

Summary of the Ombudsman's report into the Triangle

The Council approved the BBC Triangle in August 2008 (In February 2008 it had approved the plan subject to changes). In September 2008 unChain brought a challenge to VCAT.

While this was going on, there was an Inquiry by a Committee of the Legislative Council into Public Lands. unChain made three detailed written submissions: in September 2007, 25 January 2008 and 5 March 2008. We also made an oral presentation to the committee. Council CEO Spokes and Steve McMillan also made oral submissions. unChain's submissions to the Select Committee detailed our concerns with the processes involved in the Triangle decision-making.

Our submission drew the attention of the Committee to a section of the Ombudsman Act that has never been used – section 16 gives the Committee or the Legislative Council the power to refer a matter to the Ombudsman.

The Select Committee reported in September 2008. It accepted the substance of our submissions. The Committee reported to the Legislative Council and the Council referred the matter to the Ombudsman in December 2008. The Committee recommended that the Victorian Ombudsman investigate the probity of the St Kilda Triangle development processes that were followed by the State Government and the Port Phillip Council.

The Ombudsman reported in June 2010. We made written and verbal submissions to the Ombudsman. The Ombudsman's report cast light into the decision-making process that we as outsiders were able to raise as concerns but not to establish through an examination of the council documents and officers in our unsuccessful VCAT action. The Ombudsman's report was very critical of the processes, including the conflicts of interest of Crs Ray and Gross and staff. Had we known at the time of our VCAT application the problems that the Ombudsman's investigation revealed, I think we would have won our action. (We also waged a long FOI battle with the Council). Unfortunately we were not able to wait until the Ombudsman had completed his report before bringing our VCAT challenge.

Below are extracts from the Ombudsman's Report on the conflict of interest. For the full report see [Ombudsman on the Triangle](#). In 2009 the Ombudsman also investigated the procurement and contract management practices of the City of Port Phillip. The report found poor procurement and contract management, failure of governance, conflict of interest and staff misconduct. A feature of the investigation was Council's use of a self-proclaimed 'white witch' as a consultant. See [Ombudsman on Management at Port Phillip](#).

Peter Holland
June 2011

EXTRACTS FROM THE OMBUDSMAN'S REPORT

Conflicts of interest identified during my investigation

595. My investigation did not identify evidence that conflicts of interest led to the unfair treatment of particular tenderers. However, I did identify conflicts of interest that were not declared or managed as follows. These conflicts have the potential to give rise to perceptions of, or to provide opportunities for, corrupt conduct.

596. In this regard, I note that the probity plan stated:
Any probity issue whether perceived, potential or actual should be identified, managed and eventually eliminated to ensure that the Project is delivered in a robust manner.

1. Councillor working for BBC's public relations consultants

597. My investigation identified that Mr Darren Ray, a City of Port Phillip councillor from 1999 until November 2008, was engaged by BBC's public relations consultants, CPR (Communications and Public Relations) as a 'Planning and Development Advisor' from 1 August 2006 to March 2007 – during the tender process. Mr Ray did not declare a conflict of interest throughout the process and did not inform or seek advice from the probity auditor.

Mr Ray's employment with CPR

598. Mr Ray was engaged by CPR, through his company DCR Consulting, from 1 August 2006. This was just prior to the due date for the three short-listed consortia's final submissions (31 August 2006) and BBC's final presentation to the St Kilda's Edge Committee (12 September 2006). I note that BBC was represented by the National Manager, Public Affairs, CPR (the CPR National Manager), who attended BBC's final presentation.

599. According to Mr Ray, he was engaged until March 2007. During this period, the St Kilda's Edge Committee received and evaluated bids from the short-listed consortia and determined that BBC was the preferred bidder. Subsequently, on 24 May 2007, Mr Ray voted as a councillor to award the tender to BBC.

600. Mr Ray gave evidence to my investigation that he was managed by the CPR National Manager who represented BBC in relation to the development. Mr Ray listed the CPR National Manager on a résumé obtained by my office as his 'most recent employer'. Further evidence obtained demonstrates that the CPR National Manager managed Mr Ray in relation to six of the 12 CPR projects that Mr Ray worked on.

