WESTERN AUSTRALIA

CCC | Corruption and Crime Commission

Report into how conflicts of interest undermine good governance - A report on the Chief Executive Officer of the Shire of Halls Creek

30 August 2018

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INTRODUCTION

[1] A Council is entitled to trust its Chief Executive Officer. When that trust is misplaced, the ratepayers suffer.

[2] Mr Rodger Kerr-Newell, the CEO of the Shire of Halls Creek showed disregard for the rules. He took short cuts to benefit himself.

[3] He made certain that his partner, Ms Bronwyn Little, won the position of Strategic Planning Manager by allowing her to draft the position description. She was the only candidate interviewed and she was appointed before the application period had even closed.

[4] Mr Kerr-Newell failed to declare to the Shire President, Mr Malcolm Edwards, his financial interests, as required by law. He took an inordinate amount of leave to which he was not entitled and misapplied Shire resources for his own purposes. This conduct served to facilitate Mr Kerr-Newell's secondary employment as Director, and then Chairman of a New Zealand windfarm company.

[5] Conflicts of interest permeated every aspect of his decision-making: from the appointment of Ms Little, to his own private business interests and the management of a Shire tender to replace the Executive's vehicles. Conflicts are not necessarily fatal but if left undisclosed and unmanaged, can upend good government.

[6] The Commission's investigation culminated in a series of public examinations in April 2018 during which a number of Shire employees, including Mr Kerr-Newell, admitted to wrongdoing. Much of this came as news to Mr Edwards, as it would have to other Council members as well.

[7] The Council must always exercise its best judgment when it comes to governing the Shire. In an ideal world, it should be able to trust that the actions of its CEO are taken in good faith and without improper motives. But too much trust can be a bad thing. The Council must have a means by which it can ensure its trust and backing in the CEO is well-placed.

[8] Following the Commission's examinations, Mr Kerr-Newell and Ms Little tendered their resignations. The Council refused to accept Mr Kerr-Newell's resignation, instead resolving to terminate his contract of employment with the Shire.

[9] The Council has sought to recover the monies misapplied by Mr Kerr-Newell and has indicated a commitment to improving its governance structure.

CHAPTER ONE

The Commission's investigation

[10] Operation Oakley was an investigation commenced by the Commission to determine whether any public officer employed by or elected to the Shire of Halls Creek may have engaged in serious misconduct.

[11] The Commission's investigation originated from a report, received anonymously in June 2016, alleging that the Shire of Halls Creek CEO, Mr Kerr-Newell, may have engaged in serious misconduct by taking advantage of his position to obtain a benefit for himself and/or other persons.

[12] The Commission endorsed an investigation into the conduct of Mr Kerr-Newell and other public officers at the Shire of Halls Creek who had been his former colleagues and/or friends. Friends and former colleagues of Mr Kerr-Newell remained part of the Shire Executive.

[13] As a result of material gathered during the investigation, the scope of the Commission's inquiries was widened to include allegations that Mr Kerr-Newell:

a) misused his leave entitlements in order to maintain external business interests in New Zealand; and

b) failed to declare these aforementioned business interests, as required under law.

[14] On 26 September 2017, the Commission executed search warrants at the Shire premises and Mr Kerr-Newell's home. Senior Sergeant Peter Jenal, the officer in charge at the Halls Creek Police Station, acted as the independent observer during the search as Mr Kerr-Newell was not in Halls Creek at the time.

[15] Documents and other items were seized from both premises and subsequently examined.

[16] The Commission's presence in Halls Creek generated some media attention.

[17] On 28 September 2017, the Commission received another anonymous report regarding the conduct of Mr Kerr-Newell.

[18] The complainant alleged that Mr Kerr-Newell and other Shire employees had corruptly subverted the tender process for the procurement of six Shire vehicles to ensure the tender was awarded to a local Halls Creek

vehicle dealership. It was further submitted that Mr Kerr-Newell was in a personal relationship with a senior Shire employee for whom he undertook performance reviews and approved salary increases.

[19] In February and April 2018, the Commission conducted a number of private examinations before proceeding to public examinations. The Commission determined it was in the public interest, and in particular, the interests of the Halls Creek ratepayers, to hear about the actions of particular Shire employees who were entrusted to act for the benefit of the Shire.

[20] The Commission has formed opinions of serious misconduct in respect of Mr Kerr-Newell.

[21] The Commission did not uncover any serious misconduct by the Shire President or other elected members.

[22] The Commission has identified a lackadaisical and flawed procurement process for the purchase of Shire vehicles but has formed no opinion of serious misconduct.

[23] The matters canvassed in this report are capable of having an impact on public confidence in decision-making and good governance in the Shire of Halls Creek. The Commission encourages other local councils to look upon this as a cautionary tale.

CHAPTER TWO

Who's who

Mr Rodger Kerr-Newell

[24] Mr Kerr-Newell was the Shire's CEO.[1] He commenced this role on 17 December 2013 but had been filling the role of the Shire's CEO designate since August 2013.

[25] Prior to commencing at the Shire, Mr Kerr-Newell lived in New Zealand and served as the CEO for three local government authorities: Hutt City Council, New Plymouth City Council and Rodney District Council.

[26] He was the chairperson of New Zealand Windfarms Ltd (NZ Windfarms) until stepping down from that role on 31 May 2018, after the Commission held public examinations. He serves as a Director for NZ Windfarms and the company's subsidiaries.

Mr Malcolm Edwards

[27] Mr Edwards is the Shire President and a long-time resident of Halls Creek. He has served in this position for 12 years.

Ms Bronwyn Little

[28] Ms Little was the Shire's Director of Strategic Planning,[2] a position which reported directly to Mr Kerr-Newell.[3]

[29] She commenced employment with the Shire on 24 February 2014.

[30] Prior to her position with the Shire of Halls Creek, Ms Little worked for the Hutt City Council in Wellington, New Zealand.

Mr Philip Burgess

[31] Mr Philip Burgess is the Shire's Director of Infrastructure Assets.

[32] He has held this position for over two years after initially being employed as the Operations Officer.

Mr Perry Kearney

[33] Mr Perry Kearney is the Shire's Operations Officer and reports directly to Mr Burgess.

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[1] R J Kerr-Newell's employment was terminated by the Shire at a special Council meeting on 16 May 2018.

[2] Contract of employment dated 1 August 2016. Prior to that B J Little was Strategic Planning Manager.

[3] B J Little submitted her resignation following a private examination held by the Commission.

Ms Delia Baz

[34] Ms Delia Baz is the sole Director of Baz Industries Pty Ltd, which trades as 'Halls Creek Toyota'. Halls Creek Toyota is a Toyota dealership whose clientele is generally derived from the Halls Creek community.

[35] Ms Baz is a long-time resident of Halls Creek.

[36] All persons mentioned above are public officers with the exception of Ms Baz.

CHAPTER THREE

The corrupt appointment of a Shire employee

[37] Mr Kerr-Newell formally commenced as the Shire's CEO on 17 December 2013.

[38] He had been acting as the CEO designate since August 2013 alongside the then substantive CEO, Mr Warren Olsen.

[39] As the CEO, Mr Kerr-Newell had the power to appoint Shire employees.

A relationship develops

[40] Mr Kerr-Newell knew Ms Little from the time they both worked at Hutt City Council in New Zealand. He admitted that a "personal relationship of an intimate nature"[4] developed between the two after he left Hutt City Council to take up a post as CEO of Rodney District Council in Auckland.

[41] The two had planned for Ms Little to find employment in and move to Auckland, where Mr Kerr-Newell was living at the time. However, this aspiration was never realised.

[42] After his appointment in August 2013, he alternated between Halls Creek and New Zealand while Ms Little continued to reside in Wellington. It was agreed that Ms Little would move to Halls Creek because "it would be convenient and pleasurable to live together".[5]

[43] Ms Little set about seeking employment in Halls Creek with Mr Kerr-Newell openly making job enquiries on her behalf.

[44] Ms Little applied for a job with the Department of Housing as the Area Housing Manager but was unsuccessful.

The process is corrupted

[45] On 24 November 2013, Ms Little sent an email to Mr Kerr-Newell's private email account. It read:

> *This is starting to do my head in because its late (over here). I will send the rest tomorrow night. I would suggest you save the document to your laptop then attach it to an email from yourself (gmail) to yourself (HC CEO) that way my email not attached to it - just saying ……*[6]
>
> *Xx*

[4] R J Kerr-Newell transcript, public examination, 26 April 2018, p 16.

