



OmbudsmanSA

Report

Full investigation - *Ombudsman Act 1972*

Complainant	Mr Andrew Cameron
Council members	Mayor Ray Agnew and Councillors John Rich and Robert Nicholls (the council members)
Council	District Council of Yorke Peninsula
Ombudsman reference	2013/09405
Date complaint received	1 October 2013
Issues	<ol style="list-style-type: none">1. Whether the council members breached the conflict of interest provisions of the <i>Local Government Act 1999</i> at the meeting of the council's Strategic Planning and Development Policy Committee on 11 September 20132. Whether the council members breached the conflict of interest provisions of the <i>Local Government Act 1999</i> at the council meeting on 11 September 2013

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.²

I consider that the complaint about the council members falls within this definition; and I am also satisfied that in relation to the complaint, the council members were 'engaged in the work of ... [the] agency' within the meaning of section 3 of the Ombudsman Act.

The complaint was made by the Chief Executive Officer (CEO) of the council having regard to Part 3 of the Code of Conduct which states that 'Alleged breaches of this Part made to a Council ... may be referred to the Ombudsman for investigation...'

Investigation

My investigation has involved:

- assessing the information provided by the CEO
- seeking a response from the council members
- seeking further information from the council
- considering the conflict of interest provisions of the Local Government Act, the *Development Act 1993* and the Code of Conduct

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

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

- providing the council and the council members with my provisional report for comment, and considering their responses
- 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.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

In response to my provisional report the council indicated it had no comment to make.⁵

Mayor Agnew wrote to me on 5 February 2014, stating that the matter the subject of this investigation was a 'regrettable oversight' for which he was sorry. He accepted that some people may have formed a view that he had a perceived conflict of interest but he always took his 'responsibilities and obligations seriously and [acted] in a proper manner in the discharge of [his] public duties'.

Cr Nicholls sent an email on 29 January 2014 stating he had no comment to make.

Cr Rich did not respond to the provisional report.

Background

1. The council members are members of the council's Strategic Planning and Development Policy Committee (the committee) established under section 101A of the Development Act.
2. On 11 September 2013 the committee considered 'Item 4.1 Rex Minerals Hillside Mine Site DPA'. The advice to the committee was that a Development Plan Amendment (DPA), if successful, would result in land identified in the DPA being rezoned. This would see the land change from Primary Production and Coastal Conservation to Mineral Extraction.
3. The committee passed the following resolution:

That council resolve to proceed with the proposed developer funded DPA subject to the proponents entering into a contract with Council for the preparation of the document to be completed by Council's Planning Consultant at no cost to Council.

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.

⁵ Telephone conversation between Mr Andrew Cameron, CEO and my Investigating Officer on 12 February 2014.

4. Later on 11 September 2013, a meeting of the council considered 'Item 6.4... SECTION 101A COMMITTEE'. This was the resolution made earlier that day by the committee. Cr Davey moved the acceptance of the resolution which was seconded by Cr Rich.
5. On 25 September 2013, the council conducted a workshop during which information came to light that the council members held shares in Rex Minerals. On its face, this created a possible conflict of interest scenario for the council members.
6. The CEO took steps to call a special meeting of the council under section 82(1)(b) of the Local Government Act. On 1 October 2013 the mayor and Cr Rich gave their apologies as they could not attend the meeting due to other council commitments. Cr Nicholls attended the meeting, but declared that he had an interest in the matter under consideration and left the meeting. He subsequently passed his apologies to the council for his earlier failure to declare an interest. The council passed a resolution to rescind the resolution made on 11 September 2013.
7. On 2 October 2013, the CEO referred the matter to my office, as he considered first, the council members had an interest which they did not disclose at the meetings of 11 September 2013, and second, that this was in breach of Part 3 of the Code of Conduct.

Relevant law

8. Section 101A(2) of the Development Act provides *inter alia*, that the functions of a committee established under that section include the provision of advice to the council to assist it in making orderly and efficient development decisions and achieving high levels of integration of transport and land use planning decisions.
9. Section 101A(3) states that:

The *Local Government Act 1999* will apply in relation to a committee established under this section as if it were a committee established under that Act.
10. Section 63 of the Local Government Act provides for a code of conduct and that council members must comply with it.
11. Section 73(1) of the Local Government Act defines the circumstances in which an elected 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).

