

## Report

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

Public Authority	Kangaroo Island Council
Public Officer	Mayor Peter Clements
Ombudsman reference	2018/01787
ICAC reference	2018/002353
Date of referral	9 February 2018
Issues	<ol style="list-style-type: none"><li>1. Whether Mayor Clements' conduct in approving the Chief Executive Officer's Time Off in Lieu and payments for additional hours worked amounted to maladministration in public administration</li><li>2. Whether Mayor Clements' conduct in approving the Chief Executive Officer's Time Off in Lieu and payments for additional hours worked appears to be contrary to law within the meaning of the Ombudsman Act</li><li>3. Whether Mayor Clements' conduct in approving the Chief Executive Officer's Time Off in Lieu and payments for additional hours worked breached the Code of Conduct for Council Members and thereby amounted to misconduct in public administration</li><li>4. Whether Mayor Clements' conduct in approving the Chief Executive Officer's Time Off in Lieu and payments for additional hours worked breached the Code of Conduct for Council Members and appeared to be contrary to law within the meaning of the Ombudsman Act.</li></ol>

### 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 a potential issue of misconduct and/or maladministration within the meaning of that Act (the referral).

Section 14B of the Ombudsman Act provides:

### 14B–Referral of matter by OPI or ICAC

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

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- (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 third and fourth issues concern alleged breaches by Mayor Clements of clauses 3.14 and/or 3.16 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. As a contravention of Part 3 can constitute grounds for disciplinary action under the *Local Government Act 1999*, I have considered these matters under section 5(3)(a) of the ICAC Act.

I have utilised my own initiative powers pursuant to section 263A(2) of the *Local Government Act 1999* (SA) to determine if Mayor Clements’ conduct appears to be contrary to law within the meaning of section 25(1) of the Ombudsman Act. However, ICAC provided me with details of a further complaint to their Office which was relevant to this issue. On that basis I provided my provisional report to the complainant to seek their views.

Mayor Clements ceased to be the Mayor of the Council in November 2018. I shall refer to Mr Clements as Mayor Clements for the purposes of my report, as was his role at the time. On 19 February 2019 I was informed that the contract of Mr Andrew Boardman, the council’s Chief Executive Officer had been terminated. I shall still refer to Mr Boardman as the Chief Executive Officer for the purpose of my report, as was the role he held at the relevant time.

### Investigation

My investigation has involved:

- assessing the information provided by the reporter
- seeking a response from Mayor Clements
- seeking a response from the Chief Executive Officer, Mr Andrew Boardman (**Mr Boardman**)
- considering the ICAC Act, the Ombudsman Act and the Code
- providing Mayor Clements, the council with my provisional report for comment, and considering their responses
- preparing this report.

## Standard of proof

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

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

## Response to my provisional report

In response to my provisional report, Mayor Clements replied by email on 5 March 2019. Mayor Clements rejected the provisional view that he committed maladministration in public administration and stated that his support of Mr Boardman was in the best interests of the community because it provided value for money, and that the majority of the council agreed to permit Mr Boardman to work overtime. Mayor Clements responded that paying out Mr Boardman's additional leave discharged the council's liability to Mr Boardman for undertaking the additional work and that the council saved \$150,000 by Mr Boardman agreeing to project manage the new Kangaroo Island Airport construction.

The council responded by seeking an authorisation to share the provisional report with Mr Mark Booth from BRM Holdich, whom the council had appointed to investigate the matter on behalf of the council. The Ombudsman provided the council with an authorisation. I then received a letter dated 29 January 2019 from Griffins Lawyers, acting on behalf of the council in response to my provisional view. The letter stated that the council had no issue with the factual findings made by me and did not wish to make any submissions in respect of the foreshadowed recommendations. It was submitted, however, that my final report be published because it would inform other elected members who may not have knowledge of Mr Boardman's employment arrangement and signal to the public that other elected members were not to blame for the situation.

The fact that Mr Boardman's efforts may have provided a financial benefit to the council does not change my view that approval of the payments went beyond the terms of his employment contract providing that additional work. My provisional view therefore remains unchanged.

The complainant replied by email on 26 January 2019. The complainant was unhappy that there was no penalty or censure of Mayor Clements because he is no longer an elected member. The complainant felt that there was an attempt by Mayor Clements and Mr Boardman to deceive the public and keep the arrangement hidden. It was also stated that if I had no evidence to determine that the arrangement was dishonest, I should have stated that it appeared the arrangement "was deliberately kept from the elected members because it was outside of Boardman's employment agreement and they realised there was a very high probability that the elected members would not have approved the arrangement." I do not consider that I have any evidence to suggest the arrangement was hidden and therefore decline to amend the report as requested.

