festival advanced the CPMA's own stated objectives (that is, per the association's constitution, to 'promote the development of the Coober Pedy opal mining

⁵ *Petrovski v Dolling* [2013] SADC 27 at [34].

⁶ *Ibid* at [44].

- industry'), I do not consider this fact alone caused the CPMA to obtain or have a reasonable expectation of obtaining a non-pecuniary benefit as a result of the motion within a manner contemplated by section 73(1)(b) of the Local Government Act.
54. It would have been reasonable to expect that the funds provided by EDL to both the CP Gem Trade Show and the CP Opal Festival would be used, *inter alia*, to promote the Coober Pedy opal mining industry. It could also be argued that utilisation of the funds for such a purpose could reasonably have been expected to benefit persons deriving a profit or loss from this industry, including individual opal miners represented by the CPMA. That said, I am not satisfied that the CPMA itself could reasonably have been expected to receive such a benefit under the agreement. I do not understand the CPMA to carry on a business or to otherwise derive a profit or loss from the opal mining industry. At law, it is a distinct and separate entity from its constituent members.
 55. Per the terms of EDL's 30 August 2015 correspondence with the CPMA, EDL's sponsorship of the CP Gem Trade Show and the CP Opal Festival was to continue 'for as long as EDL operates the power station in Coober Pedy.' At this time, the existing electricity supply contract between EDL and the council was due to expire in 2019. The council's determination to execute the PPA on 19 January 2016 therefore ensured, barring termination of the PPA, that the sponsorship arrangement would continue in force for a further 20 years.
 56. The CPMA and the CP Gem Trade Show are separate legal entities. The only evidence of a financial arrangement between the two associations is the verbal agreement concerning the provision of booth panelling by CPMA to the CP Gem Trade Show described by Cr Reynolds. Although one could argue that this arrangement would be jeopardised by the collapse of the CP Gem Trade Show, there is no evidence before me to suggest that EDL's sponsorship agreement was necessary to avoid such an outcome.
 57. The complainant in their response to my provisional report sought to advance the case that the CPMA derives a direct financial benefit from the success of the CP Gem Trade Show. In this regard, the complainant supplied a copy of the CPMA's profit and loss statement for the 2015/2016 financial year. This statement records that the CPMA received \$7,251.18 from the CP Gem Trade Show for 'booth construction' during that financial year. No other income from the CP Gem Trade Show is disclosed.
 58. The complainant has also referred my investigation to the CPMA's observation, made within its 2015/2016 financial report, that the agreement concerning booth panelling 'will result in the ongoing success of the GTS and the GTS benefits all members of the Association.'
 59. I do not consider this information provides any further basis to conclude that the CPMA stood to receive a benefit from EDL's sponsorship of the CP Gem Trade Show.
 60. There is no evidence before me of any financial arrangement between the CPMA and the CP Opal Festival existing at the time of the 19 January 2016 confidential meeting.
 61. Both Cr Reynolds and Cr Rapaic submitted that the CPMA did not receive or distribute funds supplied by EDL under the sponsorship arrangement.
 62. On the information before me, I do not consider the CPMA received or had a reasonable expectation of receiving a direct or indirect pecuniary benefit based on the outcome of the 19 January 2016 motion. I am similarly not satisfied that the CPMA suffered or had a reasonable expectation of suffering a direct or indirect pecuniary detriment based on the outcome of the motion.

63. I am also not satisfied that the CPMA obtained or had a reasonable expectation of obtaining a non-pecuniary benefit or suffered or had a reasonable expectation of suffering a non-pecuniary detriment as a result of the motion.
64. I am therefore not satisfied that the CPMA had an interest in the outcome of the 19 January 2016 motion.
65. It follows that I do not consider Cr Reynolds was obliged to declare an interest in the relevant motion arising from his association with the CPMA.

Opinion

It is my final view that Cr Reynolds did not commit misconduct in public administration by failing to declare and/or appropriately deal with a conflict of interest in a matter before the council arising from his association with the CPMA.

