

Report
Full investigation - *Ombudsman Act 1972*

Complainant	Mr Brian McFarlane
Agency	Outback Communities Authority
Ombudsman reference	2012/10619
Date complaint received	21 December 2012
Issues	<ol style="list-style-type: none">whether the agency complied with the requirement in section 17(4) of the <i>Outback Communities (Administration and Management) Act 2009</i> to consult about the community affairs resourcing and management agreement for Andamookawhether the agency had valid authority for the community contribution scheme.

I received a complaint from the complainant by email dated 21 December 2012.

The complaint included allegations in relation to the establishment and the constitution of the Andamooka Town Management Committee (**the ATMC**). The issues which were raised in these allegations occurred more than 12 months ago.¹ As such, I determined not to investigate these matters.

The complainant also complained that the Outback Communities Authority (**the agency**) does not have a valid public consultation policy as required by section 14 of the Act. The agency's document 'Community Engagement - Our Commitment'² appears to be a valid public consultation policy. As such, the complainant was advised that there is no requirement that the document be titled 'public consultation policy' and that I would not investigate this allegation.

I decided to conduct a preliminary investigation of the following allegations:

- whether the agency complied with the requirement in section 17(4) of the *Outback Communities (Administration and Management) Act 2009* to consult about the community affairs resourcing and management agreement for Andamooka
- whether the agency had valid authority for the Andamooka community contribution scheme.

These allegations of the complaint are within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

¹ See section 16 of the *Ombudsman Act 1972*.

² Outback Communities Authority, 'Community Engagement - Our Commitment', version 3, approved 4 April 2012.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the agency
- clarifying the response with the agency and seeking further information from it
- seeking more particulars from the complainant
- considering the *Outback Communities (Administration and Management) Act 2009 (the Act)*
- considering the agency's 'Community Engagement - Our Commitment' policies³
- considering the 'Andamooka Town Management Committee Community Plan 2012, incorporating 2012/13 Annual Financial Plan and 2012/13 Annual budget
- providing the complainant and the agency with my provisional report for comment
- meeting with the agency
- 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.⁴ 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 ...⁵

Responses to my provisional report

The complainant responded to my provisional report by email dated 24 May 2013. I have considered his comments, but I have not amended my views in response to his email.

The agency responded to my provisional report by letter dated 10 May 2013. In summary, the key points of the response are as follows:

- the agency believes that it was diligent and acted in good faith in accordance with the Community Contribution Scheme (CCS) provisions in the Act and with its policies
- the agency defined 'the outback community concerned' in section 17(4) of the Act as the incorporated community association which is party to the agreement, namely the Andamooka Progress and Opal Miners Association (APOMA) Incorporated. The agency disputes my interpretation of 'the outback community concerned' as being those people living and working in and around Andamooka. As such, the agency submits that by consulting APOMA it did consult 'the outback community concerned', as it was required to under section 17(4) of the Act
- the agency points out that it is customary practice in the use of community affairs resourcing and management agreements (CARM agreements) for community organisations to consult their community regarding their annual plans, financial plans and budgets

³ Outback Communities Authority, 'Community Engagement - Our Commitment', version 2, approved 10 March 2011 and Outback Communities Authority, 'Community Engagement - Our Commitment', version 3, approved 4 April 2012.

⁴ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 449-450 per Mason CJ, Brennan, Deane and Gaudron JJ.

⁵ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

- the agency submits that its public consultation policy was intended to provide examples of the methods that it could use at different levels of community engagement, but it was not intended that all of the steps would apply in all circumstances. The agency accepts that there is some ambiguity in its public consultation policy. As such, it advises that it is currently reviewing the policy
- the agency accepts that there has been an administrative error in allowing a three week period for feedback and not four weeks in accordance with its policy
- the agency submits that the implementation of the CCS was initiated by APOMA and has broad community support in Andamooka as it 'addresses urgent and pressing issues relating to the continued provision of essential services to people living and working in Andamooka,' as well as responding to the concerns about expectations of community volunteers to manage services and infrastructure.

I have taken account of the agency's comments as I consider appropriate in finalising my views.

