

REDACTED FINAL REPORT

Investigation pursuant to referral
Section 24(2)(a) *Independent Commissioner Against Corruption Act 2012*

Agency	TAFE SA
Ombudsman reference	2016/05611
ICAC reference	2016/000737
Date of referral	5 July 2016
Issue/s to be assessed	<p>Whether TAFE SA, the TAFE SA Board or the Chair committed misconduct or maladministration in public administration by failing to keep accurate records of its proceedings in December 2014</p> <p>Whether TAFE SA committed an act that was unlawful, unreasonable or wrong under the <i>Ombudsman Act 1972</i> by failing to keep accurate records of its proceedings in December 2014</p>

Jurisdiction

The matter of an alleged failure to keep accurate records of proceedings was referred to the Ombudsman by the Independent Commissioner Against Corruption pursuant to section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012* (the **ICAC Act**), as raising a potential issue of misconduct and maladministration in public administration within the meaning of that Act (the **referral**).

The referral arose out of a report to the Office for Public Integrity made by my Office in relation to a Freedom of Information (FOI) application for external review.

In the course of my investigation, I concluded that the matter should be examined as an allegation of administrative error pursuant to section 13(2) of the *Ombudsman Act 1972* (the **Ombudsman Act**).

Jurisdiction under the Ombudsman Act

The Chief Executive of TAFE SA provided a detailed response to my revised provisional report (**Response to my revised provisional report**) prepared with the assistance of the agency's lawyers. The response raised two issues relevant to my jurisdiction to investigate.

First, the response makes an assertion that the focus of my investigation is an investigation into an employment decision made by the agency in relation to a particular employee. The submission is that such an investigation is prohibited under the provisions of sections 13(3) (alternative right of appeal) and 17(1) (acts related to employment) of the Ombudsman Act 1972.

I consider that this construction of the focus of my investigation is wrong. The allegation I investigated is that neither members of the TAFE SA Board nor the Board itself kept records of the Board's decision to terminate a senior Executive's employment on the grounds of redundancy in late 2014 and early 2015.¹ As such, the matter under investigation is not intrinsically an employment matter. It is an administrative matter that incidentally happens to be about an employment decision. These issues are not confused in my report.

Second, the response raised issues in relation to my jurisdiction to investigate matters under the Ombudsman Act (using my powers under the Ombudsman Act), that have been referred to me by the Commissioner.

I consider that I have jurisdiction to investigate referred matters using Ombudsman Act powers. In my view, a referral to me as an inquiry agency by the Commissioner enlivens the use of my Ombudsman Act powers, even though the matter referred is not, on the face of it, an 'administrative act'. A contrary interpretation would be inconsistent with the purpose of the ICAC Act.

I also consider that I have jurisdiction to make findings under the Ombudsman Act in relation to matters that have been referred by the Commissioner by virtue of section 13(2) of the Ombudsman Act. This allows me to investigate an administrative act, notwithstanding that, on the face of it, the complaint may not appear to relate to that administrative act.

Action taken

Using my powers under the Ombudsman Act, I have conducted an investigation of the issue in response to the referral by:

- assessing the information provided by the Commissioner
- seeking a written response from Mr Peter Vaughan (Chair, TAFE SA Board) and the Acting Chief Executive, TAFE SA, for the relevant period)
- considering the response from Mr Vaughan's legal representative
- considering:
 - the ICAC Act and the Ombudsman Act
 - the *TAFE SA Act 2012* (the **TAFE Act**)
 - the *Public Corporations Act 1993* (the **Public Corporations Act**)
 - the *State Records Act 1997* (the **State Records Act**)
- preparing a provisional report and providing TAFE SA with the report for comment
- considering submissions received and preparing a revised provisional report
- considering submissions received and preparing this final report.

Standard of proof

The standard of proof I have applied in my investigation and this 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 (***Briginshaw***), I have considered the nature of the complaint and the allegations made and the consequences if they were to be upheld. *Briginshaw* recognises that greater care is needed in considering the evidence in some cases;² and 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 ...³

¹ For the purposes of privacy, I refer to the senior Executive concerned as 'Mr A' throughout this report.