Whether Cr Paul Reynolds committed misconduct in public administration by failing to declare and/or appropriately deal with a conflict of interest in a matter before the council arising from an association with the Coober Pedy Gem Trade Show

66. Cr Reynolds acknowledged that he was a member of the governing body of the CP Gem Trade Show at the time of the council's 19 January 2016 confidential meeting.
67. I am satisfied, per section 20(3)(a) of the Associations Incorporation Act, that the CP Gem Trade Show is a body corporate for the purposes of the Local Government Act.
68. I am therefore satisfied that that the CP Gem Trade Show was a 'person' with whom Cr Reynolds was 'closely associated' at the time of the council's 19 January 2016 confidential meeting for the purposes of section 73(2)(a) of the Local Government Act.
69. As I have already observed, EDL's agreement to sponsor the CP Gem Trade Show was contingent on it remaining the operator of the Coober Pedy power station. The council's resolution to execute a new energy supply contract with EDL had a material bearing on this sponsorship agreement. It indirectly obliged EDL to fund the CP Gem Trade Show for a further 20 years.
70. On this basis, I am satisfied that the CP Gem Trade Show had a reasonable expectation of receiving an indirect pecuniary benefit based on the outcome of the 19 January 2016 resolution to execute the PPA.
71. In response to my provisional report, Cr Reynolds submitted that it was EDL that determined the recipients of the community contribution. Cr Reynolds submitted:

This decision was made by EDL on 30 April 2015 – some eight months prior to my election as counsellor [sic] to District Council of Coober Pedy.
72. The circumstances that existed at the time EDL undertook to sponsor the CP Gem Trade Show are not relevant to the question of whether the CP Gem Trade Show had a reasonable expectation of receiving a benefit based on the outcome of the resolution at issue. This question is to be determined by reference to the circumstances as they existed at the time the obligation to declare any interest arose.
73. It follows that I am satisfied that Cr Reynolds had an interest in the matter within the meaning of section 73 of the Local Government Act.

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74. Pursuant to section 74(1) of the Local Government Act, Cr Reynolds was obliged to disclose this interest to the council. The substance of this disclosure was required to be recorded in the council's minutes.
75. In response to my provisional report, Cr Reynolds submitted:
- On 18 January 2016, I spoke with Mr Tony Renshaw A/CEO of [the council] in the CEO office. My purpose of meeting with him was to specifically ask if I had a conflict of interest regarding the PPA contract. He was aware I was President of the CPMA and also committee member of [the CP Gem Trade Show].
- I specifically remember asking him [...] "Because GTS will receive \$5000.00pa do I have conflict [sic] of interest?" I asked him to find out legally for me before tomorrow's meeting. His response was [...] "I will find out for you and let you know at tomorrow's meeting."
- During the council meeting [on] 19 January 2016, the meeting had been formally opened, I asked Mr Renshaw again, "Do I have a conflict of interest?" His response was "No. Cos you don't personally profit or benefit from it." [...] I believed I was fairly and truthfully advised by Mr Tony Renshaw on 19 January 2016.
76. Cr Reynolds in this regard sought to draw my attention to section 74(4a)(d) of the Local Government Act, which provided at the time that an elected member would not contravene section 74 'if the interest was unknown to the member at the relevant time.'
77. I take Cr Reynolds to be submitting that he was not aware of his interest in the matter owing to the advice he received from Mr Renshaw.
78. Cr Reynolds' proffered construction of section 74(4a)(d) is in my view misconceived. Section 74(4a)(d) concerns an elected member's ignorance of circumstances giving rise to an interest; in this case, Cr Reynolds cannot reasonably be said to have been unaware of his association with the CP Gem Trade Show or the sponsorship agreement offered by EDL and its connection to the PPA.
79. Each elected member is ultimately responsible for their own compliance with the provisions of the Local Government Act and the Code.
80. I consider Cr Reynolds' failure to declare an interest in the motion to execute the PPA arising from his association with the CP Gem Trade Show contravened section 74(1) of the Local Government Act and, in turn, clause 3.13 of the Code.
81. It follows that I am satisfied that Cr Reynolds committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.
82. It also follows that I consider Cr Reynolds' failure to declare an interest in the motion to execute the PPA arising from his association with the CP Gem Trade Show was contrary to section 63(2) of the Local Government Act and, accordingly, contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.
83. Section 74(4) of the Local Government Act would ordinarily preclude a council member who has declared an interest in a matter under section 74(1) of the Act from then participating in the council's consideration of that matter.
84. Pursuant to section 74(4b) of the Act, however, I am satisfied that Cr Reynolds was exempt from this requirement by virtue of the CP Gem Trade Show's status as a non-profit association.
85. I have received no information to suggest that Cr Reynolds set out to conceal his association with the CP Gem Trade Show from the council or the public at large. I note

that he is publicly identified as an office bearer of the CP Gem Trade Show on its website.⁷ I note that, according to Cr Reynolds, he endeavoured to seek advice from the council's Interim Chief Executive Officer in relation to the issue.