12. Section 74(1) provides:

A member of a council who has an interest in a matter before the council must disclose the interest to the council.

13. Section 74(2) provides:

A member in making a disclosure under subsection (1) must provide full and accurate details of the relevant interest.

14. Section 74(4) provides:

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.

15. Section 75(1) provides:

(1) The provisions of this Division extend to committees and to members of committees established by councils as if—

- (a) a committee were a council; and
- (b) a member of a committee were a member of a council.

16. Item 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.

Whether the council members breached the conflict of interest provisions of the *Local Government Act 1999* at the meeting of council's Strategic Planning and Development Policy Committee on 11 September 2013

17. The facts in this matter are that the council members exercised their voting rights in relation to an approach to the council by Rex Minerals while they were shareholders of the company. Their shareholder status was not disclosed to the committee.

18. The effect of section 75(1) of the Local Government Act is that members of the committee must comply with the conflict of interest provisions in sections 73 and 74 of that Act.

19. Mayor Agnew told my investigation that:

- his wife purchased shares in Rex Minerals in 2009⁶
- he had over 30 years' experience in local government
- he would not knowingly overlook the conflict of interest provisions
- as mayor he has a casting vote only but did not have cause to use it
- he believed:

that Council was only starting a normal procedural process for a DPA which would come back to full Council at a later stage for debate on whether to proceed or not.

20. Cr Nicholls told my investigation:

⁶ See section 73(2)(g) *Local Government Act 1999*.

- in June 2013 he purchased shares in Rex Minerals
 - he recorded this fact in the council's Register of Interests
 - he unwittingly neglected to declare his interest in Rex Minerals at the meeting.
21. Cr Rich told my investigation:
- he purchased shares in Rex Minerals 2 to 3 years ago
 - as a former mayor of Walkerville Council and former President of the Local Government Association he is aware of the conflict of interest provisions in the Local Government Act
 - the Director Development Services had advised the council meeting that the DPA did not commit the council to a course of action. It was the start of the process to provide information for a subsequent council decision
 - there was no dissent to the proposed resolution
 - he understood that consideration [of a DPA] by the council at a later date would require a declaration of a conflict of interest
 - he acknowledged he inadvertently breached the code of conduct.
22. I note it is the practice of the council to include in each agenda document for a committee or a council meeting a reminder to council members of their conflict of interest obligations. This is a good practice for a council to adopt. I would suggest that the practice could be enhanced if council members were reminded of the conflict of interest provisions at the commencement of each meeting.
23. To decide whether the council members were in breach of the conflict of interest provisions of the Local Government Act, I must first be satisfied that they had an 'interest in a matter' in relation to the committee's decision on 11 September 2013 within the meaning of section 73(1). That is, I must be satisfied that by participating in the committee's voting as they did, they individually would receive a benefit or suffer a detriment or would have a reasonable expectation of receiving a benefit or suffering a detriment of the type described in section 73(1). Such benefit or detriment should not be shared with all or a substantial proportion of ratepayers, electors or residents of the area, or some other substantial class of persons.
24. In the case of *Petrovski v Dolling*,⁷ the SA District Court emphasised that the legislation is confined to the type of interest referred to in section 73 and 'not to conflicts of interest at large'.⁸ The disclosure requirement in section 74 is confined to disclosure of the type of interest in a matter described in section 73.
25. Further, the court said that the question of whether a council's resolution gives rise to a section 73(1) interest, must be determined by a consideration of the actual terms of the resolution.⁹ In addition, the test is that the council member 'would' receive a benefit or suffer a detriment or 'would have a reasonable expectation' of receiving a benefit or suffering a detriment. Speculation about the consequences of the matter being decided in a particular manner is not sufficient.
26. The resolution proposed that Rex Minerals fund the DPA. I am mindful that the Development Act prescribes a process for a DPA to follow, and that the resolution passed related to the early stages of that process. As the process continued, there would be a requirement for a future council meeting to consider the matter again.
27. The general thrust of the submissions by the council members is that their individual failure to declare an interest was inadvertent. Against this claim, I note that neither the

⁷ *Petrovski v Dolling* [2013] SADC 27 (5 March 2013).

⁸ *Ibid*, [41].