[5] Ibid 21.

[6] Email from B J Little to R J Kerr-Newell, 24 November 2013.

[46] Attached to the email was a draft position description for the Strategic Planner position at the Shire of Halls Creek.

[47] Mr Kerr-Newell "asked Ms Little … to draft it even though she was not an employee as a favour for [him]".[7] He did this even though he suspected she might want to apply for the position.

[48] Ms Little suggested Mr Kerr-Newell send the document to his Shire email from his private email "[b]ecause it may have been seen to be inappropriate for [her] to have been helping him do that … because at some time [she] may have applied for that position".[8]

[49] Later that night, Ms Little followed up her earlier email with further input on the position description.

[50] The next day, Ms Little sent Mr Kerr-Newell a full draft of the position description and suggested he "may want to cull and focus it".[9]

[51] Ms Little admitted to drafting a substantial part of the document "probably 80 per cent".[10] She stated that she expected Mr Kerr-Newell to work on it some more. However, there was very little variation between what Ms Little had drafted and what ultimately became the final position description for the Strategic Planning Manager, a position Ms Little applied for soon after.

The recruitment process

[52] On 16 December 2013, the Shire advertised for a Strategic Planning Manager with applications scheduled to close on 20 January 2014.

[53] Ms Little submitted her application on 22 December 2013.

[54] The very next day, while the application period was still open, the Shire's Secretarial Services Officer contacted Ms Little to make travel arrangements for her interview.

[55] When Ms Little arrived in Halls Creek on 15 January 2014, she went straight to the Shire offices to pick up the key for Mr Kerr-Newell's residence. She stayed with Mr Kerr-Newell while she was in Halls Creek. The interview was the next day.

[56] Ms Little was interviewed by Mr Musa Mono, Ms Heather Perkins and Mr Kerr-Newell. Mr Kerr-Newell had advised the other panel members of

[7] R J Kerr-Newell transcript, public examination, 26 April 2018, p 19.
[8] B J Little transcript, private examination, 23 April 2018, p 18.
[9] Ibid 19.
[10] Ibid 20.

his "long and close personal relationship with Bronwyn".[11] He did not disclose the true (intimate) nature of their relationship.

[57] Mr Kerr-Newell says he did not ask any questions during the interview.

[58] After the interview, Ms Little was "taken around various houses in case [she] wanted to have a house of [her] own, and then the next few days would've been spent looking around Halls Creek".[12]

[59] Ms Little was offered the position on the same day, following her interview. She was the only person interviewed for the position. She was offered the position while the application period was still open.

[60] Curiously, the advertised job description stated that the successful applicant would be reporting to the Manager of Corporate Services. Ms Little's evidence was that this never occurred and she always reported to Mr Kerr-Newell.

[61] Mr Kerr-Newell stated the position of Manager of Corporate Services did not exist in December 2013 and suggested that as "perhaps the reason … the work [of Ms Little drafting the position description] had been done".[13]

[62] This was false. The position did in fact exist and was being occupied by Mr Sterling Bonython-Romanov at the time.

[63] Mr Bonython-Romanov's employee performance review report showed he was interviewed by Mr Olsen and Mr Kerr-Newell on 12 December 2013, five days before Mr Kerr-Newell officially assumed the CEO role.

[64] Mr Bonython-Romanov was rated as either having performed 'well', 'very well' or 'exemplary' in all aspects of his job.

[65] Of relevance, was the inclusion of the performance objective to 'Support and Develop a Strategic Community Plan'. As the Manager of Corporate Services, strategic planning was one of his responsibilities. The loss of this part of his job was not communicated to him.

[66] Mr Bonython-Romanov knew nothing about the recruitment of a Strategic Planning Manager until Ms Little arrived for her first day of work.

[67] Ms Little moved in immediately with Mr Kerr-Newell.

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[11] R J Kerr-Newell transcript, public examination, 26 April 2018, p 28.

[12] B J Little transcript, private examination, 23 April 2018, p 25.

[13] R J Kerr-Newell transcript, public examination, 26 April 2018, p 19.

[68] At the time Ms Little came to work at the Shire, Mr Kerr-Newell stated he told the Shire President and the rest of the Council that he was in a relationship with Ms Little but did not disclose it was a relationship of an intimate nature.

[69] Mr Edwards told the Commission he only became aware that Mr Kerr-Newell was in a romantic relationship with Ms Little in the month leading up to the Commission's examinations. Mr Kerr-Newell had not previously disclosed that information to Mr Edwards.

Performance reviews and pay increases

[70] As the CEO, Mr Kerr-Newell conducted performance reviews for all the Shire's managers.

[71] The process involved employees rating themselves across specific performance criteria. Mr Kerr-Newell would then indicate whether he agreed or disagreed with those ratings and determine what, if any, pay increase was appropriate.

[72] Mr Kerr-Newell conducted four reviews for Ms Little. In almost all of the criteria, he either agreed with or increased the ratings given by Ms Little in relation to her own performance.

[73] After only six months in the position, Mr Kerr-Newell awarded her a $5,000 increase in salary. After another six months, he awarded her an additional $7,000 increase.

[74] Since joining the Shire in February 2014, Ms Little received a total of $24,000 increase in salary. In all but one year, her increases (as a percentage) were the highest of all the managers.

[75] There was express provision in Ms Little's contract for an external facilitator to conduct her performance review. However, Mr Kerr-Newell declined to exercise this option on the basis that it was too costly, even though his own performance review was conducted by an outside consultant.

[76] The *Local Government Act 1995* (LG Act) s 5.40 provides that no power with regard to matters affecting employees is to be exercised on the basis of nepotism and patronage, and employees are to be treated fairly and consistently.

[77] Both Mr Kerr-Newell and Ms Little failed to appreciate the inherent conflict in having one's partner supervise the other. Mr Kerr-Newell should have disqualified himself from conducting Ms Little's performance reviews and making decisions in relation to her pay increases.

[78] The Commission makes no comment as to whether Ms Little's performance ratings and pay increases were warranted. However, in the absence of any conflict of interest declaration and a failure to manage the resulting situation, significant doubt must remain over whether Mr Kerr-Newell appropriately exercised his discretion in relation to Ms Little.

The Department of Local Government is misled

[79] In April 2014, the Commission received an anonymous report alleging, among other things, that Mr Kerr-Newell had:

a) manipulated the Shire recruitment policy, allowing him to employ his friends from New Zealand in senior positions at the Shire; and

b) created a new position of Strategic Planning Manager at the Shire and placed his friend in the position.

[80] The allegations were referred by the Commission to the Department of Local Government (DLG) for investigation.

[81] The DLG wrote to Mr Kerr-Newell on 16 September 2014 inviting his submission on the allegations against him. It requested he provide details and supporting documents in relation to the process relied on by the Shire when creating the new position of Strategic Planning Manager, including the recruitment and selection process used.

[82] In answer to the allegations, Mr Kerr-Newell said:

> *The decision to create the position of Strategic Planning Manager was based on the need for detailed revision of the Shire's current long term plans. The need for a focus in this area was highlighted by [sic] throughout my recruitment process and identified as a priority by our Council. The creation of this position was therefore in response to this clearly identified need. The decision to appoint this position was discussed with the Shire President and Deputy Shire President at a meeting held on 10 January 2014. The minutes of this meeting are attached at Appendix 6.*
>
> *The position of Strategic Planning Manager was advertised nationally by an external advertising company, 'The Employment Office'. A copy of the advert for this position is attached as Appendix 7. Only 14 applications were received for this position. Of those applicants, only Bronwyn Little had extensive local government planning experience and as such, only Ms Little was interviewed and asked to complete psychometric testing. The interview consisted of Executive Services Manager, Heather Perkins, Health & Regulatory Services Manager, Musa Mono, and myself. Ms Little was deemed to be suitable for the position and as such was appointed pending a reference check which is attached as Appendix 8.*[14]

[14] Letter from J Matthews to N Douglas and C Shanahan, 20 October 2014.