86. I note that EDL's commitment to sponsor the CP Gem Trade Show and this commitment's connection to the PPA was publicly reported in the media.⁸
87. I have also had regard to the nature of the CP Gem Trade Show (established ostensibly as a community event) and the exemptions in the Local Government Act applicable to interests arising from a council member's association with a non-profit entity.
88. I accept that Cr Reynolds' error arose from the mistaken belief that he was not required to declare a conflict in the matter. I also accept Cr Reynolds' submissions, made in response to my provisional report, that this was only his second meeting as an elected member. On the information before me, I do not consider Cr Reynolds' failure to declare an interest had any meaningful impact upon the council's resolution to execute the PPA.
89. Although the complainant has suggested that Cr Reynolds' conduct in advancing the motion to execute the PPA was motivated by a desire 'to ensure that sponsorship would be received at a convenient time' for the CP Gem Trade Show and CP Opal Festival, the records concerning the development of the PPA supplied to my Office provide no support for this proposition.
90. I am not otherwise persuaded by the submissions of the complainant that Cr Reynolds' conduct is more serious than as assessed in my provisional report.
91. I note that sections 73 and 74 of the Local Government Act have since been substantially revised.

Opinion

It is my final view that Cr Reynolds committed misconduct in public administration by failing to declare an interest in a matter before the council arising from his association with the CP Gem Trade Show.

It is also my final view that Cr Reynolds' failure to declare an interest in the motion to execute the PPA arising from his association with the CP Gem Trade Show was contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

In the circumstances, I make a recommendation under section 25(2)(f) of the Ombudsman Act and section 263B(1)(a) of the Local Government Act that the council issue a reprimand to Cr Reynolds.

Whether Cr Paul Reynolds committed misconduct in public administration by failing to declare and/or appropriately deal with a conflict of interest in a matter before the council arising from an association with the Coober Pedy Opal Festival

92. Cr Reynolds submitted that his involvement with the CP Opal Festival is limited to his receipt of information as an elected member of the council.

⁷ Coober Pedy Gem Trade Show, 'Organising Committee', <<http://www.cooberpedygemtradeshow.com.au/Contact.aspx>> last accessed 19 August 2017.

⁸ *Coober Pedy Regional Times*, 'EDL \$37M Power Project to Commence in Sept 2016', 2 June 2016 at p. 4.

93. I do not understand the CP Opal Festival to be a body corporate for the purposes of the Local Government Act.
94. I do not in any case consider Cr Reynolds to have suggested that he is a member or director of the 'governing body' of the CP Opal Festival within a manner contemplated by section 73(2)(a) of the Local Government Act.
95. I do not consider Cr Reynolds' relationship with the CP Opal Festival is otherwise captured by the provisions of section 73(2) of the Local Government Act.
96. On the information before me, I am not satisfied that the CP Opal Festival is a 'person' with whom Cr Reynolds was 'closely associated' at the time of the council's 19 January 2016 confidential meeting.
97. It follows that I do not consider Cr Reynolds was obliged to declare an interest in the relevant motion arising from his association with the CP Opal Festival.

Opinion

It is my final view that Cr Reynolds did not commit misconduct in public administration by failing to declare and/or appropriately deal with a conflict of interest in a matter before the council arising from his association with the CP Opal Festival.

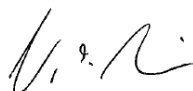
Conclusion

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

- Cr Reynolds did not commit misconduct in public administration by failing to declare and/or appropriately deal with a conflict of interest in a matter before the council arising from his association with the CPMA
- Cr Reynolds committed misconduct in public administration by failing to declare an interest in a matter before the council arising from his association with the CP Gem Trade Show
- Cr Reynolds did not commit misconduct in public administration by failing to declare and/or appropriately deal with a conflict of interest in a matter before the council arising from his association with the CP Opal Festival.

It is also my final view that Cr Reynolds' failure to declare an interest in a matter before the council arising from his association with the CP Gem Trade Show was contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

To remedy this error, I make a recommendation under section 25(2)(f) of the Ombudsman Act and section 263B(1)(a) of the Local Government Act that the council issue a reprimand to Cr Reynolds.



Wayne Lines
SA OMBUDSMAN

16 November 2017