

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	Mr Andrew Boardman
Ombudsman reference	2018/01787
ICAC references	2018/002353 and 2018/01856
Date of referrals	9 February 2018 and 7 March 2018
Issues	<ol style="list-style-type: none">1. Whether Mr Boardman's arrangement whereby he was permitted to receive Time Off in Lieu for additional hours worked and have that converted to financial payments amounted to maladministration in public administration2. Whether Mr Boardman by receiving Time Off in Lieu for additional hours worked and having that converted to financial payments, breached the Code of Conduct for Council Employees and thereby committed misconduct in public administration3. Whether Mr Boardman by receiving Time Off in Lieu for additional hours worked and having that converted to financial payments breached the Code of Conduct for Council Employees and section 110 of the Local Government Act 1999 (SA) and appeared to act contrary to law within the meaning of the Ombudsman Act4. Whether the council's conduct in respect of its Chief Executive Officer Performance Review Panel was wrong within the meaning of the Ombudsman Act5. Whether Mr Boardman's conduct in utilising council resources to pay for flights and accommodation when visiting his family interstate amounted to maladministration in public administration6. Whether Mr Boardman's conduct in utilising the council's workshop and mechanic for his own personal use was a breach of the Code

and thereby misconduct in public administration

7. Whether Mr Boardman's authorisation of council funds to pay for airport security and landscaping for the Kangaroo Island Airport amounted to misconduct and/or maladministration in public administration

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 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.
- (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.

These issues concern alleged breaches by Mr Boardman of clauses 2.4, 2.23, 2.24, 2.26 of the Code of Conduct for Council Employees (**the Code**) as in place at the relevant time. Part 2 of the Code states that a failure to comply with any of these behaviours can constitute a ground for disciplinary action against the employee under section 110(5) of the Local Government Act. Section 5(3)(a) of the ICAC Act includes in the definition of misconduct 'a breach of a code of conduct that constitutes a ground for disciplinary action'. I therefore consider a breach of the code to be misconduct under the ICAC Act.

This Office received two referrals from ICAC in relation to Mr Boardman's alleged conduct. On 5 February 2018 I received the first referral, based on information from two anonymous reporters who made allegations in relation to the first, second, fifth and seventh issues identified above. I agreed to investigate this referral. On 7 March 2018 I received a second referral in relation to the sixth issue above. I agreed to investigate the second referral in conjunction with the first because both concerned Mr Boardman's conduct.

Since the original two referrals, three further reporters contacted OPI and made individual complaints about the same issues as referred by the first referral. All three reporters (**the three known reporters**) consented to providing their details to my Office and were informed by OPI that the referral had already been made to my Office. Further, 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.

I am investigating the third and fourth issues utilising my own initiative powers pursuant to section 13(2) of the Ombudsman Act.

Investigation

My investigation has involved:

- assessing the information provided by the reporters
- seeking responses from the council's Chief Executive Officer Mr Andrew Boardman (**Mr Boardman**)
- seeking a response from Mr Peter Clements (formerly the Mayor of the Council. For the purposes of my report I shall refer to Mr Clements as 'Mayor Clements' as was his role at the time)
- considering the ICAC Act, the Ombudsman Act, and the Code
- providing the three known reporters, Mr Boardman and the council with my provisional report for comment, and considering their responses
- 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

In response to my provisional report Mr Andrew Boardman provided responses on 16 January 2019, 28 January 2019 and 7 February 2019. I summarise Mr Boardman's submissions as follows:

- that I contact those elected members present at the time of the council resolution on 29 January 2014 to obtain their understanding of the resolution
- that I consider his Performance Review Reports from 2015-2018, which have been prepared by an independent facilitator as these demonstrate that he was performing well in his role as CEO, and had independent oversight
- 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 employment agreement (**EA**)

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.

- 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 he attempted to have his EA re-issued with amendments that included the overtime with the council on 26 March 2016, 18 August 2017 and 5 February 2018 and therefore he refutes any suggestion that he operated in an underhanded manner
- that the report is phrased as though additional hours were worked but it was additional days worked, a standard working day at the council being 7.6 hours, and days being easier to verify than having to send an email every at least every hour
- that elected members were informed at council meetings on 13 February 2018, and 13 March 2018 about the CEO's Time Off in Lieu (TOIL) arrangement
- that the TOIL arrangement created a liability to council in the form of accrued days that required compensation either by leave or payment
- that as CEO his employment conditions were award free and he and the council could therefore agree their own arrangements
- he disputes that he has been paid "overtime", but rather payment for additional days has been claimed
- the Mayor is the lead agent for the council's Performance Review Panel (PRP) and therefore the council and no-one else had the authority to have approved his leave also under the law of agency the Mayor had ostensible authority to approve leave
- that he did not have a current EA because his EA expired on 14 August 2013
- had he resigned at any point the council would have had to discharge its liability to Mr Boardman by payment
- that the payments made to himself were within the budget allocations each year and were of a quantum that is within his authority to expend.

Mr Boardman concedes that "it would have been prudent and best practice to have taken the matter of accrued days to the Panel and for the Panel to have delivered a report with recommendation to Council for payment to reduce the accrued liability"³, however submitted that his conduct does not amount to misconduct nor maladministration.

I address Mr Boardman's submissions as necessary in the body of my report.

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 their behalf. The Ombudsman granted this authorisation. I then received a letter dated 29 January 2019 from Griffins Lawyers, acting on behalf of the council in response to my provisional report. 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.

Two of the three known reporters indicated that they had no comments to make about the provisional report. The third reporter concurred with my provisional views but considered there was dishonesty in the arrangement at the point in time where Mr Boardman attempted to explain or justify his arrangement following the release of information from the FOI requests. This reporter considered that by this point there was a deliberate attempt by Mr Boardman to justify what he "clearly knew was unlawful." I am not persuaded by the third known reporter's argument in this regard and have not been provided with any additional evidence by them in support of their assertion.

The complainant replied by email on 26 January 2019. The complainant felt that Mr Boardman and Mayor Clements' behaviour was dishonest because my provisional report expressed the view that many elected members were unaware of the arrangement. The complainant stated that if I had no evidence to determine that the arrangement was dishonest I should have stated that it appeared that the arrangement "was deliberately kept from the

³ Letter from Mr Boardman to the Ombudsman, 28 January 2019, page 1.

elected members because it was outside of Boardman's employment agreement and that 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 from elected members and therefore decline to amend the report in this regard. The complainant also made adverse comment about Mr Boardman's handling of the Kangaroo Island Airport budget alleging that by not counter signing the NBS Specialised Crushing (**NBS**) contract he caused NBS to go into voluntary administration and that Mr Boardman had a close relationship with "Willson" the owner of the business that obtained work from the council following the collapse of NBS. These allegations go beyond the scope of this investigation and I decline to investigate these allegations. The complainant should submit any evidence they have to support these allegations to the Office for Public Integrity for assessment.

On 19 February 2019 I was also informed by letter from Griffins Lawyers that the council resolved to terminate the employment agreement of Mr Boardman. I have therefore amended the relevant recommendations to refer to the arrangement the council has with its Chief Executive Officers more broadly, and not just to Mr Boardman.

Background

1. At the relevant time, Mr Andrew Boardman was the Chief Executive Officer of the Kangaroo Island Council (**the council**). While Mr Boardman is no longer the Chief Executive Officer of the council, I will refer to him as the Chief Executive Officer in this report. Mr Peter Clements (**Mayor Clements**) was the Mayor of the council from November 2014 until November 2018 and is no longer an elected member of the council.
2. An elected council, comprising of elected members and a Mayor is responsible for appointing the Chief Executive Officer and managing and reviewing the Chief Executive Officer's 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. On 14 February 2018 I wrote to Mr Boardman outlining all allegations and sought a response.
4. Mr Boardman wrote to my Office on 13 April 2018, 26 June 2018, and 25 October 2018 providing thorough responses. Mr Boardman denies all allegations.

Time Off in Lieu (TOIL)

5. The referral from ICAC to my Office included allegations that Mr Boardman claimed financial payments for accrued TOIL in excess of \$20,000 for 300 hours of additional hours worked and TOIL days, neither of which Mr Boardman was entitled to in his employment contract. It was also alleged that Mayor Clements approved Mr Boardman's three separate requests for payment of accrued TOIL.

6. At the relevant time, there was an EA between Mr Boardman and the council which was signed on 25 July 2011. Clause 9 of the EA states:

9. TOTAL EMPLOYMENT COST PACKAGE (TEC 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.
- 9.7 Superannuation
- ...
- 9.8 Deductions
- ...
- 9.9 Vehicle
- ...

