

Report - District Council of Mallala
Full investigation - *Ombudsman Act 1972*

Complainant	Councillor Steve Jones
Council member	Councillor Joe Daniele
Council	District Council of Mallala
Ombudsman reference	2015/05158
Date complaint received	6 July 2015
Issue	Whether Cr Daniele breached the conflict of interest provisions of the <i>Local Government Act 1999</i> and clause 3.13 of Part 3 of the Code of Conduct for Council Members at the council meeting on 22 June 2015

Jurisdiction

The complaint alleges a breach of Part 3 of the Code of Conduct for Council Members made pursuant to section 63 of the *Local Government Act 1999* (the **Code of Conduct**).¹ An act of a council member that may constitute grounds for complaint under the Local Government Act is taken to be an 'administrative act' for the purposes of the *Ombudsman Act 1972*.²

The complaint is within the jurisdiction of the Ombudsman under the Ombudsman Act.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from Cr Daniele
- seeking a response from the council
- considering the Local Government Act
- considering the Code of Conduct
- providing the council, the complainant and Cr Daniele with my provisional report for comment, and considering their responses
- preparing this report.

¹ The Code of Conduct was gazetted on 29 August 2013.

² Section 263A(4) of the Local Government Act; section 3 of the Ombudsman Act.

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.³ 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 ...⁴

Response to my provisional report

Cr Daniele did not provide a response to my provisional report.

The council did not provide a response to my provisional report.

The complainant commented that he does not believe that Cr Daniele has made a further public apology to Mr Flaherty, as required by the council's 13 April 2015 resolution. He also submitted that he recalls that Cr Daniele engaged in debate during the consideration of item 10.2 of the 22 June 2015 council meeting and voted in relation to the item. I have amended my report as I consider appropriate in response to the complainant's comments.

Background

1. Cr Daniele is an elected member of the District Council of Mallala (**the council**). He is also a member of the Council Development Assessment Panel (**the CDAP**).
2. In the lead up to the 2014 local government elections, it was alleged that Cr Daniele called a mayoral candidate, Mr Tony Flaherty, "a liar" and made false statements about him. Cr Daniele subsequently made a public apology to Mr Flaherty.
3. After the elections, Cr Terry Keen made a complaint to the council about Cr Daniele's conduct, alleging that he had breached Part 2 of the Code of Conduct.
4. On 1 December 2014 the council referred Cr Keen's complaint to the Local Government Governance Panel (**the LGGP**). The LGGP investigated the complaint and found that Cr Daniele had breached clauses 2.2, 2.3 and 2.4 of the Code of Conduct, and recommended that the council:
 - note the LGGP report at a formal meeting of council
 - note that Cr Daniele had already made an appropriate public apology to Mr Flaherty
 - take such other action as it sees fit.
5. At item 17.3 of its meeting on 13 April 2015 the council considered the LGGP's report on its investigation of Cr Daniele. Cr Daniele declared a conflict of interest in the item, left the chamber and did not vote in relation to the item. The minutes record that 'Crs Keen and Daniele declared an interest in item 17.3 - *Code of Conduct Investigation - Local Government Governance Panel Response*, as the investigation involved them.'

³ 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.

⁴ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

It was resolved that the council:

- receives and notes the LGGP report
- notes that the LGGP found that Cr Daniele breached clauses 2.2, 2.3 and 2.4 of the Code of Conduct
- require Cr Daniele to make a further public apology to Mr Flaherty
- censures Cr Daniele
- remove Cr Daniele from the CDAP effective immediately.

6. At item 17.6 of its meeting on 9 June 2015 the council carried a resolution recognising that the CDAP must consist of seven members pursuant to section 65A(3)(a) of the *Development Act 1993*. Cr Daniele declared a conflict of interest in the item, left the chamber and did not vote in relation to the item. The minutes record that ‘Cr Daniele declared an interest in item *17.6 - Council Development Assessment Panel Membership* as the investigation was concerning him.’
7. The council subsequently realised that clause 4 of the Terms of Reference of the District Council of Mallala Council Development Assessment Panel requires that the council may only resolve to remove a member of the CDAP subject to giving a member of the CDAP an opportunity to be heard or to make a written submissions.
8. As a result, at item 10.2 of the council meeting on 22 June 2015, the council carried the following resolution:
9. Cr Daniele did not declare a conflict of interest in the item, remained in the chamber and voted.
10. The minutes of item 10.2 of the council meeting on 22 June 2015 record the following:

10.2.1 Council Development Assessment Panel Member Removal (CON12/537)

Moved Cr McColl Seconded Cr Summerton

“that decision 2015/104 made at the Ordinary Council meeting on 13 April 2015 to remove Councillor Daniele from the Council Development Assessment Panel effective immediately for the term of this Council, be revoked.”

CARRIED (2015/187)

Cr Summerton called for a Point of Order as Councillor’s are required to address Council in an appropriate manner.