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

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

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## Background

1. Mayor Clements was elected Mayor of the Kangaroo Island Council (**the council**) in 2014. Prior to his appointment, he served as Deputy Mayor for four years. Mayor Clements ceased holding the role of Mayor in November 2018.
2. At the relevant time, Mr Andrew Boardman was the Chief Executive Officer of the council. An elected council, comprising of elected members and a Mayor are responsible for appointing the Chief Executive Officer and managing and reviewing their performance. The Local Government Association (**LGA**) website states:

The CEO is the only staff member who is appointed by the council. The CEO is appointed for no more than five years at a time, but can be re-appointed for further terms.

The CEO is responsible for managing the organisational structure of the council, ensuring that council decisions are implemented, the day to day management of the council's operations and providing advice to council.

The CEO is also responsible for supporting the mayor in the performance of his or her role, and the development, implementation and enforcement of policies and protocols to manage interactions between councillors and council staff.

3. Mr Boardman's Employment Agreement (**EA**) with the council was signed on 25 July 2011. Clause 9 stated:

9. TOTAL EMPLOYMENT COST PACKAGE

- 9.1 In consideration of performing the Duties and Responsibilities the CEO is entitled to the TEC Package outlined in this Clause and **Schedule 4** of this Agreement.
- 9.2 The parties may agree to enter into any lawful salary packaging arrangement by mutual agreement between them, which will be recorded in writing and annexed as **Schedule 4** of this Agreement. The CEO will bear the cost of Fringe Benefits Tax (if any) associated with any salary packaging arrangement reached with the CEO.
- 9.3 No additional remuneration is paid for overtime worked by the CEO.
- 9.4 Payment in respect of annual leave loading has been incorporated into the annual base salary.
- 9.5 The cash component of the TEC Package will be paid in arrears in equal fortnightly instalments, or as otherwise provided by the Council, by direct deposit to an account nominated by the CEO.
- 9.6 The CEO's TEC Package will be reviewed annually. The CEO is not, as a right, entitled to an increase to the TEC Package each year.

4. Schedule 4 of the EA listed Mr Boardman's TEC Package at \$180,000 as at July 2011 with annual CPI increases paid on 30 June each year. Mr Boardman's TEC Package as at January 2019 was in excess of \$225,000.
5. At the council meeting on 29 January 2014 at item 3.5 of the council's Agenda the council received a report by the Chief Executive Officer's Performance Review Panel

(PRP) about Mr Boardman's EA. At that time, Mayor Clements held the position of the Deputy Mayor and was a member of the PRP.<sup>3</sup> The PRP report stated:

The current employment agreement (EA) with the CE concludes on the 15<sup>th</sup> August 2014. Clause 4.1 of the EA requires the Council to notify the CE at least 6 months before the expiry date of the EA whether or not a new contract will be offered. This requires an offer from the council to the CEO on or before 15<sup>th</sup> February 2014.

Clause 4.2 requires the CEO to provide a written response to council whether the offer is accepted or not at least 3 months before the EA expiry date (reply required on or before 15<sup>th</sup> May 2014).

Members would be aware that the CEO's family have moved to Brisbane due to personal reasons. The CEO has made it known he intends to complete his contract and if an opportunity arises he would like to extend his EA with the council.

New working arrangements have been agreed whereby the CEO will work a day on either a Saturday or Sunday over 3 weekends to allow him to spend extra time with his family when he visits, as well as allowing him to attend to a number of outstanding council matters. These arrangements will be subject to review on a monthly basis to assess workability for both parties.

6. The confidential council resolution at item 3.5 read as follows:

Moved Cr Boxall	Seconded Cr Denholm
That the council offer the CEO a new Employment Agreement until 15 August 2015 under similar terms and conditions that currently apply. That the Panel review the CEO Key Performance Indicators due to the new EA and working arrangements.	
Further that a press release be prepared highlighting the positive and exciting times ahead for the Council.	
CARRIED. 5 For 1 Against	

7. My investigation was informed that the PRP consisted of the Mayor and two elected members. The members of the PRP at the relevant time were Mayor Clements, Cr Willson and Cr Sharon Kauppila. According to the terms of reference one of the elected members must be agreed to by Mr Boardman. The PRP met at least twice a year to review Mr Boardman's employment arrangement and at additional times if requested by either the panel or Mr Boardman. No formal minutes were kept. In relation to the PRP and Mr Boardman's overtime arrangement Mr Boardman informed my investigation:

1) Arrangement reviewed at least twice / year. Meetings of the review panel have been arranged if CEO has an issue that needs discussion (for example CEO issue with a Councillor's actions, Ombudsman issues, general discussion) or if Panel desire a discussion. Been led by CEO more than Panel as Councillors have not raised issues with CEO performance that have demanded the Panel institute a discussion - if majority happy with way business is run then no need for meeting. <sup>4</sup>

8. Mayor Clements stated in his response to my Office on 21 June 2018:

Mr Boardman had conversations with me prior to January 2014 in respect to his work load which also included discussions about engaging additional help to allow him to cope. In turn I discussed the matter with the Performance Review Panel (PRP) who agreed to put the matter to Council. The discussions at the PRP and Council centred around Mr Boardman being allowed flexibility to travel to be with his family in Queensland on occasions and to also work on the weekends where he could concentrate on major projects for Council without being subjected to day to day issues of weekly Council business. The additional working arrangements and subsequent payments made were a strategic cost saving move to enable the continuous connection of council projects by the

<sup>3</sup> The members of the PRP for 2010-2014 were (former) Mayor Jayne Bates OAM, Deputy Mayor Peter Clements, Councillor Joy Willson. The members of the PRP for 2014-2018 are Mayor Peter Clements, Cr Joy Willson (was Deputy Mayor for 2014-15), Cr Sharon Kauppila

<sup>4</sup> Email from Mr Boardman to my Officer, 25 October 2018.

CEO without having to engage the services of a separate consultant or additional employee.

9. Clause 9.3 of Mr Boardman's EA prohibited additional remuneration for overtime. It is the view of Mayor Clements and Mr Boardman that the council resolution at item 3.5 on 29 January 2014 varied this arrangement. Mayor Clements stated in his response to my Office on 21 June 2018:

Mr Boardman was entitled to receive additional payments following a decision by Council on the 29th January 2014 to allow for this without making a variation to his contract.

It was seen at the time that a review of the contract, a considerable expense in itself, was not necessary at the time.

10. Mr Boardman has informed my investigation that he kept a spreadsheet 'Toil and Leave Record' (**the record**) from January 2014 to early 2019. Mr Boardman recorded additional hours worked on the record and dates he requested leave in addition to his annual leave to enable him to travel interstate. Mr Boardman informed my investigation that from 14 February 2014 to 2 April 2018 he accrued 170 days and taken 82 days TOIL (**Time Off in Lieu**).
11. Mr Boardman also informed my investigation that, from 18 January 2014 on six occasions he had, 'in mutual agreement with Mayor Clements, on behalf of the council, converted days accrued to days paid at the day rate applying at the time to reduce banked hours'. The six occasions provided by Mr Boardman appear on the following table, compiled by my Officer based on the invoices Mr Boardman provided to my investigation:

Date	Additional hours worked	Amount (gross)
4/5/15	129.20 hours, or 17 days	\$12,092.12
16/2/16	114 hours	\$10,957.59
8/11/16	121.60 hours, or 16 days	\$12,041.07
9/5/17	15 hours	\$1,470.62
23/5/17	99 hours	\$9,706.12
19/12/17	114 hours, or 15 days	\$11,433.81
<b>Total</b>		<b>\$57,701.33</b>

12. In January 2018, then local MP Mr Michael Pengilly lodged a Freedom of Information request for Mr Boardman's salary details and then provided this information to the public. The FOI documents revealed Mr Boardman's arrangement with respect to working additional hours in exchange for TOIL and financial payments. It appears that some elected members were unaware of Mr Boardman's overtime arrangement. Questions on notice about this topic were asked by elected members at the council meetings on 25 January 2018, 13 February 2018, 13 March 2018.
13. On 25 January 2018 Mr Boardman presented a briefing paper to all elected members at an informal gathering 'which provided a full and detailed drill down into expense claims and payment of TOIL'. This paper was then presented as a Council report in February.' The briefing paper included the following table which shows additional days accrued, TOIL, and days that were paid out instead of taken as TOIL:

Year	Accrued	TOIL	Paid
2013-2014	42	-36	0
2015	47	-24	-17
2016	37	-14	-31
2017	35	-5	-30
<b>Total</b>	<b>161</b>	<b>-79</b>	<b>-78</b>

14. The briefing paper explained how much TOIL Mr Boardman accumulated and how it came to be that the TOIL was paid as a financial payment in some instances:

It is noted that the CEO has worked **17.7% more** time than he has been contracted to work over three years. It is noted that he has taken 79 days as time off in lieu visiting his family but has fundamentally accrued an additional 78 days. Had this been taken it, (sic) would have equated to the CEO being absent from the workplace for nearly 4 working months.