10. TEC PACKAGE REVIEW

- 10.1 The TEC Package specified in Schedule 4 herein shall be reviewed annually.
- 10.2 The annual review of the TEC Package shall be conducted within one month following the Performance Review set out in Clause 12 (if reasonably practicable), and any change to the TEC Package shall be "backdated", to take effect from the anniversary of the Commencement Date.
- 10.3 The review of the TEC Package will take into account an assessment of performance based upon the following:
- 10.3.1 the criteria upon which the CEO's performance is assessed in accordance with the Personal Evaluation System, and the acquisition and satisfactory utilisation of new or enhanced skills by the CEO if beneficial to or required by the Council; and
- 10.3.2 movements in the Consumer Price Index (All Groups) Adelaide as issued by the Australian Bureau of Statistics.
- 10.4 Notwithstanding Clause 10.3 the parties acknowledge that in undertaking any review of the TEC package, the CEO shall not be entitled as a right to an

annual increase of the remuneration other than in accordance with any increase of the Consumer Price Index (All Groups) Adelaide.

7. 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. There were no additional salary arrangements listed in Schedule 4.
8. On 29 January 2014 the council resolved at item 3.5 of the council's Agenda to offer Mr Boardman a new EA based on a report prepared by Mr Boardman's Performance Review Panel (PRP). Mayor Clements was, at that time, the Deputy Mayor and a member of the PRP. The other members were (former) Mayor Jayne Bates and Cr Bec Davis. The report stated:

The current employment agreement (EA) with the CE concludes on the 15th 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 15th 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 15th 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.

9. The council resolution at item 3.5 indicates that the council resolved the following as recommended by the panel:

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

10. My investigation has been informed that the PRP consists of the Mayor and two elected members. According to the terms of reference one of the elected members was to have been 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[sic] 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. ⁴

⁴ Email from Mr Boardman to my Officer, 25 October 2018.

11. Mr Boardman informed my investigation that for the relevant period, there were two PRP structures:
- from January to November 2014 the PRP comprised of (former) Mayor Jayne Bates, Deputy Mayor Mr Peter Clements, Cr Bec Davis with facilitator Mr John Coombe.
 - From November 2014 to November 2018 the PRP comprised of Mayor Clements, Deputy Mayor Joy Willson, Cr Sharon Kauppila with facilitator Mr John Coombe.
12. Mr Boardman explained in response to my provisional report that, outside of interim meetings which are held on demand, there were formal meetings of the PRP annually to carry out the formal CEO Performance Review Process which were facilitated by Mr Coombe.⁵ Following the review process, Mr Coombe presented his report to the PRP in a formal in-confidence meeting of council where the council formally confirmed the review and resolved whether to extend Mr Boardman's contract by 12 months, pay increment for the year, additional leave for performance above expectation and other matters.
13. Mr Boardman informed my investigation that he kept a spreadsheet 'TOIL and Leave Record' (**the record**) from January 2014 to present. Mr Boardman recorded additional hours worked on the record and dates that he has requested leave additional to his annual leave to enable him to travel interstate. Mr Boardman continued to use the record on a daily basis. Mr Boardman has informed my investigation that from 14 February 2014 to 2 April 2018 he accrued 170 days and taken 82 days as formal leave in lieu of payment.
14. Mr Boardman also informed my investigation that, from 18 January 2014 on six occasions he has, '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' (I have referred to this in my report as financial payment for TOIL as opposed to TOIL leave, both of which were taken by Mr Boardman). The five occasions provided by Mr Boardman are seen 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
Total		\$57,701.33

15. My investigation has been informed that despite the resolution on 29 January 2014, Mr Boardman's EA was not re-issued or renegotiated since the commencement of Mr Boardman's employment in August 2011. Mr Boardman informed me that three additions were made to his EA Agreement since then and he provided what he stated is the authority for these additions, though these have not formally been written into his EA:

- inclusion of three Grace Days that are granted to all staff between Christmas and New Year (omitted in error) - In-confidence Minute 18 January 2012
- inclusion of Income Protection Insurance (omitted in the original contract in error) - Letter for Mayor 27 June 2012

⁵ Mr Coombe from Coombe Consulting has been the council's nominated facilitator since 2012-2013.

- agreement to permit Mr Boardman to work additional days on weekends/public holidays for the purpose of enabling him to address workload commitments and to visit his family if required - In-confidence council resolution 29 January 2014.

16. In January 2018, former local MP Mr Michael Pengilly (now the newly elected Mayor of the council) lodged a Freedom of Information (FOI) 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 payment. 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.
17. On 25 January 2018 in an effort to explain his salary arrangements to the council, 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 by bank transfer 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
Total	161	-79	-78

18. The briefing paper sought to explain how much TOIL Mr Boardman had accrued and how it came to be that the TOIL was paid out on six occasions:

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.

19. 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.

20. Further questions on notice were raised by elected members at 13 February 2018 meeting and the 13 March 2018 meeting.
21. Mr Boardman has informed me that the last day of work he completed outside of regular working hours was 15 April 2018. All accrued days as of that time have been exchanged for additional leave. He therefore did not continue to complete the record, working additional hours, accruing TOIL and the opportunity to convert the TOIL into payments.

Additional council funds for Airport Security and Landscaping

22. In relation to the Kangaroo Island Airport (**KI Airport**) it is alleged that Mr Boardman authorised funds to be removed from the council budget to pay for security training and landscaping to distract attention from the overspend on the KI Airport.
23. The Kangaroo Island Airport Upgrade Project (**the airport project**) is an \$18 million project funded by \$9 million each from State and Federal governments. However the day to day operational responsibility for management of the airport project belongs to the council and is budgeted for under normal council budgeting processes. I have been informed by Mr Boardman that the council provided a \$5 million Cash Advance Debenture Facility to cash flow the project.
24. It is not disputed that the airport project has run significantly over budget due to the voluntary liquidation of the crushing contractor, NBS Specialised Crushing (**NBS**) in February 2017. The council is currently seeking alternative sources of funding to cover the overspend but resolved to financially underpin the project to the \$1.5 million level pending detailed reports as to future funding options.⁶
25. The security equipment for the airport has been funded by the airport project and involved acquiring, installing and commissioning specialised air passenger and baggage security equipment that is compliant with the appropriate guidelines. This equipment cost \$240,431. In order to operate the security equipment, six officers were required to be trained, become competent and then be supervised. Employment and training of these staff is the council's obligation as the screening service provider. Training of these staff was conducted from the council's training budget and approved as part of the 2017-2018 Annual Business Plan and Budget approval process.
26. The landscaping of the airport terminal upgrade was originally to be undertaken by the principal contractor of the terminal, Mossop Construction. However, due to the cost over-run (caused by the collapse of NBS) it was determined that council could reduce costs by undertaking the "soft" elements including supplying and maintaining plants, planting beds, irrigation, turf, furniture, etc itself. The Project Control Board (**PCB**)⁷ on the airport project made this decision. Mossop Construction therefore provided a credit of \$161,514 to the council, and Mr Boardman 'recast the budget' for \$85,000 to be spent on the "soft" landscaping works.
27. Mr Boardman informed me that no funds have been removed from the council's own funds for airport security nor landscaping of the airport terminal.

⁶ Council resolution on 14 March 2017, at item 18.2

⁷ Members of the PCB include Mr Boardman, and two representatives from the Department of Planning, Transport and Infrastructure, Mr Jon Whelan (General Manager Infrastructure Delivery) and Mr Don Hogben (General Manager Intergovernmental Relations).

Travel expenses for onward travel

28. The referral alleged that Mr Boardman frequently claimed payment for flights from Kangaroo Island to Adelaide when he was flying onwards interstate to visit family, and claimed accommodation in Adelaide on 27 December 2017 when he had an early flight interstate to visit family the next morning.
29. All flights, accommodation, meals and out of pocket travel expenses are managed by council administration. Mr Boardman informed my investigation that he utilises a council credit card and the majority of the above expenses are paid for using the credit card and reconciled by council administration.
30. In each month's council Agenda Mr Boardman included a diary that detailed where he worked each day, all meetings and the subject matter of the meeting. Mr Boardman reviewed all travel records and informed me that council paid for him to leave Kangaroo Island if he was to attend meetings in Adelaide. On dates where he travelled without meetings, the travel costs were paid for by Mr Boardman personally.
31. Mr Boardman denies the allegation and informed my investigation that he did not claim reimbursement of flights from Kangaroo Island to Adelaide when flying onwards with no council business conducted either on the journey out (Kangaroo Island to Adelaide) or the return journey (Adelaide to Kangaroo Island).

Mr Boardman informed my investigation that he was in Adelaide on 27 December 2017 at his own expense travelling to Brisbane, then Townsville and did not claim accommodation expenses from the council for that night.

Use of council resources for repairs to Mr Boardman's personal motorcycle

32. Mr Boardman owned a motorcycle at the relevant time. It is alleged that Mr Boardman utilized council resources including the council's workshop, tools and the services of the council's mechanic to work on his privately owned motorcycle.
33. Mr Boardman denies the allegation and informed my investigation that he utilised the council's workshop and tools legitimately in accordance with the council's policies and procedures.