² 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.

³ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

Response to my revised provisional report

The agency's legal representative provided me with a response to my revised provisional report dated 12 May 2017. The submission reiterated some points and built on previous submissions made at the first provisional report stage.

A summary of the key comments received is as follows:

- the revised provisional report reaches an erroneous factual and legal conclusion as to where the decision to terminate Mr A's employment on account of redundancy was made
- there is no source of evidence supporting the findings of the revised provisional report
- TAFE SA has requested the [relevant] evidence be provided and this has not been done
- The Acting Chair of the TAFE SA Board has confirmed that the Board did not make the employment decisions
- the Acting Chief Executive made both decisions
- the focus of the investigation has been the Ombudsman's investigation into an employment decision made by the agency in relation to a particular employee and this seriously undermines the prohibition in the Ombudsman Act against the Ombudsman investigating administrative acts in relation to which avenues of appeal arise (s13(3)) - and acts related to employment (s17) - referred to as 'prohibited areas'
- while an investigation on referral from ICAC relating to maladministration may not be constrained in relation to the prohibited areas, an allegation of maladministration could not attach to the Board or TAFE SA and therefore could not succeed
- the Ombudsman has erred in investigating acts that are clearly acts of the employer (the Chief Executive)
- there is no reason, and it would be unfair, for the Ombudsman to report on the failed ICAC investigation to the Minister
- the referred ICAC investigation that was wrongly commenced is an unnecessary component of a consideration of TAFE SA's record keeping policies and practices
- it would be inappropriate to provide any version of the report to any person prior to its provision to the Board
- the Board has not yet had an opportunity to respond to the finding of the revised provisional report
- the essentially private-law nature of the subject matter of the revised provisional report should prevent wider publication of the Ombudsman's final report.

I have considered the agency's submissions and, where necessary, made changes to reflect them in the report.

In an earlier submission, the agency's legal representative proposed that my provisional report in response to the ICAC referral should stand alone; and that it should make no reference to the evidence gathered and analysed and the factual conclusions drawn.

I disagree with this proposal. I consider that my final report should reflect the referral as made, irrespective of stated perceptions about a lack of precision in the letter of allegations. My report, therefore, deals with the issues of alleged misconduct or maladministration in public administration - as well as examining the evidence gathered as relevant to my consequential investigation and findings under the Ombudsman Act.

In the response to my revised provisional report the agency's submission has been modified to argue that there is no reason, and it would be unfair, for me to report on the 'failed' ICAC investigation to the Minister.

I do not agree with this characterisation of the ICAC investigation. For the reason stated above, I consider it appropriate to examine the allegations of misconduct and maladministration under sections 5(3) and 5(4) of the ICAC Act and to report on the outcome

of my investigation to the Minister as per the requirements of sections 14B and 25(3) of the Ombudsman Act.