Once accrued days were running up to 17 days (in the first instance) the CEO approached the Mayor and suggested a better approach would be to be (sic) simply paid for the additional work undertaken - and this was agreed - four payments have been made through this period for 17, 16, and 3 lots of 15 days accrued. There are currently (to the end of December 2017) 4 days outstanding as accrued.

It should be noted that these additional days worked have not resulted in the accumulation of any other benefits such as contracted holiday days etc - the extra days work have been paid out at the basic cash day rate, with superannuation removed and tax paid on the balance.

...

It is noted that the original agreement between Council and the CEO (Special Meeting 29 January 2014), confirmed as a confidential resolution of Council, is not prescriptive with regards to the accrued days having to be taken off or not. Payment in lieu of days accrued from this particular arrangement is therefore not discounted.

15. At the council meeting on 13 February 2018 Mr Boardman provided two reports at items 10.3 'CEO Expense Report' and item 18.1 'Report for Information - CEO Contract'. The latter report was tabled in confidence and informed the council of all council-resolved additions to Mr Boardman's contract since 2011.
16. Further questions on notice were raised by elected members at 13 February 2018 meeting and the 13 March 2018 meeting.
17. On 5 February 2018 I received a referral from the Commissioner pursuant to section 24(2)(a) of the ICAC Act based on two reports to the OPI. The reporters are unknown to my Office. Subsequently, two further complaints were made to the OPI on the same issue. The referral included allegations that Mayor Clements authorised three separate payments to Mr Boardman in excess of \$20,000 for 300 hours of additional hours worked by him, despite Mr Boardman not being entitled to TOIL in his EA with the council.
18. On 23 March 2018 I wrote to Mayor Clements asking him for a response to the allegations. Mayor Clements responded on 21 June 2018 informing me that:
- he was aware that Mr Boardman received payments for additional hours worked that were excess to the requirements expected of him (a 50 hour week with additional time spent at functions, etc)
  - he was aware of this because he signed off on each additional payment
  - Mr Boardman was entitled to receive the additional payments following a decision by council on 29 January 2014 without making a variation to his EA
  - Mr Boardman's EA states TOIL was impermissible but the council resolution superseded and varied his EA
  - Mr Boardman has provided Mayor Clements with an application for each and every leave event following discussion with him on the nature of the leave
  - providing overtime to Mr Boardman is a cost saving to the council which would have to pay between \$800-\$1200 per day for consultants to work on projects

- the payments to Mr Boardman have not been described as TOIL however it could be considered TOIL 'although in Mr Boardman's case the time was not necessarily taken but the money was'
  - he is not aware of anyone else approving payments for additional hours worked to Mr Boardman
  - he does not approve TOIL for any other staff member
  - he is not aware of any other council employee that receive payments for additional hours worked instead of TOIL
  - TOIL is not used within the Enterprise Bargaining Agreements (EBA) of council although under particular circumstances a Director of services can permit time off
  - he estimates the value of work undertaken by Mr Boardman since 2014 to be in the vicinity of \$136,000 to \$204,000 not including the additional costs of briefing and continuity cost that external consultants would require to undertake the additional work.
19. On 23 March 2018 I also wrote to Mr Boardman asking him for information about the allegations. In responses dated 13 April 2018, 26 June 2018 and 25 October 2018 Mr Boardman informed me that:
- all leave applications including TOIL and payments for additional hours worked, were submitted to and approved by Mayor Clements only, in accordance with the council resolution on 29 January 2014
  - whilst the resolution is not specific that particular additional days worked may be compensated by either taking as TOIL or paid in lieu of TOIL the council have shown a 'resolution/ commitment' that additional compensation was made for additional days worked
  - that the TOIL arrangement created a liability to council in the form of accrued days that required compensation either by leave or payment
  - payments received for additional hours worked were decided 'in mutual agreement with Mayor Clements, on behalf of the council'
  - that his EA does not specifically prohibit the ability for Mr Boardman to claim TOIL payments
  - a new draft EA was circulated amongst the PRP which incorporated the spirit of the council resolution into the EA
  - the council and the public have visibility of his hours through the publication of Mr Boardman's diary as a standing item on council's monthly agenda
  - he had no proof of the PRP formally reviewing the TOIL arrangement as they tended to be conversations only, it was Mayor Clements who signed off on all leave applications
  - the PRP met twice a year to review Mr Boardman's agreement and more often if requested, no formal minutes were kept
  - that he obtained independent legal advice on the legality of his working arrangements which supported his view that the council resolution of 29 January 2014 amended his EA
  - that elected members at the time of the resolution and since were well aware of the effect the resolution would have on Mr Boardman's employment agreement
  - that the payments made to himself were within budget allocations each year and were of a quantum that was within his authority to expend.