Relevant law

34. 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.

35. 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.

36. Section 99(1) of the *Local Government Act 1999* (SA) provides:

99-Role of chief executive officer

- (1) The functions of the chief executive officer include-
 - (a)- (f) ...
 - (g) to ensure that the assets and resources of the council are properly managed and maintained
 - (h) ...
 - (i) to give effect to the principles of human resource management prescribed by this Act and to apply proper management practices
 - (j) ...

37. Section 110 of the Local Government Act provides:

110- Code of conduct for employees

- (1) The Governor may, by regulation, prescribe a code of conduct to be observed by the employees of all councils
- (2) The Minister must consult with any registered association that represents the interests of employees of councils before the regulation is made
- (3) A code of conduct must not diminish a right or employment condition under an Act, award, industrial agreement or contract of employment
- (4) Council employees must observe the code of conduct
- (5) Contravention of or failure to comply with the code of conduct constitutes a ground for suspending, dismissing or taking other disciplinary action against the employee.

38. Relevant clauses of the Code of Conduct for Council Employees provide:

2.4 Act in a way that generates community trust and confidence in the Council.

2.23 Council employees must not use Council resources, including the services of Council staff, for private purposes, unless legally or properly authorised to do so, and payments are made where appropriate

2.24 Council employees must not use public funds or resources in a manner that is irregular or unauthorised

2.26 Chief Executive Officers must act in accordance with the provisions specific to their position within the *Local Government Act 1999* at all times.

Whether Mr Boardman's arrangement whereby he was permitted to receive Time Off in Lieu for additional hours worked and have that converted to financial payment amounted to maladministration in public administration

39. Section 5(4)(a) of the ICAC Act relevantly 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
40. Firstly, I have not considered section 5(4)(a)(ii) as I consider section 5(4)(a)(i) to be the most relevant to the allegations which, in my view, do not suggest mismanagement in the performance of Mr Boardman's official functions as Chief Executive Officer.
41. Mr Boardman informed my investigation that it was his suggestion to Mayor Clements that the additional hours worked pursuant to the council resolution of 29 January 2014 could be paid financially (by bank transfer with his salary on specific occasion) to enable him not to be absent from the workplace for a long period of time. Mayor Clements was in agreement with this approach.
42. It is alleged that Mr Boardman received payment in excess of \$20,000 for 300 hours of additional hours worked as a payment of TOIL that was not permitted in his EA agreement. My investigation found that Mr Boardman received six payments totalling \$57,701.33 and taken 82 days TOIL for working the equivalent of 161 days in addition to his normal working hours.
43. Mr Boardman denies the allegations and informed me that:
- both TOIL and payments for excessive hours worked were agreed to by the council by virtue of the resolution on 29 January 2014 at item 3.5
 - whilst the resolution is not specific that particular additional days worked may be compensated by either taken as TOIL or paid in lieu of TOIL, the council showed a 'resolution/ commitment' that additional compensation is made for additional days worked
 - this arrangement was reviewed by Mayor Clements whenever Mr Boardman submitted a leave application (with relevant excerpts from the record attached)
 - his employment contract did not specifically prohibit the ability for Mr Boardman to claim TOIL or payments
 - he received payments of \$57,701.33 in lieu of leave from January 2014 to December 2017
 - he took 79 days of TOIL from January 2014 to December 2017, and a further 3 days in 2018, totalling 82 days
 - he worked an additional 161 days to his usual working hours
 - at the time of Mr Boardman's response, a new draft EA was being circulated amongst the panel which incorporated the spirit of the council resolution into the EA which has been provided to me. The new draft EA included the following:
- 5.3. The Employee role expects a large degree of self-management and there will be times where the Employee may be required to work a proportion of their time outside of the normal work environment e.g. at home, at another Council facility, within the state or interstate. Working outside of the normal working environment should be carried out in consultation with the Council and all parties will assess the safety of this environment and agree on any formal allocation of time that is to be worked outside of the normal place of work.
- 5.4. Working hours are notionally Monday to Friday between 0700 - 1700. This role anticipates that attendance at out of hours meetings / events / incidents may be required

and there is an expectation that this will be reasonably managed by the Employee in conjunction with the Council.

5.4.1 Flexibility to accommodate variations in working hours with personal requirements is expected. Out of hours' access to the workplace is permitted and will include remote access to Council business management systems.

5.4.2 There is an expectation that hours worked by the Employee is managed by the Employee ensuring a safe work / life balance.

5.5. Council will not remunerate the Employee for working additional hours outside of those identified in clause 5.4 unless specifically agreed to on a case by case basis.

5.6. The Employee is not entitled to "time off in lieu of time worked" unless the written authorisation is obtained from the Council.

5.6.1. Any variances to time in lieu arrangements will be identified in **Schedule 3**

...

9.4. The Employee agrees that the TEC Package provided for in this Agreement is offered as full compensation for all work performed, which takes into account:

9.4.1. any entitlement to leave loading, overtime loading, weekend or public holiday loading or any other form of salary loading;

9.4.2. any service by way of overtime, rostered days off or for attendance at meetings or functions outside the Council's usual office hours;

9.4.3. any entitlement to formal rostered days off;

9.4.4. an acknowledgement that the position is measured on performance and not on the number of hours worked;

44. In response to my provisional report, Mr Boardman stated:

Noting that a new Contract of Employment is not in place and technically I am informed that the old Contract expired on 14 August 2013 after the two year term and therefore I am without Contract. Council did resolve annually to extend my EA by 12 months fundamentally providing a rolling two year agreement and has expressed their willingness to employ me through this period. The changes to working arrangements confirmed on 29 January 2014 permitted me to work additional days over and above the standard 5 day working week to address various Council matters that were over and above the volume that could reasonably be expected of the CEO. These days were to be accrued and utilized as additional days leave when visiting family in Brisbane. That was the intent of the decision of Council and I and it has been honoured. When the taking [sic] additional days did not keep pace with the accrual then Council's liability for days rose to the point where discharge was only possible through either taking the days in a lump (not practical at the time due to workload) or payment to reduce the liability. Irrespective of how this was achieved, there was a liability for compensation for the additional days worked.

45. In order to be clear, I consider that the allegations relate to the following types of conduct by Mr Boardman:

- submitting leave forms that included requests for TOIL
- submitting leave forms that included requests to convert his accumulated TOIL for financial payment
- receiving TOIL
- receiving financial payments for TOIL
- suggesting to and obtaining approval from Mayor Clements (who had the role of authorising his leave applications) that he may be able to be paid for TOIL financially rather than taking the leave.

Irregular use of public money

46. I have firstly considered whether Mr Boardman's conduct resulted in an irregular and unauthorised use of public money. The six payments were made to Mr Boardman between 4 May 2015 and 19 December 2017. I accept that the TOIL and payments to Mr Boardman were arguably regular in the sense that they 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 the work he undertook, and when. That said, whilst I accept that Mr Boardman worked additional hours and on the weekend there is no external way of verifying whether the record of those hours are correct.

47. 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 this⁸.

48. In my view this system whereby Mr Boardman recorded his own overtime and submitted them to Mayor Clements when he wanted to take TOIL or convert TOIL to a payment was open to being abused given the lack of meaningful oversight. I maintain that it was Mr Boardman's decision alone when to submit his leave applications seeking TOIL for additional hours (or days) worked. Whilst the accrued total was always visible for Mayor Clements to see, it was Mr Boardman who determined when he wished to "cash in" those days.

49. Mr Boardman provided me with his annual performance and salary reviews completed by Mr John Coombe from John Coombe Consulting, as a demonstration of independent oversight. Mr Coombe also had the role of independent facilitator on the PRP. I have read these reviews and consider that they primarily concern agreeing the council's Key Performance Indicators (KPI's), and measuring Mr Boardman's performance against these. Whilst I acknowledge that Mr Boardman performed well against the council's KPI's, it does not, in my view, demonstrate meaningful oversight by Mr Coombe, or anyone else, in relation to his TOIL arrangement.

50. In relation to my view that the TOIL arrangement between Mr Boardman and the Mayor was open to being abused because it had no meaningful oversight, Mr Boardman disagreed and stated:

As CEO of this organization I am expected to lead by example and the volume of information openly provided around these matters would indicate to a reasonable degree that I manage with integrity and that the records of works undertaken are true and accurate records. Given that these days were outside of normal working days whom would be expected to be on hand to validate entry/ exit and time worked?
The Mayor, Elected Members and Staff were recipients of emails and witness to work carried out on these days and they raised no concerns over the veracity of whether work was conducted or not. PRP members raised concerns that I was potentially working too hard and I provided reassurances that I was happy with the situation. There are clear records of times when I did take off full weekends and/ or public holidays to provide a suitable break from work.⁹

⁸ Email from Mr Boardman to my Officer, 26 June 2018.