601. Copies of emails obtained from CPR described Mr Ray's role with CPR as follows:

- Mr Ray's engagement was 'not directly related to any individual client', but he was 'working across about a dozen accounts and picking up the overflow work' for senior CPR staff
- Mr Ray had been assisting senior CPR staff 'with a range of [CPR] infrastructure, development and planning clients. His role [was] to gather intelligence, liaise with state and local government and provide strategic advice'.

602. Mr Ray was paid a weekly retainer of \$1,320 for six months, excluding January 2007 when he was on holidays. In total, he was paid \$23,265 by CPR.

603. I note that Mr Ray nominated his City of Port Phillip mobile phone and fax numbers on his DCR Consulting invoices. I also note Mr Ray did not declare his company on his annual register of interests – a possible breach of section 81(6) of the Local Government Act.

604. According to Mr Ray and the CPR National Manager, they did not speak about the St Kilda Triangle development and Mr Ray did not work on this project on behalf of CPR. The former Special Counsel, CPR, also said he did not speak to Mr Ray about the development.

Mr Ray's knowledge of CPR being engaged by BBC

605. At interview on 26 June 2009, Mr Ray was asked if he knew of any involvement that CPR had in the St Kilda Triangle project. Mr Ray responded, 'No'. Mr Ray was reminded that he was under oath. He then stated he found out in May 2007 that CPR was engaged by BBC. Mr Ray said Mr Oulton informed the councillors in a briefing that the final presentations to the Design Review Committee had been made and 'mentioned that [the CPR National Manager] was there'. Mr Ray noted that his employment with CPR ceased in March 2007, prior to him learning of CPR's involvement in the St Kilda Triangle project.

606. However, I received evidence from the former Special Counsel, CPR and the CPR National Manager that they told Mr Ray of CPR's involvement in the St Kilda Triangle process before Mr Ray was engaged (the former Special Counsel, CPR) and while Mr Ray was working for CPR (the CPR National Manager).

My investigation identified that Mr Darren Ray, a City of Port Phillip councillor from 1999 until November 2008, was engaged by BBC's public relations consultants as a 'Planning and Development Advisor' during the tender process. Mr Ray did not declare a conflict of interest throughout the process and did not inform or seek advice from the probity auditor.

607. Mr Spokes was also aware of both BBC's engagement of CPR and CPR's engagement of Mr Ray. However, Mr Spokes said he did not recall 'linking Mr Ray's employment with CPR specifically to the triangle development' and that Mr Ray did not highlight this connection. As such, he did not raise the conflict with the probity auditor or Mr Ray. In this regard, I

note that the probity plan stated it was the responsibility of the Chair, St Kilda's Edge Committee to ensure that any conflicts 'are promptly and satisfactorily resolved'.

608. When interviewed by my office, Mr Spokes said in relation to Mr Ray: I think, based on what you've outlined, on face value that would appear to be, you know, a significant conflict of interest.

Conclusions

609. At interview, Mr Ray acknowledged that he did not declare a conflict of interest, either in the council chamber; on his annual register of interests; or on any declaration of interest or conflict of interest documents specific to the development. However, I consider that Mr Ray had a conflict of interest. His private duty as a consultant for CPR clearly conflicted with his public duty as a councillor. I do not accept Mr Ray's evidence that he did not learn about CPR's role in the development until May 2007. The evidence supports that he knew earlier.

610. I note that Mr Ray was on the St Kilda's Edge Committee in 2004- 05. As such, he had access to confidential information about the St Kilda's Edge Committee's evaluation of the Expressions of Interest and the short-listed bids. He also had access to information related to the policies and priorities of the City of Port Phillip and the St Kilda's Edge Committee that bidders did not have access to. Such information would have been invaluable to CPR.

611. Mr Ray also failed to declare his company, DCR Consulting, in his annual register of interests, as required by section 81(6) of the Local Government Act. In this regard, I note that he completed the register just three days after he modified details of DCR Consulting on the Australian Business Register. Mr Ray also failed to declare his interest in his company in July 2007 and June 2008, although his business remains registered.