### Relevant law

20. Section 263A of the Local Government Act empowers the Ombudsman to carry out investigations made against council members using my own initiative:

#### 263A-Investigation of grounds of complaint by Ombudsman



- ...
- (3) The Ombudsman may, on his or her own initiative, carry out an investigation under the *Ombudsman Act 1972* of matters that may constitute grounds for complaint under this Act against a member of a council.

21. 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.

22. Section 5(4) of the ICAC Act provides:

(4) *Maladministration in public administration*—

- (a) means—
  - (i) conduct of a public officer, or a practice, policy or procedure of a public authority, that results in an irregular and unauthorised use of public money or substantial mismanagement of public resources; or
  - (ii) conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions; and
- (b) includes conduct resulting from impropriety, incompetence or negligence; and
- (c) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions.

23. 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.

24. Clauses 3.14 and 3.16 of Part 3 of the Code provides:

- 3.14 Council members using Council resources must do so effectively and prudently
- 3.16 Council members must not use public funds or resources in a manner that is irregular or unauthorised.

**Whether Mayor Clements' conduct in approving the CEO's TOIL and financial payments for additional hours worked amounted to maladministration in public administration**

**Whether Mayor Clements' conduct in approving the CEO's Time Off in Lieu and payments for additional hours worked appears to be contrary to law within the meaning of the Ombudsman Act**

25. Section 5(4)(a) of the ICAC Act defines maladministration as:

(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

26. The relevant conduct of Mayor Clements was his signing off on Mr Boardman's applications for TOIL and to be paid financially for accumulated TOIL instead of taking time off.
27. I consider section 5(4)(a)(i) the most relevant provision in this context. I therefore firstly intend to examine whether Mayor Clements' conduct in signing off on Mr Boardman's TOIL and financial payment for TOIL applications resulted in an irregular and unauthorised use of public money, and secondly, whether the conduct resulted in a substantial mismanagement of public resources.

### *Irregular use of public money*

28. Six payments were made to Mr Boardman between 4 May 2015 and 19 December 2017 and 82 days of TOIL were requested by Mr Boardman on his leave forms for the relevant period. These were approved by Mayor Clements by signing the leave forms and passing them to payroll staff for processing.
29. I accept that the TOIL and payments to Mr Boardman appear to have been genuinely linked to Mr Boardman undertaking additional work. As far as I can ascertain the council obtained Mr Boardman's services in exchange for the payments. Mr Boardman kept detailed records of what work he has undertaken, and when. Whilst I accept that Mr Boardman worked additional hours and on the weekend there is no external way of verifying whether those hours were correct.
30. In relation to how he recorded his additional hours and the system he used to provide this to Mayor Clements, Mr Boardman informed my investigation that:
- No-one (but I) has an electronic copy, however a print-out accompanies each leave application. The copy is to provide support to the leave request form which incorporates a question *has leave been checked*. Given the Mayor does not have system access to our leave records I update the sheet with annual leave accrued and then provide a copy with a standard leave application. This then gets signed off and goes to Payroll where it will sit in their records. So Mayor sees it; my PA sees it; the Payroll Officer sees it; assume that Payroll records are secure so no-one else should have access to this<sup>5</sup>.
31. By way of comment I note that in my view this system, whereby Mr Boardman kept records of his own overtime and submitted them to Mayor Clements when he wanted to take TOIL or convert TOIL to a payment is open to being abused given the lack of meaningful oversight.
32. However, I consider that the provision of TOIL and financial payments approved by Mayor Clements to Mr Boardman were irregular for the following reasons:
- it was not envisaged by Mr Boardman's EA or the council's motion
  - it is not the accepted or usual practice that council Chief Executive Officers received TOIL or payments for additional hours worked because it is understood that their remuneration adequately made provision for that
  - it was Mr Boardman alone who determined when he wanted to convert additional hours to financial payments when submitting leave application/s to Mayor

<sup>5</sup> Email from Mr Boardman to my Officer, 26 June 2018

- Clements. Prior to that time no one knew when or how much money was spent from council resources to pay Mr Boardman for his additional hours worked
- there was no regularity in terms of when payments were made or how much they were for nor were there any set criteria for eligibility.