Background and evidence obtained in the investigation

1. In 2015, an FOI application was made to TAFE SA by Mr A (**the applicant**) for access to documents about a review of Executive level roles within TAFE SA conducted by the agency in consultation with the TAFE SA Board (**the Board**). The review led to his redundancy. The applicant was aggrieved by TAFE SA's determination and applied to me as an external review authority under the FOI Act.
2. In the course of my review of TAFE SA's FOI determination, a complaint was made to me that agency officers and the Board have failed to comply with their statutory record-keeping obligations.
3. Specifically, it is alleged that neither members of the Board nor the Board itself kept records of the Board's decision to terminate the applicant's employment on the grounds of redundancy in late 2014 and early 2015.
4. Until his redundancy, the applicant was employed by the agency in a senior Executive position.
5. In May 2014 the applicant commenced leave from his position due to ill-health. He was due to return to work on 13 January 2015.
6. During the applicant's absence, his responsibilities were apportioned to other agency executives.
7. By letter to the applicant, dated 12 January 2015, TAFE SA advised that his position had become redundant and his employment contract terminated, with effect that day. He was advised that, following '[a] review of Executive level roles within TAFE SA ... conducted in consultation with the TAFE SA Board of Directors', the senior position was identified 'as surplus to ... [the agency's] current and future needs'.
8. The applicant's solicitor wrote to me on 16 May 2016 to complain that 'the Board (a) failed to keep any or any adequate records of their decision and of the reasons for it; and (b) that the obvious explanation for [this failure] is that the persons concerned wished to avoid the consequences of the FOI Act'.
9. While this explanation may be obvious to the solicitor, I have no evidence to confirm that the alleged failure to keep records was related to an attempt to avoid the consequences of the FOI Act.
10. It is clear from the FOI applications for internal and external review that the applicant was aggrieved by TAFE SA's failure to locate relevant documentation in relation to the review of executive roles undertaken by TAFE SA. There was also concern about the nature of TAFE SA's consultation with the Board in relation to the review.
11. When applying for the FOI internal review, the applicant's solicitor submitted that it was 'almost inconceivable' that there was 'no documentation recording/ evidencing the review' and 'no relevant Board Minutes'.
12. When applying for the FOI external review, the applicant's solicitor reiterated his concerns about the absence of documents, particularly given that the applicant was 'one of the most senior executives within the organisation [and had] ... his employment terminated on account of redundancy'.

13. During a telephone discussion with one of my staff on 14 September 2015, the applicant's solicitor submitted that in his view it was likely that, at the very least, there would be a draft report; minutes containing brief references; and notes made by those directed to act (for example, the Chief Executive or Acting Chief Executive).
14. By email to Ombudsman SA dated 14 December 2015, the applicant's solicitor confirmed that the applicant remained aggrieved following the agency's determination dated 25 November 2015. His response included the following:

... there are still no Minutes (or notes) of either the Board or of the Board's Human Resources Committee which have been discovered. We are simply informed that there were *in camera* discussions in both of these forums. It is not good enough to be simply so informed. The Minutes of the meetings of these bodies should be discovered even if they simply record (as would at least be the norm) the subject matter of the discussion and then that the discussion held on the subject matter was so held *in camera*.

... We also make the observation that the "*sensitivity of the subject matter*" is no excuse for not having kept Minutes...
15. My Office requested all agenda and minutes of TAFE SA Board meetings from 1 August 2014 to 12 January 2015. After an initial search, at my request, the agency confirmed that it had repeated searches for documents.
16. In the letter to me dated 20 October 2015, TAFE SA advised that the apportionment of Mr A's responsibilities while he was on sick leave 'were not considered to be reviews as they were implemented as short-term solutions'. According to the agency, discussions about these interim arrangements 'were held *in camera* due to the sensitivity of the subject matter'. The agency further explained that:

following Mr A's extended absence, the Board's HR Committee and the full Board considered the then operation of the Executive (i.e. the then acting arrangements) *in camera* [due to the sensitivity of the subject matter]. It was in this context that the Board determined that the effectiveness of the interim arrangements and the operational improvements that they provided TAFE SA were preferable to those of having the senior Executive role in place.

On this basis, the Acting Chief Executive was authorised to take the steps necessary to separate Mr A from TAFE SA.
17. I note that the Human Resources Committee (**HR Committee**) is a committee of the Board and that it assists the Board in relation to human resource management; in particular 'workforce planning and succession planning'.
18. TAFE SA has advised that 'no minutes are kept of *in camera* discussions'.⁴ The agency has recently confirmed that it has no policy or known procedure for recording *in camera* components of Board (or other committee) meetings.
19. In my provisional determination of the FOI application, I stated that, in my view, it is arguable that the failure to keep any records of *in camera* discussions is contrary to the obligations imposed by legislation [being section 9(9) of the TAFE SA Act and section 14(2)(c) of the Public Corporations Act]. The agency did not satisfy me that its practices are appropriate.

⁴ Email to Ombudsman SA from the agency dated 16 November 2015 and advice from the agency during a meeting on 3 November 2015.