The Mayor accepted the Point of Order.

Moved Cr Lawrence Seconded Cr Jones

“that Council gives notice to Councillor Daniele of his impending removal from the Council Development Assessment Panel (CDAP) subject to Clause 4 of the Terms of Reference of the CDAP and that Councillor Daniele has eight weeks to respond to Council.”

CARRIED (2015/188)

Division

Councillor Summerton called a Division

Those voting in the affirmative are Crs Lawrence, Jones, McColl and Strudwicke

Those voting in the negative are Crs Daniele, Stubing and Summerton

The Mayor declared the motion CARRIED (2015/188)

11. By email dated 27 July 2015 the council received legal advice regarding the possible removal of Cr Daniele from his position as a member of the CDAP and Cr Daniele's potential conflict of interest in the matter (**the legal advice**).
12. At item 17.5 of its meeting on 27 July 2015 the council carried a resolution to remove Cr Daniele from the Community Development and Advisory Committee, effective immediately. Cr Daniele declared a conflict of interest in the item, left the chamber and did not vote in relation to the item.
13. Cr Daniele provided a response to my investigation by letter received by my Office on 7 August 2015, in which he gave the following reason for not declaring a conflict of interest in item 10.2 of the council meeting on 22 June 2015:

...I had been given a copy of the findings and expected that I would be questioned and be able to defend myself to the Council that evening. When the motion "that decision made at the ordinary Council meeting on 13 April 2015, to remove me from the Council Development Assessment Panel effective immediately for the term of the Council" be revoked, I stayed without entering into any debate or questions. A vote was taken followed by a call for division, those in favour were to stand up. I remained seated and was counted among those who voted against the motion...

Relevant law

14. Clause 3.13 of Part 3 of the Code of Conduct provides:

Council members must be committed to making decisions without bias and in the best interests of the whole community and comply with the relevant conflict of interest provisions of the Local Government Act 1999.

15. Section 73(1) defines the circumstances in which a council member has 'an interest in a matter' as follows:

73—Conflict of interest

- (1) A member of a council has an interest in a matter before the council if—
 - (a) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, receive or have a reasonable expectation of receiving a direct or indirect pecuniary benefit or suffer or have a reasonable expectation of suffering a direct or indirect pecuniary detriment; or
 - (b) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, obtain or have a reasonable expectation of obtaining a non-pecuniary benefit or suffer or have a reasonable expectation of suffering a non-pecuniary detriment,

(not being a benefit or detriment that would be enjoyed or suffered in common with all or a substantial proportion of the ratepayers, electors or residents of the area or a ward or some other substantial class of persons).

16. Section 74(1) of the Local Government Act imposes an obligation on a council member who has an interest in a matter to disclose the interest to the council. Sections 74(2) and 74(3) prescribe procedural requirements to be followed by council members who have an interest for the purposes of the section:

74—Members to disclose interests

- (1) A member of a council who has an interest in a matter before the council must disclose the interest to the council.
- (2) A member in making a disclosure under subsection (1) must provide full and accurate details of the relevant interest.
- (3) A disclosure made under subsection (1) must be recorded in the minutes of the council (including details of the relevant interest).
- (4) A member of a council who has an interest in a matter before the council must not—
 - (a) propose or second a motion relating to the matter; or
 - (b) take part in discussion by the council relating to that matter; or
 - (c) while such discussion is taking place, be in, or in the close vicinity of, the room in which or other place at which that matter is being discussed; or
 - (d) vote in relation to that matter.

Whether Cr Daniele breached the conflict of interest provisions of the Local Government Act and clause 3.13 of Part 3 of the Code of Conduct for Council Members at the council meeting on 22 June 2015

17. I have considered whether Cr Daniele breached the Local Government Act and clause 3.13 of the Code of Conduct by failing to declare an interest, remaining in the room while the matter was being discussed and voting at item 10.2 of the council meeting on 22 June 2015 in relation to his removal of the CDAP.
18. Cr Daniele would have had an interest in item 10.2 within the meaning of section 73(1) above, if either he or a person with whom he is closely associated would, if the motions of the item were decided in a particular manner:
 - receive or have a reasonable expectation of receiving a direct or indirect pecuniary benefit, or suffer (or have a reasonable expectation of suffering) a direct or indirect pecuniary detriment or
 - obtain or have a reasonable expectation of obtaining a non-pecuniary benefit, or suffer (or have a reasonable expectation of suffering) a non-pecuniary detriment.
19. The two motions carried in item 10.2 of the 22 June 2015 council meeting related to Cr Daniele's possible removal from the CDAP. The first motion revoked the earlier decision to remove him. The second motion resolved to give Cr Daniele notice of his impending removal from the CDAP and to allow him to provide a response.
20. The council advised my investigation that no sitting fees are paid to council members on the CDAP, or any other section 41 committees of council, unless they are a presiding member. As such, given that Cr Daniele was not the presiding member of the CDAP, he would not suffer a pecuniary detriment as a result of him being removed from the CDAP.
21. However, I consider that Cr Daniele's possible removal from his position as a member of the CDAP constitutes a non-pecuniary detriment for the purposes of section 73 of the Local Government Act. In my view, if the motions of the item were decided in a particular manner, Cr Daniele stood to suffer a non-pecuniary detriment by reason of the fact that could lose his status and reputation as a member of the CDAP.

