

Final Report

Full investigation - *Ombudsman Act 1972*

Complainant	Mr John Gamble and Ms Sally Gamble
Agency	City of Adelaide
Ombudsman reference	2015/10485
Date complaint received	8 December 2015
Issues	<ol style="list-style-type: none">1. Whether the council's decision to remove the tree was appropriately made2. Whether the council inappropriately failed to reconsider the merits of a decision to remove a tree in a section 270 review.

Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972* (the **Ombudsman Act**).

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the council
- seeking more particulars from the complainant
- considering the *Ombudsman Act 1972*
- considering the *Local Government Act 1999*
- considering the *Development Act 1993* and the *Development (Regulated Trees) Variation Regulations 2011*
- considering the council's Corporate Complaint Handling Operating Guideline (incorporating section 270 internal review of council decisions or grievances)
- considering the City Infrastructure & Public Works Committee Meeting Agenda dated 21 October 2014
- considering the council's Street Tree Planting Policy
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be

upheld. That decision recognises that greater care is needed in considering the evidence in some cases.¹ It is best summed up in the decision as follows:

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

Response to my provisional report

The Chief Executive Officer responded to my provisional report by letter dated 21 July 2016. His response included, in summary the following:

- the council is pleased with the provisional view that it did not in making its original decision to remove the tree act in a manner that was unlawful, unreasonable or wrong
- the council notes my provisional view that the merits of the decision to remove the tree should have been considered as part of the section 270 review process

The council also sought my advice with respect to reviewing the merits of decisions, particularly those of a technical nature. I provided my views to council about this matter on 25 July 2016.

The complainants responded to my provisional report by email dated 18 July 2016, commenting:

- it remains their view that the council acted in a manner that was unreasonable and wrong in its final decision to remove the tree due to:
 - reliance on incorrect information
 - a lack of action taken to verify the alleged damage caused by the tree
 - a lack of consultation with the complainants during the decision making process.

I have considered the responses provided to my provisional report, however they have not caused me to change my views.

Background

1. A large Peppercorn tree (**the tree**) is located at the boundary of Mr John and Ms Sally Gamble's (**the complainants**) property situated in Angas Street, Adelaide.
2. The tree was not planted in its current location by the council. It is believed to have self-seeded sometime during the 1970's.
3. The tree has been the subject of concern raised by residents in adjacent properties over a number of years. Correspondence between the council and residents about the tree dates back to 2004.
4. The tree was originally classified as a significant tree under the *Development Act 1993*, however is now exempt from that classification and as such does not require development approval for removal.
5. The council has considered a number of reports by arborists and structural engineers regarding the removal of the tree. The council considers that those reports indicate that the most feasible resolution of the tree's impacts is for the tree to be removed.

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

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

6. Short term management options have been carried out by the council over a number of years, including pruning and canopy reduction.

7. On 3 May 2011 the council's City Design & Character Policy Committee (**the Committee**) classed the tree as significant and resolved:

'...In its capacity as having care and control of the land, and in no other capacity, approves the removal of one Schinus areira (Peppercorn) contained in Attachment A to Item 13 on the Agenda for the meeting of the City Design & Character Policy Committee held on 3 May 2011, to enable development approval to be sought'.

8. Consultation with property owners in the immediate vicinity of the tree was conducted in May 2014 and it was reported to the Committee on 21 October 2014 that responses received overwhelmingly supported the option of removal of the tree with only one objection noted.

9. At the 26 August 2014 council meeting the council resolved to delay removal of the tree pending the provision of a further report. The minutes of the meeting record the following for Agenda item 9 - Recommendations of the City Infrastructure & Public Works Committee meeting held on 19 August 2014.

Moved: Cr Henningsen

Seconded:

Cr Wilkinson

That recommendation 9.8 contained in Item 9 [Recommendations of the City Infrastructure & Public Works Committee] on the Agenda for the meeting of the Adelaide City Council held on 26 August 2014 be adopted namely:

Recommendation 9.8

Recommendation for Agenda Item 18 for Council Consideration - Other Business - Councillor Moran - Motion without Notice - Angas Court Schinus areira (Peppercorn tree) Removal [2014/00034]

'That council at this stage not remove the tree covered in Attachment 2 to Item 17 - Out of Session Papers as planned in August 2014 and a report be brought back to Council'.