*Unauthorised use of public money*

33. In order for it to be considered maladministration pursuant to section 5(4)(a)(i) Mayor Clements' conduct had to result in irregular and unauthorised payments.
34. As to whether these payments were unauthorised, both Mayor Clements and Mr Boardman informed my investigation that they considered Mayor Clements authorised the accruing of TOIL and the additional payments. Mayor Clements has informed me that his authority for approving the TOIL and the payments came from the council resolution (29 January 2014). The wording of the resolution, based on the PRP report, did not, in my view, authorise Mayor Clements to approve the additional TOIL and payments for additional hours worked. Rather, the resolution was to record council's approval to offer a new EA to Mr Boardman under 'similar terms and conditions' as the current EA and that the PRP 'review the CEO performance indicators due to the new EA and working arrangements.' The PRP report discussed workplace flexibility for Mr Boardman by offering him to work a Saturday or Sunday so as to have a weekday off to enable him to visit family, as Mr Boardman informed me, on the fourth weekend of the month. It did not provide that Mr Boardman would accumulate TOIL or be reimbursed for TOIL not taken. Further, the resolution did not specifically adopt the "new working arrangements". The PRP could not agree to vary Mr Boardman's EA; only the council could do that.
35. In my view:
- the EA clearly prohibited remuneration for overtime
  - the council resolution was silent on the issue of remuneration for overtime and TOIL. The resolution when read most generously in Mr Boardman's favour allowed for flexibility to work on weekends to enable Mr Boardman to visit family on the fourth weekend of the month.
36. In my view there was a significant difference between the EA and the wording of the council resolution, and Mr Boardman's employment arrangement whereby he received leave or payments for additional hours worked. It is difficult to understand why Mayor Clements interpreted the effect of the resolution as he did. I also query the appropriateness of attempting to vary the EA without meaningful oversight by the PRP.
37. I consider that, as far as Mr Boardman was concerned, payments and/or TOIL were 'authorised' in the sense that Mayor Clements signed off on them. However, I do not consider that Mayor Clements had any authority to do so. I do not consider that the wording of the resolution on 29 January 2014 authorised Mayor Clements to sign off on Mr Boardman's leave applications to enable him to receive 82 days TOIL and \$57,701.33 payments for additional hours worked.
38. In summary I consider that the 82 days TOIL taken by Mr Boardman and the six payments from the council to Mr Boardman from 4 May 2015 to 19 December 2017 totaling \$57,701.33 were:
- irregular payments because they were not envisaged by Mr Boardman's EA or by the council and were outside the usual practice for remunerating council Chief Executive Officers
  - unauthorised because neither the council resolution of 29 January 2014 nor Mr Boardman's EA gave Mayor Clements authority to provide Mr Boardman with TOIL nor financial payment for additional hours worked.

39. I therefore consider that Mayor Clements has breached section 5(4)(a)(i) of the ICAC Act and committed maladministration in public administration because his conduct has resulted in an irregular and unauthorised use of public money.
40. I note that section 5(4)(b) of the ICAC Act provides that maladministration 'includes conduct resulting from impropriety, incompetence or negligence'. I do not have any evidence to suggest that Mayor Clements's intention was to subvert the council's resolution. I do have difficulty in accepting though that the resolution authorised Mayor Clements to approve the TOIL and financial payments in place of TOIL to Mr Boardman.