⁹ Letter from Mr Boardman to the Ombudsman, 16 January 2019, page 6.

51. Mr Boardman's comments do not alter my view because it was:
- the terms of the TOIL arrangement (whereby Mr Boardman received monetary payment for hours or days worked) that was determined entirely by Mr Boardman and the Mayor
 - Mr Boardman alone recording that he completed the hours he did
 - Mr Boardman alone who determined when it was time for him to "cash in" his additional hours worked.

52. Mr Boardman informed me how he defined 'additional work' in his letter to me dated 13 April 2018:

4. What hours are considered additional to your normal workload?

Answer

The Contract makes no mention of specific hours of work. I consider that any additional days worked on either weekends or public holidays are considered additional to my normal workload. I note that email/ phone/ daily diary records (published in Council Agenda's each month) demonstrate that I work additional hours over and above my standard 50 hour (typically 0715-1800 daily, M-F - minimum 10 hr days, working lunch) working week on a regular basis including weekends and public holidays without claim. On top of this are after-hours meetings in evening /weekend/ community events etc. This is part of the role and accepted as appropriately compensated through the salary package as originally negotiated.

53. In relation to the concept of a CEO working additional hours Mr Boardman stated:

There is no debate that the role requires additional hours and that those may be generally considered to be after work - this has been honoured throughout my employment as CEO - and acknowledged by PRP, Council, Staff and the Community. Additional days worked are another issue and the intent of the 29 January 2014 Report and subsequent acknowledgment by resolution of Council of the changed working arrangements was for additional days - over and above those expected by Contract - were agreed (by both parties) to be worked and compensation made for them. Again no attempt has been made by your Officer to validate with the PRP of the time (sic) the intent and understanding of these changes to working arrangements.

54. In my view, the resolution of 29 January 2014 was not to compensate Mr Boardman for additional hours or days worked, but to provide flexibility as to his arrangement. It does not matter what understanding the PRP had at that time, given that Mr Boardman's EA clearly prohibited overtime and the EA was never amended by the council to reflect any new arrangement it may have come to.

55. On balance I consider that the provision of TOIL both in the amount of leave and in payment from the council to Mr Boardman was irregular for the following reasons:
- it was not envisaged or authorised by Mr Boardman's EA or the council's motion (as discussed later in this report)
 - it is not the accepted or usual practice that council's Chief Executive Officers receive TOIL or financial payment for additional hours or days worked because it is understood that their remuneration adequately makes provision for this
 - the concept of 'additional hours' is arbitrary when considering the role of Chief Executive Officers ordinarily involves after hours work
 - there is no nominal difference between additional hours and days worked. Whilst I acknowledge that "days" rather than unlimited hours may be easier to track, ultimately nothing turns on this distinction
 - there was no meaningful oversight as to what is considered 'additional', it was entirely dependent on Mr Boardman's own view or opinion, i.e. the arrangement

is completely unregulated, despite some council members or employees having been aware of it

- It was Mr Boardman alone who determined when he wanted to 'cash' the additional hours in when submitting leave application/s to Mayor Clements. Prior to that time no one knew when or how much money would be spent from council resources to pay Mr Boardman for his additional hours worked. Mr Boardman disputed this assertion and stated that his accrued hours was visible on every leave application made to the Mayor, and that when the accrued hours reached double figures and did not decrease over the next period of time he raised it with the Mayor. Mr Boardman asserted that the additional payments did not affect council budget lines. Whilst I accept that the Mayor had access to a record of the accrued hours it was Mr Boardman who determined when he wanted to receive payment for the hours worked and how many hours he wanted to receive payment for.
- there was no regularity in terms of when payments were made or how much they were for.

Unauthorised use of public money

56. In order for Mr Boardman's conduct to be considered maladministration pursuant to section 5(4)(a)(i) of the ICAC Act Mr Boardman's conduct has to have resulted in both irregular and unauthorised expenditure.

57. As to whether the relevant 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 on 29 January 2014. Mayor Clements informed me:

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.

Mr Boardman's original contract states that TOIL was not permissible however this was superseded by the resolution of Council on the 29th January 2014 to vary this arrangement.

58. It is to be noted that it was the former Mayor, Jayne Bates who signed the first eleven applications for leave between January and November 2014, prior to Mayor Clements become Mayor.

59. When my Officer asked Mayor Clements whether anyone else approved granting payments of TOIL or additional monetary payments Mayor Clements informed me:

Not to my knowledge. My understanding is that the Mayor can only approve payments to the CEO.

60. Mayor Clements further stated:

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 centered 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 CEO without having to engage the services of a separate consultant or additional employee. In 2014 the Kangaroo Island Council deliberately embarked on a strategy to lift its revenue base by its involvement in significant projects intended to deliver income streams to make up for its low ratepayer base. These projects would ordinarily have cost Council a significant sum of money through the engagement of specialist consultants. At a rate of \$800-1200 per day for consultants I consider that Council has recovered exceptional value for money by sweating the abilities and willingness of Mr Boardman.

Mr Boardman provided me with an application for each and every leave event following discussion with him on the nature of the leave.

Additional payment for hours worked was authorized(sic) by me for the reasons previously stated.

61. The LGA has provided guidance in relation to the employment agreement of Chief Executive Officers and the role of the council in its 2010 resource paper 'Role of Council Members and Chief Executive Officers in Local Government':

In circumstances where agreements do cover Chief Executive Officers and senior executive staff the Chief Executive Officer does not have the same powers to agree to the terms and conditions of an enterprise agreement that will benefit him/her. In these circumstances, the Council must authorise the agreement. In fulfilling this role the Council may obtain its own independent advice or may act in the matter itself or through a committee of Council Members. However, the extent of its consideration of the agreement should be confined to:

- quantum increases relevant to budget allocations
- matters related to the Chief Executive Officer's terms and conditions of employment
- terms and conditions of employment relevant to a Deputy Chief Executive Officer or senior executive staff

Where the Chief Executive Officer is a party to a Council Enterprise Bargaining Agreement he/she will have a conflict of interest in relation to the conduct and outcomes of the relevant negotiations between staff and the Council sufficient to raise concerns about the Chief Executive Officer's ability to impartially represent the Council's interests in those negotiations.

The Chief Executive Officer must disclose his/her interest to the Council pursuant to section 120 of the Act however the Council can resolve at a Council meeting that is open to the public that the Chief Executive Officer is authorised to act in the matter notwithstanding his/her interest. Where the Chief Executive Officer is not party to the Enterprise Bargaining Agreement these same concerns do not arise and the Chief Executive Officer may properly conduct negotiations and certify the Enterprise Bargaining Agreement within the financial parameters (ie the salaries and wages budget) set by the Council.

62. Mr Boardman has referred me to the decision of *Hand v DC Barunga West* 2013 SASC 182 where the Court determined that CEO's are award free. Mr Boardman alleges this makes the above advice from the LGA redundant as it was developed on the basis that CEO's were covered by the SA Municipal Salaried Officers Award. Regardless, in my view, any arrangement that altered Mr Boardman's employment ought to have been reflected in his EA.
63. It is of concern that Mr Boardman and Mayor Clements determined the informal arrangements of Mr Boardman's contract. While Mr Boardman could negotiate the terms of his EA, the final decisions should have been the council's, and there would be a clear conflict in Mr Boardman having an active role in the council's decision. Whilst Mr Boardman argues that the resolution was voted on by the council in January 2014, there was no subsequent council approval for the arrangement that Mayor Clements and Mr Boardman were utilizing that went beyond, and differed from the council resolution.