[83] Mr Kerr-Newell told the Commission that the need for a strategic planner at the Shire had been "identified to [him] either during [his] interview or shortly afterwards".[15]

[84] The Shire had been using the services of a consultant to undertake strategic planning work, who, Mr Kerr-Newell stated, "appeared to spend most of their time cutting and pasting statements from Wikipedia about the Shire which were fundamentally incorrect".[16] The consultant was subsequently sacked by Mr Kerr-Newell.

[85] When this matter was put to the Shire President for comment, Mr Edwards stated that "It seems to make more sense now. Rodger wasn't happy with [using the consultant] and pointed out quite a number of issues to [him] that they weren't performing very well and … it'd be far better to have a planning officer ourselves".[17] Mr Edwards "went on [Mr Kerr-Newell's] advice".[18]

[86] Contrary to what Mr Kerr-Newell advised DLG, there were in fact 16 applications received for the position of Strategic Planning Manager.

[87] Ms Little was the only person interviewed for the position. This is despite other applicants having more relevant experience.

[88] One particular applicant had experience interacting with Aboriginal and Torres Strait Islander people, having worked with the Northern Territory and Queensland governments. Her application was received on 16 January 2014, within the advertised timeframe for accepting applications. However, it was ignored because by then, Ms Little had already been appointed to the position.

[89] Mr Kerr-Newell told the Commission he would not have interviewed the other applicant because he did not "think that person had sufficient experience in statutory planning … in the delivery of what was in Western Australia quite a new planning framework".[19] It is difficult to comprehend how Ms Little was not rejected for the very same reason given all of her work experience emanated from New Zealand.

[90] There was no mention in his response to DLG of the fact that he and Ms Little were in an intimate relationship with each other or that the position was filled four days before applications closed. Mr Kerr-Newell

[15] R J Kerr-Newell transcript, public examination, 26 April 2018, p 18.
[16] Ibid 17-18.
[17] M H Edwards transcript, private examination, 26 April 2018, pp 3-4.
[18] M H Edwards transcript, public examination, 27 April 2018, p 3.
[19] R J Kerr-Newell transcript, public examination, 26 April 2018, pp 26-27.

did not consider it relevant to do so. There were no documents attached which substantiated the short-listing process. No such records existed.

[91] None of the allegations against Mr Kerr-Newell were able to be substantiated by DLG. As a result, no further action was taken and the matter was closed.

[92] Mr Edwards was never told by Mr Kerr-Newell about the allegations being investigated by DLG.

Employee conflict of interest obligations

[93] As Shire employees, it was incumbent on Mr Kerr-Newell and Ms Little to 'ensure that there was no actual (or perceived) conflict of interest between their personal interests and the impartial fulfilment of their professional duties'.[20]

[94] Their contracts of employment required that any relationships which may have conflicted with the discharge of their duties and functions of office be declared.

[95] Both Mr Kerr-Newell and Ms Little were experienced public officers, having served long careers in local government in Australia and New Zealand. These obligations were not new to them.

[96] In September 2016, Mr Kerr-Newell was summoned as a prosecution witness to give evidence in a serious fraud case in the New Zealand High Court. Mr Kerr-Newell gave the following evidence in relation to conflicts of interest:

> *Conflicts pop up from time to time. The way you deal with a conflict of interest is to declare it and then you can determine the course of action you take. If the conflict is inappropriate you cease one side or the other.*[21]

[97] Mr Kerr-Newell knew very well what his obligations were, yet he deliberately flouted them.

[98] Ms Little was confident she understood her obligations. However, she was less certain when asked whether a person with whom she was in a relationship conducting her performance review constituted a conflict of interest.

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[20] Shire of Halls Creek Code of Conduct for Council members, Committee members & staff, clause 2.1, adopted 20 March 2014, revised and adopted 16 November 2017.

[21] Notes of evidence taken before the Hon Justice S Fitzgerald, Auckland High Court, 27 September 2016, p 75.

[99] Ms Little told the Commission she "know[s] that when [the review] is conducted it is completely impartial … because it is about the work that [she does]".[22] Ms Little's answers reveal a fundamental lack of understanding of a conflict of interest.

Conclusion

[100] Mr Kerr-Newell's intimate relationship with Ms Little presented a clear conflict of interest that should have been declared at the commencement of the recruitment process and then managed accordingly.

[101] Mr Kerr-Newell believed he "addressed that conflict of interest by not taking part in the decision making around her appointment [during the interview]".[23] However, he was part of the shortlisting discussion, a process which resulted in Ms Little being the only candidate shortlisted for interview when there were other, more competitive, applicants.

[102] Ms Little had the opportunity to declare the nature of her relationship with Mr Kerr-Newell once she commenced employment with the Shire. She described him as a 'friend' on official Shire records. This was deliberately misleading. She should have declared her personal relationship with Mr Kerr-Newell but did not.

[103] Mr Kerr-Newell had a further opportunity to be upfront about his relationship with Ms Little during DLG's investigation. Instead, he omitted pertinent information from his submission to the Department. The Council were never informed by Mr Kerr-Newell of the investigation.

[104] By providing Ms Little the opportunity to draft the position description for her job, Mr Kerr-Newell gave her an advantage that no other applicant was afforded. Ms Little herself acknowledged this.

[105] Both Mr Kerr-Newell and Ms Little have benefited as a result of her corrupt appointment. The position appears to have been created with the recruitment of Ms Little in mind and the process conducted in a manner that secured her appointment. The true nature of the relationship between both was obscured.

[106] The Commission has formed an opinion of serious misconduct in respect of Mr Kerr-Newell's appointment of Ms Little.[24]

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[22] B J Little transcript, private examination, 23 April 2018, p 36.
[23] R J Kerr-Newell transcript, public examination, 26 April 2018, p 32.
[24] *Corruption, Crime and Misconduct Act 2003* (CCM Act) *s* 4(b).

CHAPTER FOUR

New Zealand Windfarms

[107] NZ Windfarms is a company registered under the New Zealand *Companies Act 1993* and listed on the New Zealand Exchange. It is in the business of operating wind power generation assets for the purpose of generating and selling electricity, and operates solely within New Zealand.

[108] NZ Windfarms' wholly-owned subsidiaries are NZWL-TRH Ltd and TRH Services Ltd.

[109] Publicly available records held by the New Zealand Companies Office confirm that Mr Kerr-Newell is currently the Director of all three above-mentioned entities. Until recently, he had also been the chairperson of NZ Windfarms.

[110] Mr Kerr-Newell commenced as Director of all three entities on 1 March 2016. He was elected as chairperson of NZ Windfarms in June 2016.

[111] Mr Kerr-Newell received remuneration in the amounts of NZ$10,000 and NZ$60,250 for the 2015/16 and 2016/17 financial years, respectively.

[112] Mr Kerr-Newell is also the Director and sole shareholder of Eye 93 Ltd (Eye 93), a self-established management consultancy business.

Failure to disclose financial interests

[113] During the course of its investigation, the Commission found that Mr Kerr-Newell had failed to meet his obligations under the LG Act by not disclosing his financial interests in the companies.

[114] The LG Act requires a CEO to lodge with the Mayor or President, an annual financial interests return by 31 August of each year.[25] The Mayor or President is to give the CEO a written acknowledgement of having received the return.[26] The purpose of this return is to provide transparency over any conflicts of interest between the private interests of a CEO and the public interest of Shire residents that may affect decisions made by the CEO. Mr Kerr-Newell's failure to make the disclosure obscured from public view that he was engaging in secondary employment while occupying the role of CEO.

[25] LG Act s 5.76(2).
[26] LG Act s 5.77.

[115] Mr Kerr-Newell was required to disclose to Mr Edwards:

a) each source from which income was received during the return period, including where an office was held, a description of that office;[27] and

b) the name of each corporation in which he held a position, including the address and description of that corporation's principal business.[28]

[116] A breach of the financial disclosure provisions of the LG Act carries the penalty of a $10,000 fine or imprisonment for two years.

[117] Mr Kerr-Newell's employment contract also contained a similar obligation to:

> *… disclose any financial or other interest relating to the business of the Local Government in accordance with the Act or which conflicts or may conflict with the discharge of the duties and functions of the office and comply with any reasonable direction given by the Council in respect of that interest.*[29]

[118] Mr Kerr-Newell conceded he had not fulfilled these obligations "from time to time".[30] His reasons for not doing so were two-fold.