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20. In response, the agency advised me on 20 May 2016 that:
- current Board practice is such that where the *in camera* component of a Board meeting contains deliberations or decisions that warrant recording, those deliberations or decisions are referred to the meeting proper and, consequently, recorded in the minutes of the meeting proper or recorded and kept separately from the minutes for reasons of confidentiality.
21. In this case, the *in camera* HR Committee discussions, recommendation and finally the Board decision were not recorded anywhere in TAFE SA record keeping systems, specifically in the TRIM system. There is no evidence that an official record of any kind was made of the two decisions to abolish the senior Executive position and then to separate Mr A from TAFE SA.
22. During the course of the Ombudsman FOI review, Board members were specifically asked for any documents on 'private (non-TAFE) email systems, hand-written notes etc'. The issue raised the possibility that an offence may have been committed under section 17 of the State Records Act. The section prohibits a person from intentionally and knowingly without authority damaging or altering an official record or disposing of an official record.
23. The ICAC referral to me noted that any such conduct of the Board or its individual members was unlikely to attract prosecution under section 17 of the State Records Act. It was noted that it would be difficult to apportion responsibility to one or more individual Board members or to prove that those persons knowingly damaged, altered, disposed of or removed an official record by communicating via private email. I note also that an apparent failure to create particular records does not give rise to a potential offence under section 17 of that Act.
24. In response to my enquiries as part of my FOI review, at that time, all Board members advised that they either did not have any documents or did not have any further documents (that is, documents in addition to those provided in response to previous searches).
25. I have reviewed all eight Board members' responses to the private email search request made by the Board Secretary, dated 5 November 2015. As noted, all responded that they did not have any documents. I have no reason to suspect that this search was not done thoroughly and with the integrity requested by my Office. As a consequence, I determined that the issue of use of private email accounts is not relevant to my investigation.
26. The TAFE Act establishes TAFE SA as a body corporate, i.e. a statutory corporation to which the provisions of the Public Corporation's Act (other than section 35) apply. The Board is the governing body of TAFE SA and is responsible for the effective performance of TAFE SA's functions and the proper discharge of its business and management obligations.
27. By resolution the Board endorsed a document entitled *TAFE SA Board of Directors Meeting Procedures and Protocols* at the November 2012 Board meeting. Whilst this document is marked draft, it is in fact endorsed and is in operation. Section 8 of the document covers minute taking and records.
28. The Board records its decisions in minutes of meetings. These are taken down and typed up by the Executive Officer to the Board who attends meetings. The minutes are then circulated to members and confirmed or amended at the subsequent meeting.

29. TAFE SA employees operate under a policy entitled '*Information management - Creation and Capture of Official Records*' (**the Creation of Records policy**).
30. TAFE SA employees also operate under a policy entitled '*Information management - Disposal of Official Records*' (**the Disposal of Records policy**).
31. The Board has no policy or procedure for recording *in camera* components of Board meetings.
32. The Board is supported by an Executive Officer who is an employee of TAFE SA. Part of the Executive Officer's role is to attend meetings and take minutes. I am advised that the Board operates in a consistent manner in respect of *in camera* components of Board meetings.
33. *In camera* items at meetings are not attended by the Executive Officer, nor the Chief Executive or any other employee of TAFE SA unless their presence is specifically requested by the Board. However, they are attended by the Minister's representative as an observer pursuant to section 8 of the Public Corporations Act.
34. Either the Executive Officer is advised of an *in camera* decision (but not the discussion) by the Chair in the presence of other Board members on the Executive Officer's return to the meeting after the *in camera* item is concluded or, if the matter requires it, the Chair provides the outcome of an *in camera* item to the human resources manager for recording in a human resources file. This applies, for example, to decisions relating to the Chief Executive's terms and conditions.
35. Subsequent to the meeting in the process of preparing the minutes, the Executive Officer incorporates any *in camera* decision as communicated to her by the Chair into the minutes under the heading 'in camera' or, if the subject of the decision was also discussed as an open agenda item, under that item.