64. In my view:
- the EA clearly prohibited remuneration for overtime
 - while it appeared that Mr Boardman was attempting to negotiate an EA that allowed for the arrangements, no such EA was formally approved at the relevant time
 - the 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 him to visit family, as Mr Boardman has informed me, on the fourth weekend of the month.
65. In my view there is a significant difference between the EA and the wording of the council resolution, and Mr Boardman's employment arrangement at the relevant time. It is difficult to understand why Mr Boardman interpreted the effect of the resolution as he did. I also consider it inappropriate for Mr Boardman to attempt to vary the EA without meaningful oversight by the panel. However I accept Mr Boardman's argument that he was not attempting to vary the EA in an underhanded manner, and that he delivered the revised draft EA to the PRP on more than one occasion for their consideration, also suggesting to Mr Coombe that the council seek external legal advice on the changes to his EA.
66. In response to my provisional report, Mr Boardman stated:
- [...] I believe that the additional information provided demonstrates that the contract was amended to allow a change in work practices with regards to the ability to work additional days, on those not normally considered working days (being weekend/public holidays) to accrue a liability to Council for compensation - originally intended to be taken as paid leave when visiting my family in Brisbane.
- This amended arrangement existed and created a liability to Council in the form of accrued days that required compensation either by leave or by payment. In discussion with the Mayor, it was determined that payment was an acceptable alternate means of decreasing the liability. It is accepted that, in administrative terms, the Mayor and I should have presented this issue to the Performance Review Panel for their discussion and for them to then take a report and recommendation to Council for direction. This would have been prudent and best practice but did not happen. This is a failure in the exercise of good administrative practice but does not constitute maladministration, misconduct or acting contrary to the law.
67. I disagree with Mr Boardman's view expressed above that the EA had been amended by the resolution. My view is that unless and until any amendments were approved by the council, the EA had not been amended. I further note that in an email dated 26 March 2016 from Mr Boardman to Mr Coombe regarding his performance review at that time which recommended that Mr Boardman's EA be reviewed, Mr Boardman appeared to acknowledge that the resolution was not incorporated in the EA:
- I have attached my original contract and note that there was one addition to this by Council resolution (18 January 2012) and that is to add the provision of the three Grace Days to be taken between Xmas and New Year. There is a separate resolution of Council to allow me to collect TOIL through working weekends to assist me to manage the issue of my kids being up in BNE - this is not contractual and exists as long as it works for Council and I.¹⁰
68. This email, in my view, appears inconsistent with Mr Boardman's previous argument that he did not have a current EA because it expired on 1 August 2013.

¹⁰ Email from Mr Andrew Boardman to Mr John Coombe (copied in to Mr Ted Botham, Mr Boardman's personal assistance and Mayor Clements, 26 March 2016.

69. I consider that, as far as Mr Boardman was concerned, the financial 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, on behalf of the council to sign off on Mr Boardman's leave applications to enable him to receive 82 days TOIL and \$57,701.33 financial payment for additional hours worked. Any changes regarding the provision of overtime should have been annexed to Schedule 4 of Mr Boardman's EA, as set out in clause 9.2 of his EA and approved by the council upon recommendation of the PRP.
70. In his response to my provisional report dated 7 February 2019, Mr Boardman submitted that:
- in their roles as Presiding Members, both Mayor Clements and the previous Mayor Jayne Bates OAM, were 'agents' of the council in being part of the CEO Review Panel and had 'apparent authority' to uphold council resolutions
 - in approving leave and payment in lieu, both Mayors did no more than discharge their duties as resolved by the council
 - the council's Mayor had 'ostensible authority' to approve day to day matters concerning the Chief Executive Officer (such as leave) and this practice was in 'common acceptance' by the council.

71. Mr Boardman also stated:

- I had a clear understanding of the intent of the resolution of Council;
- and that this intent had been confirmed as part of a successful review process checking on the suitability of the changed working arrangement for both parties
- and that there was established consistent management practice for management of the leave process that did not change from the process prior to the change
- and that I had reasonable expectation, as an Employee, that the Mayor (as Presiding Member of both Council and Review Panel, had the ostensible authority to approve transaction processing
- and that I played no part in the approval or payment process after raising a leave requisition (thus not presenting any form of personal direction / interference / influence in the process)
- and that I had seen full Council consider a detailed response in the June 2014 Meeting with no issue, therefore acknowledging understanding of the resolution, its enactment and the delegation of responsibility to the CEO Review Panel and its Presiding Member for the historical authorisation and therefore future authorisation of the transactions

then it is difficult to assimilate that you have determined that it is I who have committed maladministration and by association misconduct and by association acted contrary to the law.

This would not pass the Pub Test.

Assuming that it is accepted that the working arrangements had been altered by mutual agreement and authorised by Council resolution, then Council had accepted that it was prepared to accrue a liability to the CEO for additional days worked on those days considered normal non-working days (weekends / public holidays). This was a liability that initially was accepted to be discharged through the taking of leave. This was the way forward from January 2014 to May 2015.

Had I resigned and left the employ of Council at any point during this time then Council would have had to discharge the liability by payment. This was confirmed with Legal Advice from KelledyJones in March 2018 (email attached in submission 2). Therefore when the issue of significant accrued days was raised with the Mayor at this time, he believed that he held the ostensible authority of Council to discharge that liability by payment rather than insisting on me taking the leave (no difference in financial impact to Council). I did originally

suggest to Mayor Clements that a resolution of Council to do this might be prudent; he demurred and, as I believed that he held the ostensible authority of Council to make this decision and the fact that the sums involved in discharging the leave liability were not material to the approved budget, I saw no reason to challenge his determination that a Council-resolution was not required.

As explained in previous submissions this was a very busy time for Council and there was no practical means of me either taking the leave OR stopping working the additional days, as workload simply would not have permitted this. Employing a Consultant of sufficient seniority, capability, with sufficient situational-awareness was simply not an option (financially or practically). The work being undertaken required delegated financial authority of Council and this could not have been provided to an external consultant. Timing and complexity of this was such that having someone else do it, then me review it, understand it and then approve it would simply add to my overall workload not reduce it. These economics had been discussed with the Panel and it was agreed that we continue provided that I was sensible and maintained a suitable work / life balance (sensible for me) then Council was getting substantial benefit from the additional work and cost. Again if the investigator had spoken with all members of the two panels concerned in this process, then this would have become completely apparent. Again reading of the formal Annual CEO Performance Review Reports (supplied in submission 1), it is completely apparent that the majority of Council concurred with the value, formally considering that they resolved I had performed above expectations for 2013-14 FY onwards, up to and including my recent review in September 2018 for FY 2017-18 – five straight years of *above expectation* performance.

72. In his response to my provisional report dated 16 January 2019, Mr Boardman stated that the ‘majority of Elected Members were not *unaware* of the arrangements’ and that all knew “I was working additional days on weekends and that an agreement for change of work arrangement was in place.”¹¹ I note that Mr Boardman does not state that elected members were aware that he was receiving payments in addition to his salary for those additional hours worked. The information provided to my Office appears to contradict Mr Boardman’s assertion. Mr Boardman also asserts that it was not his responsibility to inform the council and that they would have been informed had a revised contract been provided to them for their approval. I agree with the assertion that it was the council’s responsibility to inform its members and obtain their approval.
73. In his response to my provisional report dated 28 January 2019, Mr Boardman disputed that the arrangements were ‘informal’, that the current contract had not been amended or that the Elected Members were unaware of the arrangement. Mr Boardman raised the following points:
- the Performance Review Panel met several times to review progress from the meeting of 29 January 2014, which included acknowledgment of the changes to work practices and discussed drafting of a new contract
 - the council was appraised of the changed working arrangements via a Question on Notice from Cr Walkom which were answered in the 11 June 2014 Meeting Agenda:

Question 1

In accordance with the current employment contract (as amended) what are the CEO’s leave entitlements?

Answer

20 days annual leave
3 grace days

Question 2

What are the dates on which leave have been taken to date?

¹¹ Letter from Mr Boardman to the Ombudsman, 16 January 2019, p11.

Answer

Days taken since August 2013
 19-30 August 2013 - 10 days taken
 6, 9, 10 December 2013 - 3 days taken
 6-10 January 2014 - 4 days taken

Additional days worked

18, 27 January	(27 Australia Day Public Holiday)
1,8,22 February	(all Saturdays)
1, 9, 10, 22, 23, 29 March	(10 Adelaide Cup - Public Holiday)
6, 18, 19, 21, 25, 26 April	(18,21 Easter Public Holidays)
17, 18, 24, 31 May	(Sat/ Sun)
1 June	(Sun)

Days Taken since 10 January 2014

14, 17 February
 13, 14, 17 March
 11, 14, 15, 30 April
 1, 2 & 5-9 May

Accrued Leave as of 22 May 2014 - 11.2 days

Question 3

Has Council agreed to any variation to these leave entitlements?

Answer

Council have been informed via a report from Mr. John Coombe and the CEO Review Panel (Special Council Meeting 29 January 2014) that a trial was to be instigated from January 2014 onwards whereby the CEO would work additional days on weekends/ public holidays and then utilize these days in the form of long weekend visits to his family in Brisbane. This report was received for information by Council with no comment reported.

Question 4

Has the CEO been given any formal advice that it is acceptable to Council to take additional leave?

Answer

The CEO has not been notified by the CEO Review Panel that Council raised any issues with regards to this matter. The trial was determined as being successful from both party's perspectives when reviewed in mid-February and that it should continue.

- the arrangements were not raised again by any council member until early 2018 and the Elected Members' consideration of the issues demonstrate that the majority of Elected Members were aware of the arrangements and accepted them.

74. Mr Boardman stated:

Given that the contract was amended by the Council and that those changes and their enactment had been reviewed by the Panel (Feb 2014) and reported to the same Council (11 June 2014) then it is not fair or reasonable to suggested that I am at fault for their enactment and that this constituted maladministration [...] and misconduct/acting contrary to the law [...]