[119] Mr Kerr-Newell told the Commission that he "was led to believe [he] did not have to declare things outside of Australia" by the former Shire CEO.[31] Having sought advice on the matter, he now knew that position to be incorrect.[32] He also advised that, until recently, the income from his directorships went to Eye 93.[33]

[120] The Commission accepts neither explanation.

[121] Mr Kerr-Newell is the Director and sole shareholder of Eye 93. Even if all his directorship income went to Eye 93, he was still the beneficiary.

[122] Mr Kerr-Newell had previously disclosed his interests and positions in Eye 93, BBrink and Yachting New Zealand in his 2013/14 annual return, all New Zealand companies in which he held a position as Director. His interests in the former two companies were also declared in his 2014/15 annual return but omitted from later returns. The obligation to disclose was ongoing.

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[27] LG Act s 5.80 must be complied with where the amount of income from any particular source exceeds the prescribed amount of $500.
[28] LG Act s 5.84.
[29] Shire of Halls Creek Contract of Employment Chief Executive Officer, Clause 6.6, 15 August 2013.
[30] R J Kerr-Newell transcript, public examination, 27 April 2018, p 35.
[31] Ibid.
[32] Ibid.
[33] Ibid 44.

[123] Mr Kerr-Newell's explanations do not stand up to scrutiny.

Secondary employment

[124] Mr Kerr-Newell's employment contract required him to:

> *… devote the whole of his/her professional effort to his/her employment and will not hold any position or take on any activities which may in any way be seen to conflict with the CEO's obligations under this contract unless approved by the Council (or, if the Council so chooses, by the President).*[34]

[125] The Commission obtained a letter from Mr Kerr-Newell to Mr Edwards dated 14 January 2016 in which the former sought the latter's consent to take on a directorship with NZ Windfarms.

[126] In his letter, Mr Kerr-Newell advised there would be 'no possibility of a conflict of interest as this is a NZ based power generation company'. Mr Kerr-Newell reassured Mr Edwards there would be 'no impact on [his] activity as Chief Executive Officer of the Shire of Halls Creek as any company activity [would] occur in [his] own time'. The letter failed to indicate the income Mr Kerr-Newell would be receiving and made promises that were not adhered to.

[127] Mr Edwards signed a letter on the same day 'authorising' Mr Kerr-Newell to take up the directorship on the basis there was no conflict of interest with his role as Shire CEO and that he undertake the directorship in his own time. The matter was not spoken of again. The remainder of Council was not informed and no mechanism was put in place to review the arrangement.

[128] When asked how it was he could satisfy himself that the work undertaken by Mr Kerr-Newell would occur in his own time, Mr Edwards stated he "just took it as a matter of trust … [he] just thought that he - he would do the right thing".[35]

[129] The Commission can find no evidence that Mr Edwards was authorised by the Council to approve Mr Kerr-Newell's secondary employment. Nor was there any indication the matter had even been considered by the Council.

[130] Mr Edwards told the Commission that "there's only two of the councillors [he knows] for sure would know, but the rest of them - [they have got] three new councillors, they probably may not know".[36]

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[34] Shire of Halls Creek Contract of Employment Chief Executive Officer, Clause 6.7, 15 August 2013.

[35] M H Edwards transcript, public examination, 27 April 2018, p 12.

[36] Ibid 13.

[131] On 27 September 2017, Commission investigators interviewed two Shire councillors. One remained unaware of Mr Kerr-Newell's interest in NZ Windfarms while the other had only recently become aware after conducting a search of the internet. Both councillors told investigators they would not have consented to Mr Kerr-Newell taking up a directorship with NZ Windfarms while he was CEO.

[132] At no time did Mr Kerr-Newell disclose to Mr Edwards that he had been appointed as chairperson of NZ Windfarms.

[133] Mr Kerr-Newell sought to downplay his involvement in the company. He considered that "there [was] no difference in [his] workload as director or chairman"[37] and advised that he spent "from next to nothing to three or four hours"[38] a week on NZ Windfarm business. Evidence of his telephone call activity to and from New Zealand does not bear this out. Mr Kerr-Newell had weekly, if not more frequent calls with the CEO of NZ Windfarms and other directors and consultants in New Zealand during core business hours.

[134] When pressed, Mr Kerr-Newell admitted that he "talk[ed] to the chief executive [of NZ Windfarms] at least weekly".[39] As chairperson, he was expected to attend board meetings "once every three months"[40] in New Zealand and via telephone every other month. He was a member of the company's risk and audit committee (by virtue of his directorship), which met "at least two or three times a year".[41] In addition to telephone consultations, Mr Kerr-Newell travelled to New Zealand on eight occasions following his appointment as Director in March 2016. His absences from the Shire were frequent, regular, and not fully authorised.

[135] Mr Edwards only learnt Mr Kerr-Newell was receiving an income from his role as Director and that he had been appointed as chairperson when he attended the Commission to give evidence. Having now been informed about the extent of Mr Kerr-Newell's involvement with NZ Windfarms, Mr Edwards stated that he would not have approved Mr Kerr-Newell's secondary employment.

Conclusion

[136] Being the CEO of a local government is a full-time job. Mr Kerr-Newell gave Mr Edwards his personal assurance that his directorship would not

[37] R J Kerr-Newell transcript, public examination, 26 April 2018, p 78.
[38] Ibid 77.
[39] R J Kerr-Newell transcript, public examination, 27 April 2018, p 3.
[40] R J Kerr-Newell transcript, public examination, 26 April 2018, p 80.
[41] R J Kerr-Newell transcript, public examination, 27 April 2018, p 4.

conflict with his role as CEO, and that any company work would occur in his own time. However, nothing was put in place to review adherence to these conditions. Mr Edwards took him at his word. Mr Kerr-Newell never disclosed the true extent of his involvement with NZ Windfarms.

[137] Disclosure of private interests makes decision-making more transparent by minimising the possibility of conflicts arising between public duties and private interests. Failure to be transparent can give rise to a perception that an official may be improperly influenced in the exercise of their powers or functions. It also gives an impression that an official is trying to hide something.

[138] The effect of Mr Kerr-Newell's failure to disclose his financial interests was that both the Council and ratepayers were in the dark about what interests he had outside the Shire.

[139] The Commission has formed an opinion of serious misconduct in respect of Mr Kerr-Newell's failure to lodge annual returns in the prescribed form for the 2015/2016 and 2016/2017 financial years.[42]

[140] While the Commission believes that secondary employment was outside the parameters of Mr Kerr-Newell's contract of employment, it does not form an opinion of serious misconduct in relation to that activity. The Shire President was informed and authorised the activities of the CEO, albeit without being fully informed.

[42] CCM Act s 4(c).

CHAPTER FIVE

Misappropriation of Shire funds and resources

[141] A local government CEO is employed subject to the terms and conditions of his or her contract of employment negotiated with the Shire Council. Additionally, the CEO is expected to comply with his statutory obligations and the Shire's policies and procedures.

[142] A CEO's remuneration package must reflect the cap on entitlements and salary determined by the Salaries and Allowances Tribunal (SAT). A CEO working in a remote area is entitled to a package that includes a regional or isolation allowance in addition to the base salary, annual airfare allowance, utilities allowances, healthcare and housing. However, the total reward package must be within the parameters of a salary band.

Entitlement to time-in-lieu

[143] Mr Kerr-Newell entered into two contracts of employment over his length of service with the Shire. Mr Kerr-Newell's contracts both required him to work 'such reasonable hours as are necessary to carry out the duties and functions of the position'. The second contract in 2016 specified his total remuneration package of $309,145 should take into account the requirement to attend Council meetings outside working hours and an acknowledgement that the position is measured on performance and not hours worked. The CEO was to work the hours required to do the job regardless of whether some of those hours were on weekends or in the evening.

[144] The CEO did not have a contractual right to accrue 'time-in-lieu' for working outside core business hours. Other Shire employees worked a nine day fortnight and accrued time-in-lieu as a specific contractual entitlement. Shire policy stated that time-in-lieu was an entitlement for an employee only if specified as such in the employee's contract.[43]

[145] Despite acknowledging under examination that his contract of employment did not specify an entitlement for the CEO to accrue time-in-lieu, Mr Kerr-Newell regularly took leave from the workplace that was recorded as such. He expended 100 days' time-in-lieu in his employment period at the Shire up to 30 January 2018. This equated to approximately $78,000 at the CEO's hourly pay rate, or 24 days per year that he was absent from the workplace.