CARRIED

10. On 28 October 2014 the Committee resolved to recommend to the council that council:

In its capacity as having care and control of the land, and in no other capacity, approves the removal of one Schinus areira (Peppercorn tree) as contained in Attachment A to Item 11 on the Agenda for the meeting of the City Infrastructure & Public Works Committee held on 21 October 2014.

11. The council considered that recommendation during a council meeting held on 28 October 2014 and consequently resolved to remove the tree.

12. On 30 January 2015 the complainant's solicitor wrote to the council on behalf of the complainants objecting to the removal of the tree on the basis of:

- the contribution the tree makes to the amenity of the area
- the long life expectancy of the tree
- the lack of evidence to support that the tree is causing any significant damage to surrounding substantial structures
- the council's resolution to approve the removal of the tree was not validly made
- the council failed to observe the rules of natural justice and procedural fairness and as a consequence its decision was not properly made

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- the terms of the resolution of 28 October 2014 do not require the tree to be removed and council is not compelled to remove the tree.
13. Also within this correspondence, the complainants' solicitor noted:
- Dr Dean Nicolle, arborist, had been engaged to provide his opinion as to whether the removal of the tree was warranted
 - the complainants had sought that the council take Dr Nicolle's report into consideration
 - the reports of Mr Sam Cassar, arborist (dated 24 February 2011), and Dr Nicolle did not recommend the tree be removed
 - the removal of the tree is not the only remedial option available
 - the council had advised that as the complainants had questioned the appropriateness of the council's decision to remove the tree, an internal review of the decision would be conducted in accordance with the provisions of section 270 of the Local Government Act and the procedure outlined in the council's Corporate Complaint Handling Guideline (**the Complaint Handling Guideline**).
14. The section 270 review was commenced in February 2015 by Ms Tamara Charman, Senior Risk & Governance Advisor at the council, with the findings of that review presented to council on 28 April 2015.
15. By letter dated 29 April 2015, the council advised the complainants' solicitor that it had considered the request for a review of its decision relating to the removal of the tree at its meeting on 28 April 2015. Council advised that in considering this matter, it was resolved that the council:
1. Notes that an investigation has been undertaken, in accordance with the Internal Review of Council Decisions procedure, regarding Councils [sic] decision of 28 October 2014 to approve the removal of the Schinus Areira (Peppercorn Tree) located on public land in Angas Court, Adelaide;
 2. Notes the findings of the investigation have confirmed the validity of the decision
 3. Declines the request to rescind the decision;
 4. Notes that the investigation has confirmed that no miscarriage of natural justice or procedural fairness has occurred, and that community members' views and concerns have been appropriately considered and weighted in its decision making;
 5. Requests the Chief Executive Officer to forward this resolution and the "Response to Applicant's Complaint" presented in the Supporting Information of the report be forwarded to the Applicant to finalise this matter in accordance with Council's Internal Review of Council Decisions Procedure.
16. The outcome of the section 270 review noted that:
- This report will not deal with 6.2 of the Applicant's complaints, as it is not the role of procedures under Section 270 of the Act to discuss or determine on the merits of opposing arguments. Rather, the purpose is to ensure decisions were made reasonably, fairly, and followed appropriate processes. As such, this review will only deal with procedural matters relating to the decision itself.
 - An arborist report was also supplied by the Applicants with the request for review. However, this has not been presented with this report as it discusses the merits of retaining the tree, which as outlined above, is not the purpose of a review under Section 270 of the Act.
 - The Council has, as the owner of the tree and the land on which the tree is located, the legal authority to remove the tree without restriction.
 - While it is not necessary for Council to consult on matters of this nature, consultation was conducted to ascertain the level of support/disagreement of those affected, to ensure the decision appropriately considered community views.
 - There is no legal requirement for the Council to resolve its approval for the Administration to enable an operational decision such as the maintenance and repair (including removal) of Council assets. In the absence of a Council policy or

resolution to the contrary, the Administration has the authority to remove the tree without an express resolution directing its removal.

- The Council, being the owner of the tree in question, has the legal authority, and obligation, to manage and to make decisions in relation to the tree. The Council is not required to obtain permission of adjacent property owners to exercise this authority.

17. Part 3.2.4.5 of the Complaint Handling Guideline sets out the process of a Section 270 review:

Principles of Natural Justice will apply to applications made. All parties will have the opportunity to express their point of view, provide relevant information, and respond to issues raised. The Corporate Governance Advisor is responsible for dealing with Section 270 reviews. If they are the subject of the application, the CEO will appoint another officer to carry out the matters the Corporate Governance Advisor normally would.