75. Mr Boardman further asserts that he obtained legal advice from Kelledy Jones which supported his view that his EA was amended by the council resolution on 29 January 2014 and provided me with advice from Mr Chris Morley dated 7 March 2018. However, I note that while the legal advice considered that payment for additional days worked

was valid, it also stated that it was unfortunate that the information contained in the resolution never was included in the EA (even as an addendum), that it would have been preferable to have any change of arrangement form part of a formal written variation of the EA and, importantly, that the TOIL and additional payments were not envisaged by resolution.¹² In my view this advice does not support Mr Boardman's proposition that his EA was amended by the resolution to allow TOIL and additional payments.

76. Regardless, as previously expressed, I disagree with the assertion that the resolution amended Mr Boardman's EA.
77. Having carefully considered all of Mr Boardman's submissions on my provisional report, my view is:
- while the Mayor and members of the PRP may have had apparent authority to uphold council resolutions, the resolution did not, in my view, authorize TOIL or payment for extra days worked
 - neither the Mayor nor other members of the PRP had authority to vary Mr Boardman's EA and I do not accept Mr Boardman's submission that being on the PRP meant that they were 'agents' in the sense that they could vary his EA without resolution of the council
 - there is no evidence that the EA was formally varied
 - the fact that Mayor Clements had authority to approve leave generally did not mean that he could approve leave other than allowed for by the EA or council resolution or otherwise alter leave arrangements
 - the fact that some or all of the Elected Members may have had some knowledge that the arrangements were continuing does not amount to those arrangements being authorised by resolution of the council
 - little turns on the fact that TOIL and payment was claimed for extra days worked, as opposed to extra hours
 - in determining whether the payments were irregular and unauthorized, little turns on the fact that the council would have had to pay a consultant more to the extra work
 - while Mr Boardman has suggested that I need to interview members of the council and the PRP to confirm what their understanding was, in my view, regardless of anyone's understanding at the time, the fact remains that I have not been provided with any resolution of the council or council-approved amended EA which authorised TOIL and payment for accrued days worked and therefore interviewing these people is unnecessary for the purposes of my investigation.
78. 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's resolution and are 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 financial payments for additional hours worked.
79. I therefore consider that Mr Boardman committed maladministration in public administration within the meaning of section 5(4)(a)(i) of the ICAC Act.

¹² Email from Mr Chris Morley, Kelledy Jones to Mr Andrew Boardman, 7 March 2018.

Substantial mismanagement of public resources

80. I have also considered whether Mr Boardman's conduct in applying for and receiving TOIL and financial payment has resulted in a substantial mismanagement of public resources (section 5(4)(a)(i)).
81. 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 therefore consider that a failure to properly monitor extra hours worked could be a mismanagement of human resources by giving rise to Occupational Health and Safety concerns.
82. In response to my provisional report, Mr Boardman stated:
- The suggestion that the accrued days records was [sic] not being monitored by the Mayor/PRP and that it was an open-ended arrangement managed for my personal benefit is not correct. The CEO role is substantially a self-driving/determining role and Council places significant trust in the CEO to deliver resolved organizational outcomes. These have been achieved and the records of Performance Assessment confirm that the majority of Council believed that I have consistently performed above expectations. The PRP did raise concerns over workload undertaken and were reassured by the CEO that this was being managed by him appropriately. The varied nature of days worked and not worked on weekends/public holidays bears testament to the fact that where I felt that I needed a break, I took one.
83. Having considered that response, my view remains that the arrangement could give rise to Occupational Health and Safety concerns. I do not express a view as to whether it gave rise to such concerns in relation to Mr Boardman.
84. I now need to determine whether public resources were mismanaged by Mr Boardman. In my view Mr Boardman's conduct in applying for and receiving TOIL and financial payment for additional hours worked has 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 current EA
 - no other employee has the benefit of converting their TOIL to a financial payment or accumulating unlimited TOIL
 - there was no meaningful oversight of 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 (only references)
 - it is clear from the FOI application and subsequent council meetings that not all current elected members were aware of Mr Boardman's arrangement with respect to receiving TOIL and being paid for additional hours worked (although Mr Boardman has informed me that information was provided to the then council members in 11 June 2014 via questions on notice that appear in the minutes, which I have quoted earlier in this report)
 - Mr Boardman has been paid \$57,701.33(gross) and taken 82 days TOIL leave which, in my view, were not authorised by the council or Mr Boardman's EA
 - the amount of money and time paid to Mr Boardman for his additional services are significant amounts for the council to expend.

85. 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. Mayor Clements and Mr Boardman have not provided my investigation with any evidence to support that contention.

86. In his response to my provisional report, Mr Boardman stated:

With regards to claims of financial mismanagement, the payments made to me for the additional days worked were able to be covered within the budget allocations each year and were of a quantum that is within the CEO's authority to expend, with external authorization of the Mayor in this instance. Through careful management this Council has delivered better than budget performance in terms of cost management and revenue generation consistently since 2011-12 and the four additional payments did not impact the Council's financial performance. Given my "rolled up" gross rate equates to just under \$1000/day, it has been suggested that the cost to Council to have employed a Consultant of sufficient capability would be far in excess of this daily cost, before disbursements for travel to/from Island, on-Island accommodation etc are applied. Council use the services of an ex-Local Government CEO on a regular basis to provide expertise in the area of Development Services and to provide additional support for Special Projects. His base rate is \$1,860 per day.

It is accepted that it would have been prudent and best practice to have taken the matter of accrued days to the Panel and for the Panel to have delivered a report with recommendation to Council for payment to reduce the accrued liability. In this respect I would accept that I have not ensured that Council has followed best administrative practice but this is a long way short of personal and deliberate maladministration and misconduct as is being currently suggested.

87. 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 Mr Boardman and Mayor Clements have purportedly varied Mr Boardman's contract without council's authorisation. Nor has there been any meaningful regulation or oversight of the special allowances made to Mr Boardman by the PRP. I consider that Mr Boardman and Mayor Clements were operating on a false premise that Mr Boardman's overtime was benefitting the council more than it was benefitting Mr Boardman.

88. 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 Mr Boardman Act committed maladministration in public administration for the purposes of section 5(4)(a)(i) of the ICAC Act.

Whether Mr Boardman by receiving Time Off in Lieu for additional hours worked and having that converted to financial payments, breached the Code of Conduct for Council Employees and thereby committed misconduct in public administration

Whether Mr Boardman by receiving Time Off in Lieu for additional hours worked and having that converted to financial payments breached the Code of Conduct for Council Employees and section 110 of the Local Government Act 1999 (SA) and appeared to act contrary to law within the meaning of the Ombudsman Act

89. Section 5(3) of the ICAC Act defines misconduct as:
- (a) 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.
90. Therefore in order to determine whether Mr Boardman has committed misconduct in public administration, I need to determine whether Mr Boardman's conduct was in breach of the relevant provisions of the Code (section 5(3)(a) of the ICAC Act), or if not, whether Mr Boardman committed other misconduct while acting in his capacity as a public officer (section 5(3)(b) of the ICAC Act).
91. As a council CEO, Mr Boardman is a public officer and the conduct relevant to this issue is the submitting of leave application forms to Mayor Clements that, on occasion, additionally sought to claim TOIL and/or financial payment for additional hours worked, and taking the TOIL and receiving financial payments.
92. The relevant clauses of the Code are set out below. A breach of Part 2 of the Code can constitute grounds for disciplinary action, including dismissal of the employee under section 110(5) of the Local Government Act:
- clause 2.4 which requires council employees to act in a way that generates trust and confidence in the council
 - clause 2.24 which states that council employees must not use public funds or resources in a manner that is irregular or unauthorised
 - clause 2.26 which states that Mr Boardman must act in accordance with the provisions specific to their position within the Local Government Act.
93. In relation to clause 2.4, from the information provided to me, I accept that Mr Boardman:
- has been transparent to the council in terms of the additional hours worked, publishing his diary as a standing item in the council agenda for its monthly meetings
 - does not appear to have acted deliberately in relation to possible breaches of his employment conditions
 - has openly provided explanations, when asked by elected members and the community, about his employment arrangements at the council meetings in January to March 2018.
94. However, his actions have resulted in a significant amount of public money paid to him without authority and without the knowledge of all elected members. I consider that the general public expect more from Mr Boardman and that Mr Boardman's conduct could erode public trust and confidence in the council. For these reasons, I consider that Mr Boardman has breached clause 2.4 of the Code.
95. I have already formed a view that Mr Boardman's conduct has resulted in public resources being used in a manner that is irregular and unauthorised. I therefore am of the view that Mr Boardman has breached clause 2.24 of the Code.