[43] Policy no. STF 30 - Leave Entitlements, clause 16, in Shire of Halls Creek Policy Manual as at 1 December 2016.

[146] Administrative systems in place at the Shire automatically accrued 8.44 hours per fortnight of time-in-lieu for Mr Kerr-Newell regardless of the hours he had worked during the fortnight. Not only was this accrual outside the terms of his employment, but it was also not necessary for the CEO to demonstrate he had worked any additional hours in overtime.

[147] Mr Kerr-Newell's explanation was that it was the 'usual practice' of the organisation for employees to work a nine day fortnight. He explained "It was something that was established before [he] arrived. It carried on. [He] didn't think about it at the time".[44]

[148] The approval for a CEO to take any type of leave was required to be signed off by the Shire President. In examination, Mr Kerr-Newell initially stated that he "treated any absence from the office as requiring a leave form"[45] signed by the Shire President.

[149] The leave forms obtained by the Commission from the Shire showed that Mr Kerr-Newell was far from rigorous when it came to his own leave approvals. On occasion, Mr Kerr-Newell approved his own leave applications.

[150] Mr Kerr-Newell used the accrued time-in-lieu to enable him to be absent from the Shire to attend to his secondary employment with NZ Windfarms or take annual holidays during the Christmas period. As a result, his annual leave remained largely untouched such that by 30 January 2018, he had accrued 88 days (over 17 working weeks) of annual leave. This was a substantial and unacceptable financial liability for the Shire and double the allowance the Shire's leave policy allowed an employee to accrue at any one time.

[151] Accrual of annual leave to this extent provided Mr Kerr-Newell with a significant financial cushion. Should he ever be released from his contract with the Shire, he would leave with nearly six months' pay constituting accrued annual leave. In addition, it provided a mechanism for Mr Kerr-Newell to be absent from the Shire to undertake secondary employment duties with NZ Windfarms. Mr Kerr-Newell's international travel increased in regularity particularly after he took on the role of Chairman. By mid-2016, Mr Kerr-Newell was travelling internationally every second month.

[152] All applications for time-in-lieu, with the exception of six, were submitted by Mr Kerr-Newell for approval by the Shire President, Mr Edwards. Of the exceptions, three submitted by Mr Kerr-Newell were signed by

[44] R J Kerr-Newell transcript, public examination, 27 April 2018, p 11.

[45] Ibid 12.

himself, two were signed by the Deputy Shire President and one by the previous Shire President. The leave forms that were self-approved were generated for the sole reason of maintaining the leave database.

[153] Mr Edwards told the Commission he trusted that the applications to be absent from the workplace Mr Kerr-Newell placed before him to be signed, were accurate, and that he had understood Mr Kerr-Newell to be entitled to time-in-lieu. On occasion, Mr Edwards signed leave applications but failed to date the document or make a recommendation as to whether he approved or disapproved the leave requested.

[154] Mr Edwards trusted the accuracy of the document being put before him for signature "At our meetings on the Thursday [Mr Kerr-Newell] would just produce the document … and ask me to sign it".[46] He routinely signed leave applications without being provided any additional information as to whether the leave should be approved.

[155] In one instance in November 2014, Mr Kerr-Newell submitted a leave application for 17 days' time-in-lieu. Mr Edwards approved the leave. Also on the form was a direction 'Please pay airfare allowance of $4000 x 2 $8000'.[47] This was contrary to Mr Kerr-Newell's then contractual annual leave airfare allowance benefit of the equivalent of an economy class return airfare to Perth. In 2014, Mr Kerr-Newell's contract stipulated the allowance would be paid on the condition of taking one week's annual leave.

Negotiation of 2016 contract

[156] The negotiation of Mr Kerr-Newell's 2016 contract and the subsequent annual performance review in 2017 resulted in the Council agreeing to some contractual employment changes that were clearly in Mr Kerr-Newell's favour:

a) the termination period for any reason was increased from three to twelve months' written notice;

b) payment for fuel for the Shire vehicle became the responsibility of the Shire even if purchased outside the Shire;

c) the requirement that Mr Kerr-Newell take one week's annual leave in order to qualify for the $4,000 travel allowance was removed allowing for the payment of this allowance even if the type of leave taken was 'time-in-lieu'; and

d) annual leave was increased to seven weeks per annum.

[46] M H Edwards transcript, public examination, 27 April 2018, p 9.

[47] Shire of Halls Creek Leave Application Form, 13 November 2014.

[157] The negotiation of Mr Kerr-Newell's 2016 contract and the annual performance review was undertaken by a consultant on behalf of the Shire. Mr Kerr-Newell presented to the consultant the contractual changes he sought "I certainly said to him the changes I was looking for".[48]

[158] As CEO, Mr Kerr-Newell had been contractually entitled to six weeks annual leave. That was above the usual employee entitlement of five weeks paid per year. The Shire agreed to grant Mr Kerr-Newell an extra week's annual leave despite the significant leave balance previously accrued.

[159] SAT allowances in place at the time of negotiating the 2016 contract stated that for a CEO situated at Halls Creek, the total reward package must not exceed $256,711. Mr Kerr-Newell's package was already near the top of this limit and any increase in entitlements was subject to the SAT determination salary cap.

[160] The specific allowances that comprise the 'total reward package' are specified in the SAT determination. Contractual benefits that fall outside the SAT determination are not subject to salary capping. The additional benefits negotiated for Mr Kerr-Newell's 2016 contract equated to significant financial benefits for Mr Kerr-Newell. They also circumvented the SAT salary cap as they were benefits that fell outside those comprising a 'total reward package'.

[161] Mr Edwards admitted that increasing Mr Kerr-Newell's annual leave was a way of getting around the salary cap from SAT:

> *Counsel Assisting:* *Was increasing his annual leave a way of getting around the salary cap from the Salaries Allowance Tribunal?*
>
> *Shire President:* *Yeah. Yes, I think that was it. Yeah, yeah. Come to think of it, I remember, yeah, now it was, yes.*
>
> *Counsel Assisting:* *What is it that you remember about any discussions on that point?*
>
> *Shire President:* *I just - because we'd nearly reached the maximum salary cap, to - to increase any benefits to him was to provide another week's - I just remember that being brought up, another week annual leave - now that you mention it, yeah.*[49]

Fuel entitlement

[162] As mentioned earlier in this report, Mr Kerr-Newell was called to give evidence in September 2016 as a prosecution witness in the New Zealand

[48] R J Kerr-Newell transcript, public examination, 27 April 2018, p 28.

[49] M H Edwards transcript, public examination, 27 April 2018, p 18.

High Court. The New Zealand Department of Justice Serious Fraud Office paid for Mr Kerr-Newell's travel expenses to return to New Zealand for that purpose.

[163] Mr Kerr-Newell submitted a detailed claim form to the Serious Fraud Office for his travel expenses. He was reimbursed directly into his personal bank account. Included in the claim form was mileage for the total of 360 kilometres driving each way from Halls Creek to Kununurra.

[164] Mr Kerr-Newell admitted he used the Shire issued vehicle for the purpose of this travel. This was a vehicle maintained at the Shire's cost, including the cost of fuel. It was not an expense that Mr Kerr-Newell personally incurred. However, he claimed and was personally reimbursed the sum of $273.60 for the 720 kilometres. Mr Kerr-Newell admitted he did not repay that sum of money to the Shire.

Mobile telephone entitlement

[165] As CEO, Mr Kerr-Newell was entitled to the provision of a mobile telephone as a 'tool of trade' as part of his contract of employment. This was an aspect of the remuneration package that was designed to attract people to work in regional Western Australia.

[166] Shire policy provided parameters around the reasonable use of a Shire issued mobile telephone. The policy provided that the Shire allowed 'reasonable personal use' of the Shire issued mobile that did not cause 'additional cost' to the Shire. The policy defined 'unreasonable personal use' to include 'lengthy calls' or 'international calls involving significant additional charges'. Reasonable personal use included 'occasional short telephone calls of a personal nature'.[50]

[167] Call data collected by the Commission established there was a high frequency of telephone calls made to and received from New Zealand telephone services by Mr Kerr-Newell's mobile telephone.