18. On 3 March 2016 Mr Mark Goldstone, Chief Executive Officer of the council advised my Office that:

- the coordination of the section 270 internal review was undertaken by the council's Senior Risk & Governance Advisor, with input on questions of procedural fairness and decision making authority provided by council's legal providers
- the original decision maker (in relation to the decision to remove the tree) was the council
- as required by the council's section 270 internal review procedures, the internal review recommendation was presented to the council for decision
- the employees involved in providing previous recommendations to council were involved in the internal review process in so far as providing information and documentation to the Senior Risk & Governance Advisor, in order to effectively conduct the internal review
- the council has followed its procedures within the Complaint Handling Guideline in the conduct of the review
- the report of Dr Dean Nicolle provided by the complainant was considered as part of the review, along with other reports previously commissioned regarding the tree
- all of the reports confirm that the tree is causing damage to infrastructure and property, however were varied in their assertions as to the extent of the non-visible damage that may be caused by the tree and their recommendations for remediation
- Dr Nicolle's opinion on these particular elements of the matter were provided to council in the review through extracts provided in the applicant's request for internal review
- these technical matters were all appropriately considered in the original decision by appropriately qualified employees, so these matters were not discussed further in the review
- through the review council did not consider the merits of the technical arguments in relation to the extent of the damage being caused by the tree, or remedial options
- the council did consider the merits of the decision in relation to the decision making processes and whether the views of different parties had been appropriately considered
- the council also considered the legality of the decision, the ownership of the tree and whether or not they had the authority to make the decision in relation to the tree.

19. Mr Goldstone further advised that should this Office's review recommend that council reconsider the decision to remove the tree, a report would be presented to remind council of:
- the visible and confirmed damage caused by the tree
 - the consistent requests from other adjacent owners/occupiers to remove the tree to prevent further damage to their properties
 - the significant costs and disruption involved in remedial options
 - that council would need to impose this disruption on adjacent property owners to effect the remedial works; and
 - the council's legal liability under section 245(2) of the Local Government Act 1999 should it not take reasonable action to avert the risk of damage due to the tree.
20. The Ombudsman audit of complaint handling in South Australian councils noted:
- ...I can find no impediment to reviewing the merits of a decision in the legislation. Further, as a matter of good governance complainants are entitled to a review of all aspects of a decision, including merit, under section 270 of the Local Government Act.³
21. The Commonwealth Administrative Review Council noted:
- ...the purpose of a merits review action is to decide whether the decision which is being challenged was the 'correct and preferable' decision. If not, a new decision can ordinarily be substituted. The process of merits review will typically involve a review of all the facts that support a decision.⁴

Relevant law

Section 270 of the Local Government Act provides:

- (a1) A council must develop and maintain policies, practices and procedures for dealing with-
- (a) any reasonable request for the provision of a service by the council or for the improvement of a service provided by the council; and
 - (b) complaints about the actions of the council, employees of the council, or other person acting on behalf of the council.
- (a2) The policies, practices and procedures required under subsection (a1) must be directed towards-
- (a) dealing with the relevant requests or complaints in a timely, effective and fair way; and
 - (b) using information gained from the council's community to improve its services and operations.
- (1) Without limiting subsections (a1) and (a2), a council must establish procedures for the review of decisions of-
- (a) the council;
 - (b) employees of the council;
 - (c) other persons acting on behalf of the council.

³ Ombudsman SA, Valuing Complaints: An audit of complaint handling in South Australian councils (November 2011), Part 5, available at <http://www.ombudsman.sa.gov.au/publications/audit-reports/>.

⁴ Overview of the Commonwealth System of Administrative Review, Administrative Review Council, part 8, <http://www.arc.ag.gov.au/Aboutus/Pages/OverviewoftheCommonwealthSystemofAdminReview.aspx>.

Section 245 of the Local Government Act provides:

- (1) A council is not liable for any damage to property which results from-
 - (a) the planting of a tree in a road; or
 - (b) the existence of a tree growing in a road (whether planted by the council or not).
- (2) However, if-
 - (a) the owner or occupier of property adjacent to the road has made a written request to the council to take reasonable action to avert a risk of damage to property of the owner/occupier from the tree; and
 - (b) the council has failed to take reasonable action in response to the request,

The council may be liable for any damage to property that would have been averted if the council had taken reasonable action in response to the request.