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22. As such, my final view is that Cr Daniele had an interest in item 10.2 of the 22 June 2015 council meeting pursuant to section 73 of the Local Government Act, and that he:
- failed to disclose the interest, contrary to section 74(1)
 - remained in the room while the matter was being discussed, contrary to section 74(4)(c), and
 - voted in relation to the matter, contrary to section 74(4)(d).
23. Cr Daniele admitted that he remained in the room, advising my investigation that he did so because he expected that he 'would be questioned and be able to defend himself'.⁵ Cr Daniele submitted that he did not participate in the discussion in relation to the matter and that he thought that he was not voting in relation to it. In response to my provisional report, Cr Jones submitted that Cr Daniele did participate in the discussion and did vote in relation to the matter. In any event, Cr Daniele was counted as voting in the negative when those in favour of the motion were asked to stand up and he remained seated. Cr Daniele should not have been in the room when the discussion and voting was taking place and ought to have known that he was being counted in the vote when he remained seated. Whether Cr Daniele participated in the discussion or not does not change that he should not have been in the room.
24. I note that Cr Daniele may have remained in the chamber to ask and answer questions, with the permission of the council, however such permission was not granted. In any event, had Cr Daniele been given permission to remain in the chamber and ask and answer questions in relation to the matter, he was required to declare his conflict of interest and to leave the chamber during the discussion and voting.
25. I comment that it appears that Cr Daniele was cognisant of his conflict of interest responsibilities under the Local Government Act in relation to the other decisions of the council relating to the same matter. I note that he declared an interest and properly absented himself at the council meetings of 13 April 2015, 9 June 2015 and 27 July 2015. I note also that, unlike the minutes of the 22 June 2015, the minutes of these meetings show the details of Cr Daniele's interest, as required by section 74(3).
26. Having regard to the matters relevant to item 10.2, my final assessment is that Cr Daniele did have an interest under section 73(1) of the Local Government Act. Consequently, by failing to disclose his interest, remaining in the chamber and voting on the motions, Cr Daniele was in breach of sections 74(1), 74(4)(b) and 74(4)(c) of the Local Government Act and the Code of Conduct.
27. In reaching my view above, it is worthy to emphasise the District Court's views in the decision of *Petrovski v Pain*⁶, and the court's comments about the importance of the role of council members and their responsibility to properly discharge their public duties:
- The business of local council is an important one. Those who are elected to council must take their responsibilities and obligations seriously so as to reassure the public, who elected them that they are acting in a proper manner in the discharge of their public duties. This is particularly relevant in relation to any conflict of interest that may arrive.
28. In my view, Cr Daniele's conduct at the 22 June 2015 council meeting shows that he lacks an understanding of the conflict of interest provisions of the Local Government Act.

⁵ Letter from Cr Daniele to the Ombudsman, undated, received 7 August 2015.

⁶ *Petrovski v Pain* [2013] SADC 6 [52]

Conclusion

In light of the above, my final view is that in relation to item 10.2 of the 22 June 2015 council meeting, by failing to declare an interest, remaining in the chamber whilst the discussions were taking place and voting, Cr Daniele breached the conflict of interest provisions of the Local Government Act and clause 3.13 of Part 3 of the Code of Conduct. In this way, Cr Daniele acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

Recommendation

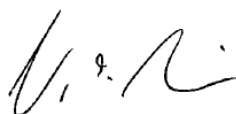
To remedy this error, I recommend under section 25(2) of the Ombudsman Act and section 263B of the Local Government Act, that the council require Cr Daniele to attend conflict of interest training as soon as practicable.

Final comment

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by 18 November 2015 on what steps have been taken to give effect to my recommendation above; and, if no such steps have been taken, the reason(s) for the inaction.

In accordance with Part 3 of the Code of Conduct, my report must be provided to a public meeting of the council, within two ordinary meetings of the council following receipt of my recommendation. I ask that the council confirm to me in writing that my report has been so tabled within the stipulated timeframe.

Pursuant to section 263B(2) of the Local Government Act, if a council member fails to comply with a council requirement made as a result of an Ombudsman recommendation such as that above, the council member will be taken to have failed to comply with Chapter 5 Part 4 of the Local Government Act. In this event, the council is to ensure that a complaint is lodged against the member in the District Court.



Wayne Lines
SA OMBUDSMAN

23 September 2015