[168] Between January 2016 and December 2017, all calls to and from New Zealand came to a combined total of just over 72 hours. Predominately, the calls were to fellow Directors of NZ Windfarms at varying times of the day. Mr Kerr-Newell agreed that the pattern of international calls constituted a "high frequency of international calls"[51] that were predominately concerned with his conducting NZ Windfarm business.

[50] Shire of Halls Creek Policy Manual, 15 June 2017, ADM 24 Telecommunications and Information Technology - Provision and Usage, pp 31-32.

[51] R J Kerr-Newell transcript, public examination, 27 April 2018, p 4.

[169] Looking at a snapshot of calls made and received by Mr Kerr-Newell's mobile telephone over a 13 month period between 14 February 2017 and 15 March 2018, it was accepted by Mr Kerr-Newell that 90 per cent of the calls were made or received during core business hours. Calls made or received over that period amounted in total to 27 hours.

[170] It was unreasonable for Mr Kerr-Newell to expect the Shire to pay for international business telephone calls unrelated to Shire business.

Conclusion

[171] The claiming of time-in-lieu by Mr Kerr-Newell, a benefit to which he was not entitled, came at a great cost to the Shire. Mr Kerr-Newell persistently took advantage of this practice to be absent from the Shire on NZ Windfarm business. The added bonus was the effect of boosting his annual leave payout, if he were ever to part ways with the Shire.

[172] It beggars belief that an experienced CEO, as Mr Kerr-Newell was, did not read his contractual provisions with sufficient care to establish that he was not entitled to time-in-lieu. By contrast, in 2016, Mr Kerr-Newell managed to renegotiate other contractual entitlements in his favour. He also signed other employment contracts on behalf of the Shire (such as Ms Little's contract) that clearly stated the employee's entitlement to take time-in-lieu.

[173] The accrual of the fortnightly hours was in place as an administrative process aligned with the management of Shire personnel leave.

[174] While the Commission has no evidence that Mr Kerr-Newell actively instructed this process be implemented in relation to him, his failure to make the relevant enquiries in regard to a process that personally benefitted him is concerning.

[175] As such, it could be regarded as serious misconduct.[52]

[176] Likewise, seeking reimbursement for fuel expenses not personally incurred and misusing his mobile telephone entitlements could constitute stealing and therefore form the basis of a serious misconduct opinion.[53]

[177] However, the Commission cannot discount the possibility that Mr Kerr-Newell genuinely believed he was entitled to claim time-in-lieu given this had also been the practice of his predecessor. The Commission

[52] CCM Act s 4(b).
[53] CCM Act s 4(c).

is unaware whether the previous CEO had a contractual entitlement to time-in-lieu.

[178] Neither can the Commission discount the possibility that his claim for fuel reimbursement and the misuse of his mobile telephone entitlements was inadvertent.

[179] In these circumstances, no opinion of serious misconduct is formed in relation to Mr Kerr-Newell's misuse of entitlements.

[180] The Commission recommends that all local government authorities and CEOs ensure that the contractual entitlements are understood and not exceeded.

[181] The Commission stresses that any SAT determination is not to be circumvented.

CHAPTER SIX

The 'botched' tender

A complaint is made

[182] On 29 September 2017, the Commission received an anonymous report, which in part alleged:

> *The shire was getting ready to tender for new vehicles. The local Toyota dealer was given information as to what vehicles were required well prior to the tender going out, allowing her to get the appropriate vehicles ordered. After the successful tender was announced, the dealer from Broome who tendered, unsuccessfully, stated that the halls creek [sic] agency (Baz Industries) must have had inside information regarding the tender, as the requested vehicles were not currently available for purchase anywhere else in Australia. This gave them the best chance of winning the tender. The owner of Baz Industries is a friend of both the CEO and the Shire President.*

[183] The Commission confirmed that at the Council meeting of 18 May 2017, a resolution was passed to award the tender for the purchase of six Toyota vehicles to Halls Creek Toyota.

The procurement process commences

[184] The Shire's decision to purchase the six vehicles was prompted by the State government's decision to withdraw local government vehicle licensing concessions from 1 July 2017.[54] Therefore, any vehicles purchased by the Shire had to be delivered and registered by 30 June 2017 in order to avoid incurring an additional financial impost.

[185] Mr Kerr-Newell advised that he "saw no reason to give the state any more of the Shire's money than was absolutely necessary".[55]

[186] Halls Creek Toyota had an ongoing contract with the Shire to supply its fuel.

[187] Mr Kerr-Newell and Mr Burgess socialised with Ms Baz, the proprietor of Halls Creek Toyota, outside of work.

[188] On 9 March 2017, Ms Baz sent Mr Burgess an email with the subject line 'Vehicle Comparison Spreadsheet'. Attached to the email was a spreadsheet which contained a breakdown of specific vehicle models, additional parts and their pricing. The document had been prepared by

[54] The State government's decision to withdraw local government concession vehicles did not take effect as a result of a disallowance motion passed in the WA Legislative Council on 27 June 2017.

[55] R J Kerr-Newell transcript, public examination, 26 April 2018, p 46.

Ms Baz in order to educate Mr Burgess about what his options were for purchasing Shire vehicles. She was "under the impression that he was going to put [the spreadsheet] in to Council to get approval to go - to update their vehicles".[56]

[189] A budget amendment was necessary in order to fund the vehicle purchase. As the Shire's Director of Infrastructure Assets, Mr Burgess was told by Mr Kerr-Newell to go to the local Toyota dealer, Halls Creek Toyota "[b]ecause [Ms Baz] had all the knowledge".[57] This was approximately four to six weeks before the tender proposal went to the Council for consideration.

[190] Mr Kerr-Newell stated there was an "absolute possibility" he spoke to Ms Baz about seeking a budget amendment for the vehicle tender.[58]

[191] It was more than just an absolute possibility. A meeting took place between Mr Burgess, Mr Kerr-Newell and Ms Baz around mid-March 2017 in which they discussed:

> *The pros and cons of the different vehicles. What's probably best suited for us and the – and the - you know, our part of the (indistinct) if you like, best value for money, the replacement – sorry, the sale prices or the potential prices for the vehicles that we're going to sell, which vehicles we'd swap kit from so that we didn't have to, you know, purchase it again, that type of thing, and then basically – yeah, I think that was pretty it – oh, the – the – two – two – two of the – two of the managers or the directors had previously said they wanted or not previously but had been offered – I think we'd been offered colours for the vehicles. Obviously Rodger's was the same. So we squared away the colours because apparently that increases the price ...*[59]

[192] Ms Baz was under the impression that he (Mr Kerr-Newell) was going to put in to council to get approval to update their vehicles.[60]

[193] Ms Baz was made aware that the vehicles had to be delivered by the end of June as a result of her discussions with Mr Kerr-Newell and Mr Burgess.

[194] Also discussed at this meeting was a proposal to transfer some of the 'kits' from the old vehicles to the new Toyotas. This was done in an effort to minimise cost to the Shire.

[195] On 13 March 2017, Mr Burgess emailed Ms Baz confirming the colour for one of the other manager's vehicles. It was clear from the preceding email conversation that Mr Kerr-Newell had instructed his staff to decide which

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[56] D J Baz transcript, private examination, 21 February 2018, p 23.

[57] P J Burgess transcript, private examination, 24 April 2018, p 7.

[58] R J Kerr-Newell transcript, public examination, 26 April 2018, p 48.

[59] P J Burgess transcript, private examination, 24 April 2018, p 15.

[60] D J Baz transcript, private examination, 21 February 2018, p 23.

colours they wanted and to advise Mr Burgess accordingly. Mr Kerr-Newell selected a gold colour.

[196] Later that day, Ms Baz emailed Toyota WA stating she would like six Toyota vehicles delivered to Halls Creek in June 2017. Toyota WA confirmed the availability of the specific models requested, including preferred colours, indicating that "[t]hey should hopefully arrive here in May, so we can get them up to you for June delivery".[61] The effect of putting in an order at this time meant that Toyota WA could "lock away April Production vehicles" for Halls Creek Toyota. This was still 66 days prior to the tender being awarded by the Council.