Relevant law/policies

36. 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.
37. 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.

38. Section 9(9) of the TAFE SA Act provides:

- (9) The board must cause accurate minutes to be kept of its proceedings.

39. Section 14(1)(a) and (2)(c) of the Public Corporations Act provides:

- (1) The board of a public corporation is responsible to its Minister for overseeing the operations of the corporation and its subsidiaries with the goal of -

- (a) securing continuing improvements of performance;

- (2) Without limiting the effect of subsection (1) the board must for that purpose ensure as far as practicable -

- (c) that appropriate systems and practices are established for management and financial planning and control, including systems and practices for the maintenance of accurate and comprehensive records of all transactions, assets and liabilities and physical and human resources of the corporation and its subsidiaries;

40. Section 17(1)(a) of the State Records Act provides:

- (1) If a person, knowing that he or she does not have proper authority to do so, intentionally -

- (a) damages or alters an official record

the person commits an offence.

Whether TAFE SA, the TAFE SA Board or the Chair committed misconduct or maladministration in public administration by failing to keep accurate records of its proceedings in December 2014

Alleged misconduct and maladministration under sections 5(3) and 5(4) of the ICAC Act

41. To find that the Board has committed maladministration in public administration, I would need to be satisfied that the Board is a public authority as defined in Schedule 1 of the ICAC Act. However, the Board is not covered by any of the descriptions of a public authority contained in Schedule 1. Neither is it a public officer. Therefore, it cannot commit maladministration in public administration.
42. I note that the members of the Board, including the Chair, are each public officers by reference to Schedule 1 of the ICAC Act. Whilst it is possible that the Chair (or other Board members) may commit misconduct or maladministration by virtue of their status as public officers; the nature of the allegations relate to a failure of organisational policies and procedures, i.e. organisational record keeping practices, rather than the conduct of individuals. In addition, the obligations of section 9(9) of the TAFE SA Act and section 14(2)(c) of the Public Corporations Act are imposed on the Board, not the members individually.
43. If I were to find a breach of either section 9(9) of the TAFE SA Act or section 14(2)(c) of the Public Corporations Act, the finding would be made against the Board, not an individual member. However, as noted, the Board cannot be held accountable under the ICAC Act for either misconduct or maladministration. Whilst it is possible to find that an individual Board member committed an act of maladministration in public administration in their position as a public officer, I can find no evidence to support an allegation that the Chair (or any other individual Board member) was personally responsible for a failure to keep accurate minutes of a Board meeting.

44. If failure of the Board is a failure of TAFE SA, then potentially the maladministration allegation will apply to TAFE SA as the relevant public authority. However, the nature of the allegation (failure to keep proper records) does not, in my view, meet the definition of maladministration for a public authority because it does not concern an irregular or unauthorised use of public money or substantial mismanagement of public resources.

Opinion

My final view is that the TAFE SA Board is not a public authority for the purposes of section 5(4) of the ICAC Act; therefore it is not subject to a finding of misconduct or maladministration. Further, neither the Chair of the TAFE SA Board nor TAFE SA committed misconduct or maladministration in public administration for the purposes of section 5(3) and 5(4) of the ICAC Act.

Whether TAFE SA committed an act that was unlawful, unreasonable or wrong under the *Ombudsman Act 1972* by failing to keep accurate records of its proceedings in December 2014

45. In reaching my final conclusions of the referral under the ICAC Act, I have also considered whether TAFE SA's alleged failure to keep accurate records constituted an administrative error for the purposes of the Ombudsman Act.
46. As noted above, section 9 of the TAFE SA Act provides that 'the board must cause accurate minutes to be kept of its proceedings'. It is arguable that the deliberations and decisions relevant to changes to Mr A's [then] senior Executive position are 'proceedings' for the purposes of the Act.
47. I have also reviewed the current TAFE SA Information Management - Creation and Capture of Official Records policy and the Information Management - Disposal of Official Records policy.
48. The Creation of Records policy notes the State Records Act (short) definition of an Official Record as:

a record made or received by an agency in the conduct of its business

Further, that:

TAFE SA staff shall create a record in all circumstances when required under law to be accountable or for other purposes required to comply with:

- Regulations,
- Standards
- Internal business accountability requirements
- Community expectations when this would reasonably be required.

and that:

TAFE SA staff must...create a record to provide evidence of decisions made or actions transacted.