*Substantial Mismanagement of public resources*

41. I have also considered whether Mayor Clements's conduct in signing off on Mr Boardman's TOIL applications and financial payment for TOIL has resulted in a substantial mismanagement of public resources for the purposes of section 5(4)(a)(i) of the ICAC Act.
42. I consider that the relevant public resources are the council's financial resources and its human resources. It is fair to say that in most government workplaces where public resources are expended, TOIL use by employees is closely monitored rather than being an open ended arrangement. I consider that a failure to properly control extra hours worked could be a mismanagement of human resources, giving rise to Occupational Health and Safety issues.
43. I now need to determine whether the approval resulted in mismanagement of public resources. In my view Mayor Clements's conduct in approving Mr Boardman's leave applications including the provision of TOIL and payments for additional hours worked resulted in mismanagement of public resources for the following reasons:
- the provision of these benefits was not, in my view, permitted by the council resolution of 29 January 2014 and was therefore not approved by the council
  - the provision of these benefits was outside Mr Boardman's EA
  - no other employee had the benefit of cashing in their TOIL or accumulating unlimited TOIL
  - there was no meaningful limit on Mr Boardman's use of TOIL or how much TOIL he could be paid out by the council
  - there was no meaningful oversight of Mr Boardman's calculation of his TOIL
  - there was no meaningful oversight of Mayor Clements's approval of Mr Boardman's TOIL or payments to Mr Boardman for his TOIL
  - there is no record by the PRP of discussions with Mr Boardman or Mayor Clements about Mr Boardman's use of TOIL or payments for additional hours worked
  - it is clear from the FOI application and subsequent council meetings that some current elected members were unaware of Mr Boardman's arrangement with respect to receiving TOIL and being paid for additional hours worked
  - Mr Boardman was paid \$57,701.33(gross) and took 82 days TOIL leave which, in my view, were not authorised by the council or Mr Boardman's EA
  - the amount of money paid to Mr Boardman and time taken off for his additional services were significant amounts for the council to expend.
44. Mayor Clements and Mr Boardman argued that it would have cost less to pay overtime to Mr Boardman than to pay external consultants to perform the same work. In my view there is no evidence to support that contention.
45. In my view, the above errors are significant enough, to amount to a substantial mismanagement of public resources. It is particularly serious that it appears that Mayor

Clements and Mr Boardman have effectively varied Mr Boardman's EA without council's authorisation or knowledge. Nor has there been any meaningful regulation or oversight of the provision of TOIL and payments made to Mr Boardman by the PRP. I consider that Mr Boardman and Mayor Clements were operating on an unsubstantiated premise that Mr Boardman's overtime was benefitting the council more than it was benefitting Mr Boardman.

46. I am not of the opinion that this arrangement was dishonest: it appears to me that both Mr Boardman and Mayor Clements honestly believed the arrangement was an appropriate way of compensating Mr Boardman for the additional hours worked. However, the arrangement did not have the proper authorisation and Mr Boardman was receiving payments and leave benefits to which he was not lawfully entitled.

## Opinion

In light of the above, I consider that Mayor Clements committed maladministration in public administration for the purposes of section 5(4)(a)(i) of the ICAC Act.

In light of the above, I consider that Mayor Clements breached clauses 3.14 and 3.16 of the Code of Conduct for Elected Members and section 63 of the Local Government Act and thereby appeared to act in a manner that was contrary to law within the meaning of section 25(1) of the Ombudsman Act.

### **Whether Mayor Clements' conduct in approving the CEO's TOIL and payments for additional hours worked breached the Code and thereby amounted to misconduct in public administration**

### **Whether Mayor Clements' conduct in approving the CEO's Time Off in Lieu and payments for additional hours worked breached the Code of Conduct for Council Members and appeared to be contrary to law within the meaning of the Ombudsman Act.**

47. My investigation is concerned with whether Mayor Clements, in approving the 82 days TOIL and payments to Mr Boardman totalling \$57,701.33 paid for additional hours worked, breached the Code and thereby committed misconduct.

#### *Clause 3.14 of the Code*

48. Clause 3.14 of the Code states that council members must use council resources effectively and prudently. Mayor Clements submitted that he used council resources effectively and prudently by authorising TOIL and payments to Mr Boardman because the council was getting value for money in not hiring external consultants to undertake the additional work. Mayor Clements estimated the cost of hiring external consultants to perform the additional work would be between \$136,000 to \$204,000 at a rate of between \$800 and \$1200 per day.
49. It appears the original intent of the arrangement in 2014 was to provide flexible working hours to Mr Boardman to accommodate changes in his family living arrangements. The PRP recommended Mr Boardman 'to work a day on either a Saturday or Sunday over 3 weekends to allow him to spend extra time with his family'.
50. The wording of the resolution stated that the council:
- offer Mr Boardman a new EA until 15 August 2015 under similar terms and conditions that currently applied