[197] Mr Burgess prepared the budget amendment report that went before the Council. The report included a spreadsheet which itemised the vehicle models by component and cost. Save for a few exclusions, Mr Burgess' costings were identical to the figures prepared by Ms Baz.

[198] Halls Creek Toyota did not have a 'floor-plan'.[62] This would have enabled it to hold vehicles in stock and on-hand for purchase. Ms Baz had sufficient cash to make payment for vehicles without needing a floor plan arrangement. Therefore, in order to secure the vehicles from Toyota WA, Ms Baz had to pay for the vehicles outright. She was prepared to do so as she "was confident [she would] probably get the tender":

> *I'm confident because I'm local. Um, there is government policy to award - that when it comes to tender a local tenderer can - can be 10 per cent more than a lower price. I knew that my pricing was competitive. But I knew that the essence of any tender, whether it - whether - or any of these vehicles, whether I sold it to the Shire or I sold it to another government department, is going to be the timing of the legislation coming in on 1 July.*[63]

[199] In fact, a significant proportion of the payment was made to Toyota WA before the tender period had even closed. Halls Creek Toyota transferred the sum of $300,000 to Toyota WA on 4 and 5 May 2017 and made the final payment of $35,324 on 12 June 2017.

[200] Further, Ms Baz stated:

> *I believed that if I was to win the tender it would be based on my ability to have them in stock. If I did lose the tender then there will be either potentially Kununurra or Broome, which I'm assuming are the other two people that put in for the tender, that will be wanting that stock. If they didn't need that stock because they had them in stock, because I don't know what stock they've got, um, Toyota would take*

[61] Email from Toyota WA to Halls Creek Toyota, 13 March 2017.

[62] Type of short-term loan used by car dealerships to purchase and secure high-cost inventory.

[63] D J Baz transcript, private examination, 21 February 2018, p 31.

that stock back from me and, you know, I'd - I wouldn't have to - yeah, I didn't have a problem.[64]

[201] On 20 April 2017, Council resolved to procure six new Toyota vehicles by tender, at a budgeted cost of $336,000 plus GST.

The request for tender

[202] Mr Burgess prepared the request for tender document that accompanied the tender advertisement.

[203] The tender specifications incorporated the following requirements:

The six vehicles offered under this Tender must be a new, current production model fitted with the additional parts as listed.

All six vehicles are to be delivered to Halls Creek, and be registered by the Shire of Halls Creek prior all [sic] to 16 June 2017.[65]

[204] The request for tender also advised that vehicle registration, stamp duty and insurance was not to be included in the tender price.

[205] Significantly, there was no mention in the application of any regional price preference policy.

[206] Mr Burgess commenced leave on 21 April 2017, the day after the Council meeting. He returned to Perth on 23 May 2017. In Mr Burgess' absence, the Operations Officer, Mr Kearney, assumed responsibility for the tender.

[207] The tender was advertised in The West newspaper on 21 April 2017. Tender offers closed at 2.00 pm on 8 May 2017.

[208] The Shire received three tenders from Halls Creek Toyota, Broome Toyota and Kununurra Toyota.

[209] The Operations Officer was a junior level position occupied by Mr Kearney. Mr Kearney had no previous experience managing a tender process.

[210] Before going on leave, Mr Burgess gave Mr Kearney specific instructions to email Halls Creek Toyota, Broome Toyota and Kununurra Toyota advising them of the tender as the Shire had always received tender submissions from the three businesses.

[64] D J Baz transcript, private examination, 21 February 2018, p 32.

[65] Shire of Halls Creek Request for Tender, Specification & Requirements, HC 2017-06.

[211] Mr Burgess also instructed Mr Kearney on "what documents to send out and … when the tender was closed".[66] Beyond these tasks, Mr Kearney was given no instruction. Every query of which he was unsure was forwarded to and handled directly by Mr Kerr-Newell.

The tender evaluation

[212] The minutes from the meeting held on 18 May 2017 revealed that Council considered the report of Mr Kearney in deciding to award the tender to Halls Creek Toyota.

[213] Under the heading 'Matters Behind Closed Doors - Item 10.3', the meeting minutes recorded the following resolution:

> *Based on the analysis of the tenders submitted, Council award the tender for Supply and Delivery of Six Specified New Toyota Vehicles to Halls Creek Toyota to the value of $345,903.28 plus GST.*

[214] Mr Kearney was not the true author of the report.

[215] Despite his obvious lack of experience, Mr Kearney was tasked with preparing the evaluation report for a tender in excess of $300,000. He "tried to do a spreadsheet … to work out - work it out but … it was out of [his] league".[67]

[216] Mr Kearney sought assistance from Ms Little who said "she'd do it all because she does up most of the spreadsheets anyway".[68] Ms Little stated that her role in assisting with the tender evaluation was something to which Mr Kerr-Newell would have agreed. However, she also had no previous experience writing tender evaluation reports.

[217] Ms Little did not consult any legislation or policy in preparing the report for the Council. She "cut-and-pasted"[69] from one of Mr Burgess' earlier reports.

[218] Ms Little conceded that she made a number of errors in evaluating the tenders. For example, she incorrectly added registration to Broome Toyota's quote when the request for tender made it clear it was not to be included in the tender price. But she did not do the same to Halls Creek Toyota's total.

[219] The Shire's regional price preference policy was also applied in error, resulting in a discount of $27,213.22 to Halls Creek Toyota's price.

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[66] P A Kearney transcript, private examination, 23 April 2018, p 7.

[67] Ibid 10.

[68] Ibid 10-11.

[69] B J Little transcript, private examination, 23 April 2018, p 43.

[220] A council may choose to adopt a regional price preference policy in order to maximise the use of competitive, local businesses in goods, services and works purchased or contracted on behalf of the local government.[70] This allows for specific discounts to be applied to those tenders and quotations falling within the scope of the policy.

[221] The Shire's price preference policy expressly did not apply to the supply of motor vehicles.

[222] Further and in any event, the Shire's failure to include a copy of its regional price preference policy with the request for tender as required by local government regulations[71] meant that the policy could not apply at all.

[223] Ms Little was not alone in her misapplication of the regional price preference policy.

[224] Mr Burgess "applied [the policy] to everything" and believed the discount was "the normal 10 per cent".[72] This was wrong. As the Director of Infrastructure and Assets, he ought to have known the policy did not apply to vehicles. He conceded he "should've actually checked [the policy] as opposed to [relying on what others told him]".[73]

[225] Mr Kerr-Newell gave an explanation:

> *We want to support local businesses and suppliers. I think there's a bit of a group thing in the organisation that we have a formal policy which mandates 10 per cent, come what may. In fact the policy's remarkably badly written and should - it's limited, I think, too.*[74]

[226] Ms Little advised that Mr Kearney's name was on the evaluation report as the 'reporting officer' "[b]ecause he would be the one who was going to report to the Council and stand up at the Council [and] talk about this if it was going to - if he was going to be there".[75]

[227] But Mr Kearney did not attend the meeting and, in any event, it was evident he was not going to be in a position to appropriately advise on the matter to the Council.

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[70] *Local Government (Functions and General) Regulations 1996* pt 4A.

[71] *Local Government (Functions and General) Regulations 1996* reg 24F(4)(a).

[72] P J Burgess transcript, private examination, 24 April 2018, pp 30-31.

[73] Ibid p 32.

[74] R J Kerr-Newell transcript, public examination, 26 April 2018, p 53.

[75] B J Little transcript, private examination, 23 April 2018, p 42.

Department of Local Government review

[228] As part of its investigation, the Commission requested DLG to conduct an independent review of the Shire's tender process.

[229] The review corroborated the Commission's investigation and further found that:

a) Only Halls Creek Toyota's tender was assessed by the Shire to be wholly compliant with the tender specifications. Therefore, the tenders of Broome Toyota and Kununurra Toyota should have been rejected outright but were not.

b) Given Kununurra Toyota's tender was not rejected, it should have been evaluated along with Halls Creek Toyota and Broome Toyota but was not.

c) The tendered values of Broome Toyota were revised upwards to account for missing specifications. The local government regulations do not allow for this and Broome Toyota was never notified its figures were altered in this manner.

d) The evaluation criteria stated in the tender document did not match the actual criteria used to evaluate the tenders.