There must be adequate evidence of the conduct of business activity to be able to account for that conduct.

49. Consistent with these requirements are the TAFE SA Disposal of Records policy commitments. One in particular is relevant here. That is referred to as the Normal Administrative Practice (**NAP**) Test. It holds that records must not be destroyed if:

- the record forms part of an agency transaction
 - the record adds value to an existing record
 - the record shows how a transaction was dealt with
 - the record shows how a decision was made
 - the record shows who was involved or what advice was given.
50. By implication, the NAP Test holds that records should be made and preserved for all agency transactions, decisions and advice given to agency decision-makers.
51. I consider these TAFE SA policy documents establish a clear requirement for the Board to ensure that records of the decisions to abolish the senior Executive position, and then to separate Mr A from TAFE SA as a consequence, are decisions that fall into the above category. In other words, a decision of this import should clearly have been documented, an official record created and that record kept according to agency policy. It should then have been produced when lawfully requested for the purposes of an FOI external review search 'to provide evidence of decisions made'.
52. On the basis of the evidence before me, I consider that the deliberations of the HR Committee in this matter to have been a *de facto* review of the senior Executive position.⁵ As the TAFE SA letter of 20 October 2015 indicates, the Board then made a determination about terminating the senior Executive role and with it the employment of the incumbent officer, Mr A. The letter makes clear that the Acting Chief Executive was then:
- authorised to take the steps necessary to separate Mr A from TAFE SA.
53. I turn now to the issue of responsibility for decision making in this matter.
54. In evidence given to my investigation⁶, the Acting Chief Executive of TAFE SA for the relevant period described the genesis of the decision to abolish the senior Executive role. It was said that after Mr A took leave in May 2014:
- there were several people in the role for a period of 7-8 months - other people had 'stepped-up' to the role [the role was split into its component parts]. The proposal for change [to the senior Executive role] had come about simply because the new arrangements seemed to be working well. The proposal came from me as Acting CE. I discussed it with the chair one to one and later put it to the HR committee. I'm not sure of the details now'.
55. Asked whether the Board had determined that the effectiveness of the new arrangements were preferable to having the senior Executive role in place...and if the 'Acting Chief Executive was authorised [by the Board] to take the steps necessary to separate Mr A from TAFE SA, the Acting Chief Executive responded:
- That's correct.
56. However, when advised that the Board's Chair had repudiated this, and that his legal representative had asserted that the decision to terminate Mr A's employment 'were not made by the Board but rather by the Acting Chief Executive following consultation with the Board', the Acting Chief Executive said:
- It's quite tricky. The Chair was always careful about the Board not making operating decisions. It was a decision I was making.

⁵ See paragraph 7. I note that the letter of termination to the applicant dated 12 January 2015 referred to a 'review of Executive level roles within TAFE SA'. It is possible this review was the same advice received by the Board about the apparent success of the interim acting arrangements referred to in the 20 October 2015 letter to me.

⁶ Email response to Ombudsman SA dated 21 February 2017

57. Asked why no record or minute was made of the HR advice to the Board on the senior Executive role or the Board discussions on the role and Mr A's separation, the Acting Chief Executive said:

I don't know why. I can't explain that. It may have been discussed in camera.