96. Section 99(1) of the Local Government Act sets out the role and function of Mr Boardman and includes:
- paragraph (g) to ensure that the assets and resources of the council are properly managed and maintained and
 - paragraph (i) to give effect to the principles of human resource management prescribed by the Local Government Act and to apply proper management practices.

I consider that Mr Boardman has not discharged these functions satisfactorily by mismanaging the council's resources which has resulted in the provision of financial payments and accruing TOIL, in my view, without authority. I therefore consider that Mr Boardman has breached clause 2.26 of the Code.

97. I therefore am of the view that Mr Boardman committed misconduct in public administration within the meaning of section 5(3)(a) of the ICAC Act.

Opinion

In light of the above, I consider that Mr Boardman breached the provisions of clauses 2.4, 2.24 and 2.26 of the Code of Conduct for Council Employees and section 110(4) of the Local Government Act and on that basis:

- (a) appears to have acted contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act, and
- (b) committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.

In view of my opinion in relation to section 25(1)(a) of the Ombudsman Act I recommend under section 25(2) of the Ombudsman Act that the council:

1. considers steps to require Mr Boardman pay back any financial payments (additional to Mr Boardman's salary) not made in accordance with his EA
2. review the approval process for Chief Executive Officer's leave so that it is transparent and leave is regularly reported to council

Whether the council's conduct in respect of its Chief Executive Officer's Performance Review Panel was wrong within the meaning of the Ombudsman Act

98. From the information provided to me, the council's PRP operates as follows:
- it has three members who are all elected members, one of whom is the Mayor and one of whom is nominated by the Chief Executive Officer
 - it meets twice a year, informally
 - no formal minutes were kept
 - it is unclear if the PRP has reported back to the council in relation to Mr Boardman's performance
 - Mr Boardman's EA at the relevant time was dated 25 July 2011
 - the council had no policies or procedures in relation to the Chief Executive Officer PRP.
99. In relation to performance reviewing Chief Executive Officers the LGA suggests contacting the Industrial Relations Advisory Service which provides the following services:
- council CEO and senior management performance reviews
 - in-house training to Elected Members on the conduct of a review for the Chief Executive Officer

- developing and assisting suitable key performance indicators for Chief Executive Officer
- reviewing and adjusting Chief Executive Officer position descriptions
- drafting new or reviewing current contracts of employment which may incorporate access to legal advice.

100. I do not consider that the current PRP arrangement provided meaningful, independent review of Mr Boardman's performance for the following reasons:

- the only members were from inside the council, one of whom was nominated by Mr Boardman with the exception of Mr Coombe as facilitator of the formal Annual Review Process
- there were no formal meetings nor minutes kept of the PRP, therefore no record of what was decided with Mr Boardman
- there were no formal reports back to the council about Mr Boardman's performance apart from those by Mr Coombe, whose role was to track Mr Boardman's performance against the council's KPI's
- Mr Boardman informed me that the PRP meetings were 'led' by him¹³, that is, he determined when a meeting ought to be held to discuss matters of interest
- whilst there is evidence that Mr Boardman and Mr Coombe discussed the requirement for a new EA, for various reasons there was no commitment to obtain Mr Boardman a new EA which specifically contained the changed payment arrangement¹⁴
- there is no evidence as to any discussions between Mr Boardman and/or Mr Coombe or the PRP that the council resolution of 29 January 2014 amended Mr Boardman's EA
- there is a clear conflict in Mr Boardman taking an active role in determining the terms and conditions of his EA, including drafting an amended EA for himself and circulating this to Mr Coombe
- it ought to be the role of the PRP ensuring Mr Boardman's performance as the Chief Executive Officer of the council was on track and not the reverse.

101. I consider that Mr Boardman's arrangement with respect to accumulating TOIL and receiving financial payments without authority should have come to the attention of the PRP and then been reported back to the council if properly managed. I therefore consider the way the council has conducted Mr Boardman's performance reviews to be wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

Opinion

In light of the above, I consider that the council, in the way it conducted Mr Boardman's performance reviews acted in a manner that was wrong within the meaning of section 25(1)(g) the Ombudsman Act.

On that basis I recommend under section 25(2) of the Ombudsman Act that:

3. the council appoint an independent organisation to conduct performance reviews of the Chief Executive Officer position, as suggested by the LGA.

¹³ Email from Mr Boardman to my Officer, 25 October 2018

¹⁴ See email from Mr John Coombe to Mr Andrew Boardman, 29 March 2016, where Mr Coombe states "...I therefore believe a specific CEO Employment Agreement is warranted and justified....Your contract and conditions is a matter for you and Council to agree on."

Whether Mr Boardman's conduct in utilising council resources to fly interstate to visit family amounted to maladministration in public administration

102. It is alleged that Mr Boardman utilised council resources to fly interstate to visit family and that the council paid for his flights and accommodation in Adelaide on 27 December 2017.
103. Mr Boardman has denied the allegations and informed me that:
- all flights for business purposes are managed through council administration
 - the majority of these are managed through the use of a council credit card provided to Mr Boardman
 - credit card use is managed by the council's Credit Card Procedure
 - no allowances are paid specifically for travel for Mr Boardman
 - the cheapest flights and ferries are targeted, and budget hotel rates are used
 - food, drinks and other minor expenses are paid for by credit card and reconciled monthly to the credit card account by Mr Boardman's personal assistants
 - a full analysis of Mr Boardman's credit card expenditure was recently undertaken and presented to the council in the form of a briefing paper on 25 January 2018 and then as item 10.3 at the February council meeting
 - he does not claim reimbursement of flights from Kangaroo Island to Adelaide when flying onwards with no council business conducted *either* on the leg out (i.e. Kangaroo Island to Adelaide) or the leg back (i.e. Adelaide to Kangaroo Island).
 - a review of all travel records show that Mr Boardman has always had meetings in Adelaide where council have carried out flight/ ferry bookings on behalf of Mr Boardman
 - any other time Mr Boardman has made flight/ ferry bookings is charged to his personal account, including accommodation and meals
 - all credit card reconciliations are prepared by Mr Boardman's Personal Assistants, signed by Mr Boardman, and the Director of Council Services (or Deputy Chief Executive Officer when this role is filled)
 - in the case of unusual items of travel including interstate or overseas travel payment is authorised by Mayor Clements.
104. For section 5(4)(a)(i) to be met, Mr Boardman's conduct must result in an irregular and unauthorised use of public money or substantial mismanagement of public resources.

Accommodation 27 December 2017

105. Mr Boardman has provided my investigation with:
- an invoice from IBIS Hotels dated 28 December 2017 for accommodation for the night of 27 December 2017 for \$126.78 paid for on Mr Boardman's personal credit card
 - a copy of Mr Boardman's personal credit card and council credit card
 - a record of Mr Boardman's meetings for which there are no entries for December 2017.
106. I am therefore satisfied that Mr Boardman was travelling for personal reasons and paid for his own accommodation on 27 December 2017.

Interstate Flights

107. In relation to the interstate flights for the accommodation booked on 27 December 2017 Mr Boardman has provided my investigation with:

- a copy of his Regional Express flight itinerary for a flight from Kingscote to Adelaide on 27 December 2017 departing at 8am and return journey on 8 January 2018 departing 5:25pm
- a diary record of meetings he attended on 8 January 2018 which justified the council paying for the flights because business was conducted on the leg back into Kangaroo Island.

108. Mr Boardman has informed me that he tries to coordinate private onwards travel with council business because 'the meetings would happen anyway and would then involve a separate trip on/off the island - not an efficient outcome for anyone'.¹⁵
109. I am satisfied that council ought to have paid for Mr Boardman's return flight from Kangaroo Island to Adelaide on 27 December 2017 because Mr Boardman was conducting meetings in Adelaide on 8 January 2018.

Opinion

In light of the above, I consider that Mr Boardman did not utilise council resources to fly interstate to visit family on 27 December 2017 and therefore did not commit maladministration in public administration for the purposes of section 5(4)(a)(i) of the ICAC Act.

Whether Mr Boardman's conduct in utilising the council's workshop and mechanic for his own personal use was a breach of the Code and thereby amounted to misconduct and/or maladministration in public administration

110. The council has a policy and procedure 'Employee Private Use of Council Equipment Policy' (**Equipment Policy**) and 'Employee Private Use of Council Equipment Procedure' (**Equipment Procedure**) that enables staff to hire council equipment on weekends and public holidays at their homes. The procedure states:
4. Hire of the mechanical workshop or equipment to undertake private work (under the direction of mechanically qualified workshop staff) can be given by the Technical Program Manager or, in their absences, the Deputy CEO or Director Council Services.
111. Mr Boardman has informed my investigation in his response to my Office dated 13 April 2018 that:
- he booked the council's workshop in accordance with the council's Equipment Policy and Equipment Procedure
 - he used the equipment to replace the clutch on one occasion and to modify bracketry on the rear of the bike
 - he used the equipment in the council's workshop and not his house because the equipment was fixed including a drill press, welder, bench-mounted vices and electrical wiring work
 - workshop equipment is only allowed to be used 'under the direction of mechanically qualified workshop staff'
 - Mr Bradley Tonkin is the council's mechanic and a personal friend of Mr Boardman and was supervising Mr Boardman utilising the equipment in accordance with the council's policy and procedure
 - the use of the workshop is a permissible and appropriate use of facilities
 - the council's policy and procedure refer to an 'Employee Private Use of Council Equipment Fee List' but that is for specific pieces of council equipment hired out for an hourly rate
 - there is no specific charge for use of workshop facilities

¹⁵ Email from Mr Boardman to my Officer, 31 October 2018.