Section 4 of the Development Act provides:

- (4) "significant tree" means -
 - (a) a tree declared to be a significant tree, or a tree within a stand of trees declared to be significant trees, by a Development Plan (whether or not the tree is also declared to be a regulated tree, or also falls within a class of trees declared to be regulated trees, by the regulations); or
 - (b) a tree declared to be a regulated tree by the regulations, or a tree within a class of trees declared to be regulated trees by the regulations that, by virtue of the application of prescribed criteria, is to be taken to be a significant tree for the purposes of this Act.
- (4) "regulated tree" means -
 - (a) a tree, or a tree within a class of trees, declared to be regulated by the regulations (whether or not the tree also constitutes a significant tree under the regulations); or
 - (b) a tree declared to be a significant tree, or a tree within a stand of trees declared to be significant trees, by a Development Plan (whether or not the tree is also declared to be a regulated tree, or also falls within a class of trees declared to be regulated trees, by the regulations);

Regulation 6A of the Development Regulations provides:

- (1) Subject to this regulation, the following are declared to constitute classes of regulated trees for the paragraph (a) of the definition of regulated tree in section 4(1) of the Act, namely trees within the designated area under subregulation (3) that have a trunk with a circumference of 2 metres or more or, in the case of trees with multiple trunks, that have trunks with a total circumference of 2 metres or more and an average circumference of 625 millimetres or more, measured at a point 1 metre above natural ground level.
- (2) Subject to this regulation-
 - (a) a prescribed criterion for the purposes of paragraph (b) of the definition of "significant tree" in section 4(1) of the Act is that a regulated tree under subregulation (1) has a trunk with a circumference of 3 metres or more or, in the case of a tree with multiple trunks, has trunks with a total circumference of 3 metres or more and an average circumference of 625 millimetres or more, measured at a point 1 metre above natural ground level; and

- (b) regulated trees under subregulation (1) that are within the prescribed criterion under paragraph (a) are to be taken to be significant trees for the purposes of the Act.
- (5) Subregulations (1) and (2) do not apply-
- (b) to a tree within 1 of the following species of trees:
- Schinus areira (Peppercorn Tree)

Part 3.8 (Maintenance) of the Street Tree Planting Policy states:

3.8.7 Dead or unsafe trees will be removed as soon as practicable and replaced the next planting season.

Whether the council's decision to remove the tree was appropriately made

22. The complainants assert that the tree is 'located at the boundary of their property' and are the 'owners of the land on which the tree is partly growing'.
23. The council asserts that it is the owner of the land on which the tree is growing (or has grown from).
24. The report of Mr Cassar dated 24 February 2011 describes the tree location as, 'within a narrow garden area at the end of Angas Crescent'.
25. The report of Mr Deek dated 29 March 2011 describes the tree location as, 'within a garden area on the public domain'.
26. The report of Dr Nicolle dated 22 December 2014 describes the tree as being located on the council verge.
27. On the basis of the evidence presented in the above reports I accept that the tree is located on council property and as such the council has the authority to make a determination with respect to the maintenance and removal of the tree.
28. The reports considered by the council indicate that the tree is causing damage to infrastructure and property, albeit, varied as to the extent of the damage. However, the council as the decision maker has relied upon these reports of damage in determining to remove the tree. I note that the council did not have Dr Nicolle's report before it at the time of its original decision.
29. I further note that the tree was not planted in the location by council, rather it is believed to have self-seeded sometime during the 1970's. Whilst the council has not planted the tree, there is an obligation pursuant to section 245 of the Local Government Act for the council to take reasonable action in response to a request from a property owner to avert a risk of damage to property from the tree.
30. I also note that the council has a policy relevant to the maintenance of trees and will undertake to remove a tree that is considered unsafe as soon as practicable.
31. Further, given the tree species is no longer captured within the definition of a significant tree under the Development Act 1993, the delegation or authority to remove the tree rests with the council.
32. I consider that the council when making its original decision to remove the tree relied upon the reports that were before it, namely, the reports of Mr Cassar and Mr Deek.

Both of these reports attribute damage caused to surrounding structures to the tree and identify removal of the tree as one option available to council. Further, having considered the two reports that were before the council at the time of the original decision, I consider that it was reasonably open to the council to decide to remove the tree.