58. In its response to my enquiries about the keeping of records, Mr Vaughan's legal representative has repudiated the assertion that the Board made a decision or decisions concerning Mr A's employment termination. In a letter to me dated 29 September 2016, Mr Vaughan's legal representative stated that:

In TAFE SA's reply to the Ombudsman dated 20 October 2015 in response to the Freedom of Information application made by Mr A, the Chief Executive stated that the Acting Chief Executive was authorised to take the steps necessary to separate Mr A from TAFE SA. The Chair, in consultation with the Chief Executive, rejects the implication that may be drawn from those words that the Board made or directed the Acting Chief Executive's decision with respect to the redundancy. The Board was informed of the decision. Subsequently the Acting Chief Executive implemented the Acting Chief Executive's decision. This is consistent with the Acting Chief Executive's letter to Mr A which advises him that the Acting Chief Executive had consulted the Board.

59. Presumably, and by extension, it follows that a 'non-decision' need not be recorded. I find this claim to be inconsistent with the facts and with the known division of responsibilities between the Board and the Chief Executive.
60. First, the TAFE SA Chief Executive has stated on the record that 'the Board determined the effectiveness of the interim arrangements'. They came to a conclusion, acting on advice from the HR Committee, that the reassignment of the senior Executive role across other Executive portfolios was 'preferable to having the [senior Executive] role in place'. In my view, this is a clear decision about the future of the role made by the Board. Effectively, it was a review of the position resulting in a clear outcome. It should have been recorded.
61. Second, I do not accept the claim made by Mr Vaughan's legal representative that the Board did not make or direct the Acting Chief Executive's decision with respect to the redundancy. The claim is that the Board was merely informed of the decision - and that subsequently the Acting Chief Executive implemented the Acting Chief Executive's decision [emphasis mine].

62. Section 12(3) of the TAFE SA Act provides:

The chief executive is responsible to the board of TAFE SA for -
(a) giving effect to the board's policies and decisions;

63. From the evidence, it is clear to me that the matter of the continuation [or otherwise] of the senior Executive role and the consequential matter of the incumbent's future employment with TAFE SA were discussed in the HR Committee - which then reported on its considerations to the full Board. The Board then made two decisions; one to terminate the senior Executive role; the second to authorise the Acting Chief Executive 'to take the steps necessary to separate Mr A from TAFE SA'. In my view, these were not Acting Chief Executive decisions. They were decisions of the Board with the 'authorisation' provided to the Acting Chief Executive to decide how the decision was to be implemented.
64. In addition to the requirements of the TAFE SA Act, I note the TAFE SA Creation of Records policy requires a record to be made to comply with:

- Community expectations when this would reasonably be required;
- When there is a need for accountability, or to provide evidence of decisions made or actions transacted.

65. I find that the Board made both decisions. However, even if I am wrong, and the decisions were in fact made by the Acting Chief Executive, the nub of the matter concerns the absence of appropriate records of the decision to terminate the senior Executive role and of the consequential decision to separate Mr A from employment with TAFE SA. In that sense the responsibility for the decision making is immaterial. The relevant issue is that no TAFE SA records were made. They should have been.
66. I do not accept the submission made, on behalf of the chair of the Board that the letter of termination sent to Mr A dated 12 January 2015, constitutes a record of these decisions. Whilst it may be claimed that the letter to Mr A was the instrument for executing the decisions, there was no record made of the authority for the decision.
67. The letter advised that, following '[a] review of Executive level roles within TAFE SA ... conducted in consultation with the TAFE SA Board of Directors', the senior Executive position was identified 'as surplus to ... [the agency's] current and future needs'. In my view, the review and the identification of the position as surplus to requirements both require an explicit record of decision. The instrument of communication to the affected party does not meet that requirement. Even if, as Mr Vaughan's legal representative asserts, the 'consultation' with the Board did not involve any decision making on the Board's part or issuing of directions to the Acting CE, I consider that the consultation is significant enough for the letter to make reference to it and 'the consultation' should have been recorded.