The tender is awarded

[230] Following Council's resolution, Mr Kerr-Newell wrote to Halls Creek Toyota on 22 May 2017 advising that the Shire was 'pleased to accept [its] conforming tender' for the tender sum of $345,903.28 plus GST.

[231] Mr Kerr-Newell also wrote to Broome Toyota and Kununurra Toyota notifying them of their unsuccessful bids.

[232] Mr Chris Slade of Broome Toyota contacted the Shire on several occasions in the days following the notification from Mr Kerr-Newell. Mr Slade's queries with Toyota WA led him to discover "that one dealer had managed to secure the vehicle stock that met all of the Shire's tender requirements back in February, well before the tender was advertised in April". He also noted that the prices quoted by Mr Kerr-Newell in his letter were not the prices he submitted for the tender.

[233] Mr Slade was of the view that 'it was already pre-decided that Halls Creek Shire will be purchasing from Halls Creek Toyota regardless of an open public tender'.[76] He concluded his response by requesting that the Shire not invite him to submit any future tenders.

[76] Email from C Slade to L Dransfield, 24 May 2017.

[234] Mr Kerr-Newell wrote to Mr Slade on 24 May 2017 in the following terms:

> *The Shire's intention to purchase vehicles was first outlined in a report to Council for a budget variation in April of this year, and my staff I am sure conversed with Toyota for a guide line on price for the vehicles to inform the report which would have been written in March.*
>
> *The public report to Council identified the need for the vehicles to be delivered prior to 30 June 2017 to avoid the pending increases in registration and stamp duty. The matter was tendered in April as you say, and the sale was contracted this week as you know.*
>
> *You may well be right that Halls Creek Toyota took a commercial risk in ordering the vehicles early. Any risk Halls Creek Toyota took was theirs alone as the Shire of Halls Creek made no contractual commitment to anyone until the beginning of this week to purchase the vehicles.*
>
> *I note that even had Broome Toyota been able to deliver the vehicles before 30 June they would still not have been successful in the tender as Halls Creek Toyota had the lowest price (excluding registration and stamp duty) when the local pricing preference was applied in line with the published SoHC policy ADM 21. Broome Toyota tendered $329,326.28 and Halls Creek Toyota tendered $318,690.06.*[77]

[235] Mr Kerr-Newell's statement to Mr Slade that his staff 'conversed with Toyota' was misleading. In fact, it was Mr Kerr-Newell who had himself conversed with Halls Creek Toyota, the ultimate successful tenderer.

[236] Despite Ms Little's numerous errors in evaluating the tenders, Halls Creek Toyota's quote was still the most price-competitive of the two assessed. This was due solely to the imposition of the additional stamp duty and registration on Broome Toyota for not being able to comply with the 1 July 2017 deadline. However, this price advantage was only able to be secured by Halls Creek Toyota because Ms Baz benefited from her conversations with Mr Kerr-Newell and Mr Burgess.

[237] Mr Burgess, too, experienced "a bit of a furore"[78] upon his return from leave. He was informed by Mr Kearney that:

> *Chris Slade from Broome Toyota really took to him about the fact that - that he could see she'd [Ms Baz] ordered them previously and that we were unfair and, you know, he gave us a real tongue-lashing.*[79]

[238] Mr Burgess told the Commission that he did not consider speaking with Ms Baz in March 2017 about the specific requirements of each vehicle and the tight timeframe within which the vehicles had to be delivered, might give her a commercial advantage over the other dealerships. He

[77] Letter from R J Kerr-Newell to C Slade, 24 May 2017.

[78] P J Burgess transcript, private examination, 24 April 2018, p 19.

[79] Ibid.

was not aware she ordered the vehicles from Toyota WA on 13 March 2017 because he "just couldn't see anyone doing that before it went to Council and then the tender come out".[80] He never discussed the matter with Ms Baz even after Mr Kearney told him there had been an issue about that.

[239] Five vehicles were delivered to Halls Creek Toyota on 6 June 2017 and the final vehicle was delivered on 27 June 2017, despite the contractual delivery date being 16 June 2017.

[240] On 3 July 2017, a further purchase order totalling $11,776.50 for the supply and installation of additional vehicle accessories was issued to Halls Creek Toyota.

[241] The purchase order which was signed by Mr Burgess, referenced 'Changes as per specified Tender 2017-06',[81] despite this work not being part of the original tender. Mr Burgess agreed this was misleading.

[242] The Shire should have obtained three quotes as required by its purchasing policy.

[243] Mr Burgess stated he did not do this because "Baz Industries [Halls Creek Toyota] is our preferred supplier".[82] However, the Shire's Purchasing Policy provides that procurement contracts may only be awarded to 'preferred suppliers' where the total is less than $5,000. This transaction fell outside that range. This was just another example of the Shire's sub-standard procurement practices.

Conclusion

[244] The Shire, as a public authority, must be able to demonstrate to suppliers and the community that it conducts its procurement activities with high standards of probity and accountability. One of the elements of a procurement culture that promotes high standards of probity is that communications with suppliers are consistent and do not disadvantage or advantage one supplier over others.

[245] It is apparent from the evidence at hand that Mr Kerr-Newell and others contravened those standards of probity and accountability.

[246] The Commission forms no opinion of serious misconduct in respect of Mr Kerr-Newell or any other Shire employees involved in the tender process.

[80] Ibid 34.

[81] Shire of Halls Creek Purchase Order No. 58376.

[82] P J Burgess transcript, private examination, 24 April 2018, p 41.

[247] The Commission accepts that Halls Creek Toyota took a commercial risk by purchasing the vehicles before the resolution was passed by the Council to tender for the vehicles and before it was awarded the tender by the Shire.

[248] By consulting Ms Baz and using the information provided by her to inform the tender, Halls Creek Toyota was given an unassailable advantage over other dealers by being the only tenderer in a position to comply with the specified delivery date. By having premature knowledge of the Shire's intention to go to tender, and the exact vehicle models and specifications the Shire wished to acquire, Ms Baz was able to reserve the vehicles before any other dealer.

[249] No criticism is intended or to be inferred about the actions of Ms Baz. She was entitled to act to her commercial advantage and she accepted the commercial risk.

[250] The Commission's criticism is reserved for the Shire officers in creating the situation.

[251] While it may not have been the intention of Mr Kerr-Newell or Mr Burgess to provide Halls Creek Toyota with such an advantage, it should have been obvious to anyone that that would have been the likely outcome.

[252] The Shire's own procurement processes were not observed and officers demonstrated an utter lack of care in complying with the local government regulations. From an outsider's perspective, as indeed it was the case for Mr Slade, it would have appeared as if the entire procurement process had been corrupted. They would have had good reason for believing so.

CONCLUSION

[253] Mr Kerr-Newell placed his personal interests ahead of everyone else. He wanted Ms Little in Halls Creek and every step in her appointment was orchestrated by him to get her there. It was the very embodiment of corruption.

[254] Ms Little may very well have had the requisite skills and experience to legitimately win her position. Due to Mr Kerr-Newell's interference in the process, that is a question which will never be answered.

[255] Mr Edwards reposed a significant level of trust in his CEO to do the right thing by the Shire. Mr Kerr-Newell's tenure went relatively unchecked which enabled him to take advantage of the Shire's resources for his own private benefit. Mr Edwards and the Council's trust was seriously misplaced.

[256] Decisions in relation to tenders should be fair and transparent. There should be no preferential treatment afforded to any individual given public procurement activities are undertaken with public funds.

[257] The Shire's 'botched' tender serves as an important lesson for all local councils. Councils must ensure that those who have any role in Shire finances are well-versed in procurement processes or risk public confidence in its operations being seriously undermined.

[258] The Commission's investigation also underlined the importance of 'whistleblowers', whether they be anonymous or otherwise. Without these persons, this investigation would not have been possible.

[259] Over the course of the Commission's investigation, it became evident that other members of the community may have also had information relevant to the Commission's investigation. Some of those persons were understood to be reluctant to contact the Commission because they had signed non-disclosure agreements.

[260] The *Corruption, Crime and Misconduct Act 2003* protects any person subject to a non-disclosure or confidentiality agreement from any civil or criminal liability incurred as a result of making an allegation or providing that information to the Commission.[83]

[261] The Commission encourages all persons with information regarding serious misconduct by a public officer to come forward.

[83] CCM Act s 220(2).