- the majority of the Equipment Policy and Equipment Procedure applies to the hire of specific pieces of council equipment hired out at internal rates to staff who complete the process.
112. I have requested and been provided with confirmation that Mr Boardman complied with the procedure in the form of two booking sheets which show that the council's workshop was booked by "Tonks" on 14 September 2017 and 25 February 2018 referring to Mr Bradley Tonkin, the council's mechanic. It appears therefore that Mr Tonkin booked the workshop and not Mr Boardman. I consider that Mr Tonkin booked the workshop as a council employee which he was entitled to do and it appears that this was in accordance with the Equipment Procedure. Mr Tonkin, by booking the workshop was entitled to utilise the workshop for 'private work', ie. to assist Mr Boardman with a personal project. The workshop must be hired 'under the direction of mechanically qualified workshop staff' and therefore Mr Tonkin needed to be there in any event. I do not think it matters if the workshop was booked by Mr Tonkin or Mr Boardman. The booking sheet shows that the booking by 'Tonks' on the two dates were approved by the same signature who has approved all other booking requests (either the coordinator, team leader or head mechanic) as stated on the booking sheet in accordance with the Equipment Procedure. It is not Mr Tonkin's signature.
113. I therefore do not consider that Mr Boardman's conduct in utilising the council workshop amounted to misconduct pursuant to the ICAC Act because there has not been a contravention of a code of conduct that constitutes a ground for disciplinary action (section 5(3)(a) of the ICAC Act).

Opinion

In light of the above, I consider that Mr Boardman by utilising the council's workshop to work on his motorcycle did not breach of Code of Conduct and thereby did not commit misconduct in public administration for the purposes of sections 5(3)(a) of the ICAC Act.

Whether Mr Boardman's authorisation of council funds to pay for airport security and landscaping for the Kangaroo Island Airport amounted to misconduct and/or maladministration in public administration

114. It is alleged that Mr Boardman authorised council funds to pay for airport security and landscaping and that this may amount to misconduct and/or maladministration.
115. Mr Boardman denied the allegations and has informed me that:
- the government (both state and federal governments) has funded the acquisition, installation and commissioning of specialised air passenger and baggage security screening equipment at a cost of \$240,431 (as at March 2018)
 - provision of screening services requires a minimum of six operators and employment and training of these staff was always the responsibility of the council as the screening service provider
 - training of the operators was conducted using the council's training budget lines within council's chart of accounts and approved as part of the 2017/2018 Annual Business Plan and Budget approval process
 - aircraft refuelling training/ permitting and ticketing was also funded through the training budget lines
 - landscaping associated with the terminal upgrade element of the project was originally the responsibility of the principal contractor Mossop Construction, and these costs were an integral part of their successful tender for the works
 - because of the cost over-run issues it was determined that council would reduce costs of the project by excising the "soft" elements of the landscaping works

- (planting, irrigation, turf, furniture). This decision was made by the PCB and Mossop therefore produced a credit for \$161,514
- in consultation with staff and suppliers Mr Boardman recast the budget for council to self-perform the “soft” elements with a target of \$85,000. This cost will be attributable to the project and will be recovered and accounted for appropriately
 - therefore no council operational funds will be expended against these upgrade works
 - council raises revenue from airport users through landing taxes/ levies from aircraft operators and the general public via passenger landing fees (collected by airlines). This revenue is used to offset all costs associated with the running of the airport and hopefully return a surplus each year
 - all operational funding is council’s responsibility therefore:
 - screening training and provision of screening services are recovered through council’s airport/HR training budget lines plus the passenger fees collected by airlines (if they require screening services) and reimbursed to council
 - refuelling of aircraft is an additional chargeable service
 - general grounds maintenance and upkeep is provided for within the council’s Airport Operational Cost Centre for general repairs, maintenance and upkeep of the existing landscaping surrounding the terminal building, car parks and association infrastructure
 - council has a ‘comprehensive cost control system that allows each element of works to be kept separated for budget v actual tracking and staff are well aware of the need to carefully record their time against the right cost centres.’
116. The council has reported that the airport project went over budget in February 2017 when its crushing contractor, NBS, entered into voluntary administration. The level of funding provided by State and Federal Governments for the Kangaroo Island Airport was \$9 million each, totalling \$18 million.
117. Following NBS entering into voluntary administration on 13 February 2017, the council resolved at its meeting on 14 March 2017 at item 18.2 to underwrite potential project overspend on the airport project to the sum of \$1.5 million. This sum was expended in the delays following the collapse of NBS. In total the airport has cost \$21 million, \$3 million over the initial State and Federal funding of \$18 million. The \$3 million overspend has been sought from government and, to my understanding, largely obtained from government. There have been no further commitment of council funds since the council resolution on 14 March 2017.
118. I therefore have found no evidence that Mr Boardman authorised expenditure of additional council funds to pay for airport security and landscaping in breach of the Code other than funds previously committed by council. It is my understanding that the council has always intended to pay for the training of airport security staff as set out in its 2015 Airport Upgrade Business Plan. Further, it is my view that the ‘soft’ landscape works being performed by the council staff and paid for by the airport project is a solution reasonably open to the council given the circumstances.
119. I consider that Mr Boardman did not breach clauses 2.4 and 2.24 of the Code and thereby commit misconduct in public administration because his conduct did not involve him authorising funds to be spent on the airport upgrade project and effect the trust and confidence of the council, nor did it result in irregular or unauthorised use of public resources.
120. I consider that Mr Boardman did not commit maladministration in public administration because there is no evidence of irregular and unauthorised expenditure nor a mismanagement of public resources in relation to funding airport security and landscaping on the airport project.

Opinion

In light of the above, I consider that Mr Boardman did not breach clauses 2.2 and 2.24 of Part 2 of the Code of Conduct and section 110 of the Local Government Act in relation to the airport upgrade project, and on that basis did not commit misconduct in public administration for the purposes of section 5(3) of the ICAC Act

In light of the above, I consider that the council did not commit maladministration in public administration for the purposes of section 5(4)(a)(i) of the ICAC Act.

Summary and Recommendations

Issue One

My final view is that Mr Boardman committed maladministration in public administration for the purposes of section 5(4)(a)(i) of the ICAC Act.

Issue Two

My final view is that Mr Boardman committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.

Issue Three

My final view is that Mr Boardman breached the provisions of clauses 2.4, 2.24 and 2.26 of the Code of Conduct for Council Employees and section 110(4) of the Local Government Act and on that basis:

- (a) appears to have acted contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act, and
- (b) committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.

To remedy these errors, I recommend under section 25(2) of the Ombudsman Act that:

1. the council considers steps to require Mr Boardman to pay back any additional financial payments (additional to Mr Boardman's salary) not made in accordance with his EA
2. the council review the approval process for Chief Executive Officers' leave to include transparency and independent oversight
3. the council ensure its Chief Executive Officers have up to date Executive Agreements which incorporate any additional leave arrangements including appropriate monitoring of and limits on that leave.

Issue Four

My final view is that the council acted in a manner that was wrong within the meaning of section 25(1)(g) the Ombudsman Act in the way it conducted Mr Boardman's performance reviews.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that:

4. the council appoint an independent organisation to conduct performance reviews of the Chief Executive Officer position, as suggested by the LGA.

Issue Five

My final view is that Mr Boardman did not utilise council resources to fly interstate to visit family and therefore did not commit maladministration in public administration for the purposes of section 5(4)(a)(i) of the ICAC Act.

Issue Six

My final view is that Mr Boardman did not utilise the council's workshop to work on his motorcycle without authority and therefore did not breach the Code of Conduct and thereby commit misconduct in public administration for the purpose of section 5(3)(a) of the ICAC Act

Issue Seven

My final view is that Mr Boardman did not commit maladministration in public administration for the purposes of section 5(4)(a)(i) of the ICAC Act by authorising council funds to be spent on the airport upgrade project.

Final comment

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

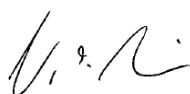
In accordance with Part 3 of the Code of Conduct for Council Members, this report must be provided to a public meeting of the council within two ordinary meetings of the council receiving my report.

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