612. I have not identified any evidence that Mr Ray sought to influence the assessment or bidding process by providing BBC with information not available to other bidders. However, I consider that it is likely that the community perception of Mr Ray's employment with CPR would be that BBC could have received an advantage from Mr Ray's employment with CPR.

2. Relationship between an SKE Committee member and BBC's public relations consultant

613. My investigation identified that Mr Dick Gross, former councillor and member of the St Kilda's Edge Committee, failed to declare his relationship during the tender process with the National Manager, Public Affairs, CPR (the CPR National Manager) – BBC's public relations consultants. While Mr Gross stated that he did not speak to the CPR National Manager about the St Kilda Triangle development, in my view he should have disclosed the contact.

614. Mr Gross was the only permanent councillor on the St Kilda's Edge Committee. He was a member from its creation in 2004 until November 2008 when he was unsuccessful at the local council elections.

615. Mr Gross said he was introduced to the CPR National Manager on 20 July 2006 (during the tender process) after the resignation of the President of the Municipal Association of Victoria (MAV).

616. Mr Gross met with the CPR National Manager again on 9 August 2006. At interview, Mr Gross said he arranged this meeting to seek advice from the CPR National Manager about how he might 'win' the presidency of MAV – a paid position.

617. In September 2006, the CPR National Manager also prepared a media statement for the Western Regional Waste Management Group (the waste management group). The media statement quoted Mr Gross as Chairperson of the waste management group and listed Mr Gross as the contact. The media statement was prepared in response to media enquiries about one of the organisation's board members.

618. Evidence obtained during my investigation demonstrated that Mr Gross telephoned the CPR National Manager from his council- issued mobile phone 10 times in August and September 2006. Final submissions were due from the short-listed bidders in August 2006 and BBC presented their submission to the St Kilda's Edge Committee and the evaluation panels on 12 September 2006.

Mr Gross' knowledge of CPR being engaged by BBC

619. At interview, Mr Gross was unable to recall when he first found out that CPR was working for BBC, but he said he did not know during the tender process. According to the CPR National Manager, he recalled telling Mr Gross that CPR was working for BBC. The CPR National Manager said:

I do remember quite specifically at one point saying to ... you know, Dick Gross, who I, you know had dealings with ... But quite specifically saying to Dick, "You know you need to know that I work for Citta [BBC]".

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620. In relation to when he told Mr Gross, he said he 'would have' told Mr Gross the first time he 'interacted' with him after he was engaged by BBC. Mr Gross said he did not 'recall' this conversation.

621. I note that the CPR National Manager attended BBC's presentation to the St Kilda's Edge Committee on 12 September 2006, which Mr Gross also attended. The presentation was closed to the public. Mr Gross did not 'recall meeting' the CPR National Manager at the presentation.

622. Mr Gross stated he did not declare a conflict of interest or inform Mr Spokes or the probity auditor about his relationship with the CPR National Manager. He said during the planning process (after the tender had been

awarded), 'I seem to remember mentioning to [the Senior Project Officer] but I don't know'. The Senior Project Officer did not recall this conversation. I note that the probity plan required that declarations be made to Mr Spokes, Chair of the St Kilda's Edge Committee.

623. Mr Gross said:

My understanding of the conflict of interest provisions is that they're about financial and pecuniary interests. Now I had no pecuniary interest with anyone.

624. However, he also stated:

The point about probity, it's not about what actually happens, it's about appearance. What actually happened was the best bid won. The appearance of CPR does not auger well, but they were irrelevant.

625. Mr Gross also said that he 'knew lots of people' from each of the consortia bidding for the project and that he had 'more connection' with 'the competitors, than [he] had with the winning tender'.

626. I note that Mr Gross signed, but did not date, a pro-forma letter addressed to the probity auditor, titled 'St Kilda Triangle Site Project', which stated:

Conflict of Interest

I am fully aware of my obligations to avoid all conflicts of interest in carrying out my duties, and to disclose any potential conflict of interest if they emerge in the course of my official duties.

627. Mr Gross wrote on the document that his declaration was for the period '1 July 2006 onwards'.

628. According to the probity auditor, members of the St Kilda's Edge Committee should have been aware that their obligations to declare conflicts of interest were broader than pecuniary interests. The probity auditor also said he was visible around the City of Port Phillip and individuals could have sought him out for advice.