- that the PRP review Mr Boardman's key performance indicators due to the new EA and working arrangements.
51. My investigation has been informed that Mr Boardman's relevant EA was dated 25 July 2011. A new EA was never signed by Mr Boardman nor the council prior to Mr Boardman's termination of employment. Mr Boardman informed my investigation that this arrangement was regularly reviewed by Mayor Clements each time a leave application was submitted and discussed at panel meetings. The arrangement was subject to the proviso that Mr Boardman did not 'over-work' himself.<sup>6</sup>
  52. Mr Boardman informed me that due to workload pressure there were times when he worked both Saturday and Sunday on the same weekend. Mr Boardman informed my investigation that the PRP were aware of this arrangement and gave permission for this to occur provided it did not become a normal occurrence as Mr Boardman could not be expected to work seven days a week. Mr Boardman informed me that he worked both Saturday and Sunday during 2014 (5 occurrences), 2015 (5 occurrences), 2016 (7 occurrences), 2017 (4 occurrences), 2018 (1 occurrence).
  53. Part of the way Executive staff's salaries are packaged is to exclude the use of TOIL. Chief Executive Officers are required to attend functions and additional events and generally work longer hours which are reflected in their high salaries. A South Australian Local Government Remuneration Survey Report for Chief Executive Officers completed by McArthur in 2016 show the main components of local government Chief Executive Officers packages are cash components, superannuation, vehicle, professional memberships, phones/laptops, and rental assistance.
  54. Mr Boardman's final TEC package was in excess of \$225,000. From 2014 to 2018 the council paid an additional \$57,701.33 to Mr Boardman, which is an average of \$14,250 per annum. Mayor Clements and Mr Boardman submit that this is an effective and prudent use of council resources to pay Mr Boardman in TOIL and convert this to a financial payment for TOIL on occasion rather than hire external consultants who would charge more than this. However, I am unconvinced by this argument because I have not been provided with any evidence to suggest Mr Boardman was undertaking routine work that would have been undertaken anyway, nor that the council had investigated hiring external consultants but had instead determined for Mr Boardman to undertake the work.
  55. Whilst Mayor Clements claims it was value for money to have Mr Boardman perform the work, it is uncertain whether this money would have been spent by the council in any event. It is clear, however, that council did not vote on whether particular projects ought to be completed by Mr Boardman or an external consultant engaged to perform the work. Whether the arrangement with Mr Boardman represented value for money is not the point. The fact remains that it did not have a lawful basis.
  56. I have already expressed the view that I do not consider that the council resolution nor Mr Boardman's EA authorised Mayor Clements to approve Mr Boardman's TOIL or additional financial payment for TOIL. In light of all of the circumstances I consider that the provision of TOIL both in leave and financial payment to Mr Boardman was not an effective nor prudent use of council resources, particularly as I have determined it to be unauthorised.

### *Clause 3.16 of the Code*

57. Clause 3.16 requires council members not to use public funds or resources in a manner that is irregular or unauthorised. I have previously formed the view that the provision of

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<sup>6</sup> Letter from Mr Boardman to the Ombudsman, 26 June 2018, page 2.

TOIL and financial payments for TOIL to Mr Boardman were irregular and unauthorised. I therefore consider that Mayor Clements breached clause 3.16 of the Code.

58. Section 5(3)(a) of the ICAC Act defines misconduct in public administration as a contravention of a code of conduct by a public officer whilst acting in his or her capacity as a public officer that constitutes a ground for disciplinary action against the officer. I consider that Mayor Clements, in authorising the use of TOIL and cash payments for additional hours worked, was acting in his capacity as a public officer. I consider that clauses 3.14 and 3.16 were breached by Mayor Clements for the reasons stated above and that because the Code was breached, section 63 of the Local Government Act which requires elected members to comply with the Code was breached. Accordingly, I am of the view that Mayor Clements appears to have acted contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

### Opinion

In light of the above, I consider that Mayor Clements committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.

In light of the above, I consider that Mayor Clements breached clauses 3.4 and 3.16 of Part 3 of the Code of Conduct and section 63 of the Local Government Act and on that basis appears to have acted contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

As Mayor Clements was not re-elected to the council at the 10 November 2018 local government elections I will not make recommendations under section 25(2) of the Ombudsman Act in relation to his personal conduct. However, I recommend under section 25(2) of the Ombudsman Act that the council:

1. consider taking steps to require Mr Boardman to pay back any cash payments not made in accordance with his EA
2. review the approval process for the Chief Executive Officer's leave so that it is transparent and the leave is regularly reported to council
3. ensure the council's Chief Executive Officer maintains a current EA which incorporates any or all amendments agreed to by the council.

### Final comment

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

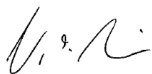
In accordance with Part 3 of the Code of Conduct for Council Members, this report must be provided to a public meeting of the council within two ordinary meetings of the council receiving my report.

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by **4 September 2019** on what steps have been taken to give effect to my recommendation/s above; including:

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

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

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



Wayne Lines  
**SA OMBUDSMAN**

4 June 2019