Opinion

In light of the above, my final view is that the council, in deciding to remove the tree did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

Whether the council inappropriately failed to reconsider the merits of a decision to remove a tree in a section 270 review

33. The complainants allege that the council did not consider the report of Dr Nicolle as part of the section 270 review.

34. I note that the section 270 review clearly states:

An arborists report was also supplied by the Applicants with the request for review. However, this has not been presented with this report as it discusses the merits of retaining the tree, which as outlined above, is not the purpose of a review under section 270 of the Act.

35. However, correspondence from the council to my Office dated 3 March 2016 states:

The report of Dr Dean Nicolle provided by the applicants was considered as part of the review, along with other technical reports previously commissioned regarding the tree...Dr Nicolle's opinion on these particular elements of the matter was provided to Council in the review through extracts provided in the applicant's request for internal review.

36. The council's response appears contradictory and I am not satisfied on the information before me that Dr Nicolle's report and opinion was considered in its entirety as part of the section 270 review.

37. In defining how a complaint will be dealt with the council's complaint handling guideline states that:

Principles of Natural Justice will apply to applications made. All parties will have the opportunity to express their point of view, provide relevant information, and respond to issues raised.

38. In the section 270 review report it is clear that the council is of the view that the procedures under section 270 of the Act do not provide for a determination of the merits of opposing arguments.

39. I am of the view, however, that the section 270 review necessitated a reconsideration of the original circumstances that resulted in the council's decision.

40. In my view the council should have considered all relevant information before it as part of its section 270 review, including the previously made technical arguments.

41. The council advised that it considered the 'merits of the decision in relation to the decision making processes', whether the views of different parties had been

considered, the legality of the decision, the ownership of the tree and whether or not council has the authority to make the decision in relation to the tree.

42. The council also advised my Office, however, that no consideration was given to the merits of the technical arguments regarding the extent of the damage caused by the tree or the remedial options as these matters had been considered by the council in its original decision.
43. I consider that the council's correspondence to my Office indicates that there appears to be some confusion in relation to the distinction between a review of the decision making process and a merits review.
44. Although the council stated that it considered the merits of the decision in relation to the decision making process, a merits review is a separate process in which a review is conducted regarding the merits of the original decision. In effect, the review officer puts themselves in the shoes of the original decision maker and considers all of the evidence from a fresh perspective in order to make a determination that appropriately considers all of the relevant evidence.
45. It is clear that there is no impediment under section 270 of the Local Government Act in reviewing the merits of the decision to remove the tree. Rather, a review of all of the relevant information which supports the decision making process should consider whether the original decision should stand or whether another outcome is appropriate.
46. I also consider that the council's guideline relevant to the section 270 review process lacks detail, particularly in regard to the scope of the review process and the considerations upon which the council is able to undertake a complete and comprehensive review. Further, I note that the guideline does not outline what information the council will consider or actions it will undertake in carrying out the section 270 review.

Opinion

In light of the above, my final view is that the council, in failing to consider the merits of the decision to remove the tree during the section 270 process, acted in a manner that was wrong within the meaning of section 25(1) of the Ombudsman Act.

Conclusion

In light of the above my final view is that:

1. the council, in its original decision to remove the tree did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 23(1) of the Ombudsman Act
2. however, the council, in failing to consider the merits of the decision to remove the tree during the section 270 process, acted in a manner that was wrong within the meaning of section 25(1) of the Ombudsman Act.

Recommendations

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

1. review its Corporate Complaint Operating Guideline (including section 270 internal review of council decisions or grievances) to clearly outline how the council will

undertake its section 270 review process and to make clear that such a process should include an assessment of the merits of the decision, including a requirement to:

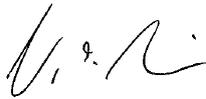
- review all documentation and information relevant to the decision
 - review all relevant council policies and procedures relied upon in making the decision
 - obtain additional information or clarification from the parties as required
 - keep the parties up to date with the progress of the review.
2. reconsider its decision to remove the tree in light of all information that is now before it, including the Nicolle report in its entirety, as well as a consideration of the merits of the decision to remove the tree.

Final comment

In accordance with section 25(4) of the Ombudsman Act the council should report to the Ombudsman by **9 September 2016** on what steps have been taken to give effect to the recommendations above; including:

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

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



Wayne Lines
SA OMBUDSMAN

15 August 2016