Mr Gross' response to my report

629. Mr Gross provided three responses to my report. The first response was prepared by him. The second and third responses were prepared by a firm of solicitors engaged by Mr Gross. The responses denied that Mr Gross' relationship with the CPR National Manager was an interest that should have been declared.

630. The third response argued that probity standards were not breached by Mr Gross. The response stated that the probity plan's discussion of conflict of interest excluded 'benefits of value of mere trifles, and ad hoc commercial transactions at arms length' – such as the CPR National Manager's advice to Mr Gross regarding the MAV presidency and the media statement prepared by the CPR National Manager for the waste management group. Moreover,

according to the response, the probity plan requirements border on ‘rendering the functions of Council unworkable’.

631. The response identified four elements of ‘affiliation and interests’ that must be declared according to the probity plan, but made no attempt to explain Mr Gross’ limited understanding of the variety of interests that need to be declared. His understanding was solely in relation to pecuniary interests.

632. According to Mr Gross and his solicitors, Mr Gross’ relationship with the CPR National Manager, described by Mr Gross as a ‘friendship and a relationship’, was not an interest that Mr Gross needed to declare. Mr Gross explained:

I had no “interest” in [the CPR National Manager’s] business or personal affairs. It may have been the reverse. He may have had an interest in cultivating my favour. [The CPR National Manager] was beholden to me as a person who could influence his appointment to act for certain organisations but I was not beholden to him.

633. Mr Gross did not attempt to explain how this accords with the free advice that Mr Gross received from the CPR National Manager or the media statements that the CPR National Manager prepared for the waste management group, of which Mr Gross was Chairperson.

634. According to the solicitors for Mr Gross:

- Mr Gross was unaware that the CPR National Manager had been engaged by BBC until after the selection of the preferred tenderer
- the CPR National Manager’s involvement with BBC was ‘invisible and irrelevant during the tender phase’ and his involvement was ‘predominately in relation to (and therefore activated during) the planning phase’
- the services provided by the CPR National Manager to the waste management group were ‘minuscule’ and ‘on all accounts a trifle’
- the telephone contacts between Mr Gross and the CPR National Manager were not significant as seven of the calls were between 30 and 60 seconds.

635. The second, third and fourth of those points, even if the descriptions provided are accepted, indicate a lack of appreciation of the nature of the concept of ‘perceived’ conflict of interest, which is not dependent on the dimension of the interest, but its perception.

636. As to the first point, the response asserts that I should have accepted Mr Gross’ evidence that he was not aware that the CPR National Manager was working for BBC, rather than the evidence of the CPR National Manager ‘that he “would have” told Mr Gross that CPR was working for BBC’. The response, however, ignores the other evidence from the CPR National Manager that he ‘absolutely’ recalled telling Mr Gross, ‘You know you need to know that I work for Citta’.

637. Therefore, I do not accept the response's selective conclusion. Neither do I accept the response's assertion that Mr Gross should be 'applauded' for mentioning his relationship with the CPR National Manager to the Senior Project Officer during the planning process. I consider that the public expects much more from elected councillors.

638. In my view, the response argument was based on a limited analysis of the standards required of councillors. It fails to appreciate the necessity of avoiding actual and perceived conflicts of interest in the public sector, particularly in the context of high-cost building projects. The probity plan required that Mr Gross declare 'an affiliation or interest which might be seen to prejudice his or her impartiality'. It is hard to avoid a conclusion that Mr Gross' 'relationship and friendship' with the CPR National Manager was not such an interest or affiliation, particularly given that Mr Gross acknowledged at interview, under oath, that he knew the National Manager was a 'lobbyist'.

Conclusions

639. I consider that Mr Gross should have declared his 'friendship and relationship' with the CPR National Manager to the Chair, St Kilda's Edge Committee or the probity auditor so that the conflict of interest could be assessed and managed appropriately. I consider that Mr Gross demonstrated an error of judgement in not declaring this conflict of interest.

640. I note that CPR chose not to respond to my draft report.