Recording decisions from 'in camera' meetings

68. A difficulty arises where the agency has no policy or procedure for recording *in camera* components of Board meetings. Notwithstanding this, I note the admission by TAFE SA in their 20 May 2016 letter to me, that *in camera* matters are 'recorded in the minutes of the meeting proper or recorded and kept separately from the minutes for reasons of confidentiality'. In this case, no such record was made and kept separately for reasons of confidentiality.⁷
69. I note the current South Australian government *Government Boards and Committees Guidelines for Agencies and Board Members*. Whilst the Guidelines draw attention to the Public Corporations Act and the requirements of section 14 vis-à-vis the 'maintenance of accurate records' - it makes no mention of guidelines for the conduct of *in camera* sessions of the Board or its committees.
70. It would appear that this is an area [when *in camera* sessions of board meetings are called], where public corporations in South Australia lack guidance as to their governance responsibilities.⁸
71. It is a statutory requirement for Board minutes to be taken when a decision is made.⁹ Decisions taken *in camera* only differ to the extent that the discussion and

⁷ I note the Acting Chief Executive's response to the question put by my Office about no record or minute being made of the HR advice to the Board or the Board's discussion on the senior Executive role and Mr A's separation. The Acting Chief Executive's response was that: 'it may have been discussed in camera'. I have taken this to mean that this was why no record was kept.

⁸ The Australian Institute of Company Directors *Good Governance Principles and Guidelines for NFP Organisations* (AICD 2013) at page 34 canvasses the need for 'minutes that accurately record information and decisions that are finalised promptly' and the value of 'regular in-camera sessions ...without staff present' - as good board meeting practices.

documentation may, for confidentiality reasons, not be included in the published Board meeting minutes. However, the decision itself should, at a minimum, be recorded in the Board minutes as a formal record, as required by law. Other information and/or documents may be kept in a separate set of confidential minutes not for circulation or publication. However, these must be available to be produced for the purposes of accounting for the conduct of the Board.

72. I find the apparent failure of the Board to keep records of the review of the senior Executive position and Mr A's employment matter to be inconsistent with the evidence of 20 May 2016. As noted above, this letter clearly states that current Board practice is to record deliberations or decisions made *in camera* in minutes of the meeting proper or to keep these separately from the minutes if there are grounds of confidentiality.
73. I note that this was done on several occasions during the relevant period, notably on:
- 13 February 2014 - to record the Board decision to approve a temporary Chair
 - 14 May 2015 - to record discussion of a reskilling of automotive workers initiative
 - 15 October 2015 - to record discussion of the recruitment process for the Chief Executive position.
74. In my view, the evidence shows that TAFE SA record keeping policy is being applied inconsistently for the purposes of *in camera* discussions and decision making. There is a case for reviewing the Board Meeting Procedures and the Record Creation Policy to ensure that the conduct of *in camera* sessions is regulated and statutory record keeping requirements are met in full.

Opinion

In light of the above, my final view is that the agency, in failing to record decisions or deliberations relating to the abolition of the senior Executive position and the termination of Mr A's appointment in December 2014, acted in a manner that was wrong for the purposes of section 25(1)(g) of the Ombudsman Act.

Conclusion and Recommendations

To remedy the error, I make two recommendations under section 25(2) of the Ombudsman Act:

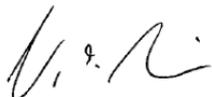
1. that TAFE SA review its *Board of Directors Meeting Procedures and Protocols* and *Information Management - Creation and Capture of Official Records* policy and amend them to provide guidance as to the circumstances under which *in camera* sessions will be held and when discussions and decisions will be documented in separate minutes, and;
2. that the revised policies include a requirement that any decision or deliberation must be documented as a formal record as per relevant legislation.

In accordance with section 25(4) of the Ombudsman Act, I request that TAFE SA report to me by **7 July 2017** on what steps have been taken to give effect to my recommendations above; including:

⁹ See 38, reference to s 9(9) of the TAFE SA Act. Also, the TAFE SA Board Meeting Procedures and Protocols at 8.1 states that: 'Proper minutes of all proceedings of the meeting of the Board will be kept including copies of all Board papers. All resolutions and associated decisions made must be clearly minuted with details of whether the proposal was passed or not'.

- 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.



Wayne Lines
SA OMBUDSMAN

16 June 2017