⁹ *Ibid*, [34].

reminder on the agenda document nor their collective experience in local government prevented the council members considering whether they had an interest to declare.

28. In circumstances whereby a company receives an outcome that could benefit its market position, one would expect its share price to be affected. In my opinion, the resolution passed by the committee, while favourable, would not in all likelihood have affected Rex Minerals' share price. Accordingly, I am not satisfied that the council members, as a result of the specific resolution passed, would have had an expectation of a pecuniary benefit or detriment e.g. the share price would be affected, as required by section 73(1). In that regard I am mindful of the DPA process as required by the Development Act, and that the council would be required to consider the DPA at a later time.
29. In the circumstances, it is my view that the council members did not have an interest under section 73(1) of the Local Government Act. I express some disquiet about this, as I consider that 'the ordinary person in the street' would perceive that the council members were conflicted.
30. A perceived conflict of interest is one which a fair minded and informed member of the public might perceive as existing. A perceived conflict of interest may not relate to what is in reality a potential or an actual conflict of interest; and it may only ever be a 'perception' of a conflict of interest. Concerns about a council member's perceived conflict of interest may also lead to suggestions that the member has acted with bias in their decision making. In my view, the management of perceived conflicts of interest is just as important for community trust and integrity of a council, as management of actual conflicts.
31. The District Court in the decision of *Petrovski v Pain*¹⁰ emphasised the importance of the role of council members and their responsibility to properly discharge their public duties in relation to conflict of interest as follows:

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 arise.

32. The Local Government Association (LGA) has published guidelines on the conflict of interest provisions in the Act.¹¹ The guidelines state:

Only the individual affected person can decide if she or he has a conflict of interest in a particular matter. That person is ultimately accountable under the law for the individual judgment made and severe penalties can be imposed if an affected person is found not to have disclosed an interest and/or failed to comply with the other requirements of the Act. In particular, the question of whether an individual affected person may have a conflict of interest is not a matter for discussion or debate by the Council.¹²

They go on to provide that elected members should be alert to perceptions of conflict of interest and act accordingly:

It is not relevant whether the affected person thinks that he or she would actually be influenced - the important question is whether the impartial observer could form the opinion that in the given set of circumstances, the affected person could be influenced by the nature of his or her possible or perceived interest.¹³

¹⁰ *Petrovski v Pain* [2013] SADC 6 [52].

¹¹ LGA, 'Conflict of Interest Provisions: Guidelines and Examples', November 2010.

¹² *Ibid*, p1.

¹³ *Ibid*, p15.

33. The LGA recommends that in the circumstances above, the affected council member should declare their interest and withdraw from voting on the particular matter which lies for decision.
34. I agree with the LGA's position; and I consider it accords with community expectations. In my view, the Local Government Act should be amended to reflect these expectations. I have already referred to this issue in my report on my investigation into the City of Charles Sturt in 2011 in response to a parliamentary referral concerning the St Clair Land Swap.¹⁴
35. In light of this, my view is that while the council members' actions in relation to the committee's resolution were not in breach of the Local Government Act, they were 'in accordance with ... a provision of an enactment ... that is or may be unreasonable' within the meaning of section 25(1)(c) of the Ombudsman Act.

Whether the council members breached the conflict of interest provisions of the *Local Government Act 1999* at the council meeting on 11 September 2013

36. The council meeting considered the outcomes of the committee meeting held earlier that day. The council members were present at this meeting and they exercised their voting rights. They did not disclose their shareholder status to the council.
37. For the reasons discussed above, it is my view that the council members did not have an interest under section 73(1) of the Local Government Act, and were thus not required to comply with section 74 of that Act.
38. However and again, my view is that the council members' actions were 'in accordance with ... a provision of an enactment ... that is or may be unreasonable' within the meaning of section 25(1)(c) of the Ombudsman Act.

Opinion

In light of the above, I consider that in relation to both the committee meeting and the council meeting on 11 September 2013, the council members' actions were 'in accordance with ... a provision of an enactment ... that is or may be unreasonable' within the meaning of section 25(1)(c) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the Local Government Act be amended to address perceived conflicts of interest on the part of council members.



for Richard Bingham
SA OMBUDSMAN

26 February 2014

¹⁴ <http://ombudsman.sa.gov.au/publications/reports>