Background

1. The agency was established pursuant to the *Outback Communities (Administration and Management) Act 2009* and commenced operations on 1 July 2010.
2. The agency is responsible for managing and governing most of the South Australian outback, where there are numerous grazing and farming properties that are not serviced by local councils.
3. The agency is a state government statutory authority subject to the control and direction of the Minister for State/Local Government Relations. Personnel assigned to the agency are public service employees administered through the Office for State/Local Government Relations, a division within the Department of Premier and Cabinet.
4. Section 11 of the Act allows the agency to establish committees to assist it in the performance of its functions.
5. Andamooka is a community within the jurisdiction of the agency.
6. The agency, in consultation with APOMA, established the ATMC pursuant to section 11 of the Act. The ATMC was established as a result of APOMA facing an increasing burden of providing municipal type services to a community that has been heavily impacted upon by rapid expansion and expectation associated with the expansion of Olympic Dam operations 32 kms west of the community. The ATMC held its first meeting on 23 January 2012. On 2 February 2012 the minister issued a news release announcing that the ATMC had been formed to 'guide the future growth of this unique community.'
7. Section 14 of the Act requires the agency to have a public consultation policy. The agency adopted its public consultation policy (entitled 'Community Engagement - Our Commitment') on 10 March 2011. It was reviewed and an amended version was adopted on 4 April 2012.
8. Section 17(1)(e) of the Act provides that the agency may enter into a CARM agreement with an incorporated body representing an outback community relating to the authorisation of community contributions by way of a CCS.
9. Section 21(3)(a) provides that a CCS may only be imposed if it is authorised by a CARM agreement.

10. As such, a CARM agreement must be executed prior to the application of a CCS.
11. My understanding of the process to date in relation to the Andamooka CARM agreement and CCS is as follows:
 - on 6 May 2012 the APOMA conveyed their support for the introduction of the Andamooka CCS to commence on 1 July 2012
 - on 8 May 2012 the ATMC recommended to the agency that the CCS had broad community support and should be implemented on 1 July 2012
 - on 10 May 2012 the agency agreed to enter into a CARM agreement with APOMA and, subject to the CARM agreement being executed, sought Ministerial approval for the implementation of the CCS for Andamooka to commence on 1 July 2012
 - on 6 August 2012 the CARM Agreement between the agency and APOMA was executed
 - on 6 August 2012 the agency wrote the Minister for State/Local Government Relations seeking formal approval for the application of a CCS for the amount of \$400 per property unit for the 2012/13 financial year into Andamooka
 - on 15 August 2012, the agency received Ministerial approval pursuant to section 21(3)(b) of the Act for the application of the Andamooka CCS
 - on 17 August 2012, the agency declared:
 - that there be a CCS for the rateable land over:
 - the township of Andamooka, and
 - portion of Section 1500 Out of Hundreds (Andamooka) in the area known as White Dam and covering the land comprised in licences to occupy granted under the Crown Land Management Act 2009 being OL022710, OL018878, OL018887, OL0018888, OL0018889, OL0018890, OL018891, OL018909, OL018910, OL018923, OL0018992
 - that a fixed charge of \$400 per property unit on rateable land for the purposes of raising revenue for the provision of services and support to the community of Andamooka
 - that pursuant to Section 181(2) of the Local Government Act, the CCS be payable in four equal or approximately equal instalments as follows:
 - first instalment, payable on 30 September 2012;
 - second instalment, payable on 30 December 2012;
 - third instalment, payable on 30 March 2013; and
 - fourth instalment, payable on 30 June 2013.
 - on 23 August 2012 the declaration of the Andamooka CCS appeared in the Government Gazette.

Whether the agency complied with the requirement in section 17(4) of the *Outback Communities (Administration and Management) Act 2009* to consult about the CARM agreement for Andamooka

12. Section 17(4) of the Act requires that, before entering into a CARM agreement, the agency must consult with the outback community concerned in accordance with its public consultation policy. The complainant alleges that the agency failed to do this.
13. Section 14(1)(c) of the Act also provides that the agency must use its public consultation policy in relation to CARM agreements, and the agency's CARM policy states that:

To be eligible to enter into a CARM Agreement a community based association is required to prepare and submit to the OCA a community plan, a financial plan and a budget.

The community plan, financial plan and budget are to be prepared in consultation with the whole community to which it relates and in accordance with the OCA's 'Community Engagement - Our Commitment' policy.

14. I note that the current version of the agency's community consultation policy (version 3, adopted 4 April 2012) defines the process for community consultation. However, the previous version of the agency's policy (version 2, adopted 10 March 2011) was in place at the time of some of the consultations. The only difference I have identified between the two versions is that version 2 provides that a minimum period of six weeks was to be allowed for feedback, and version 3 provides that a minimum of four weeks must be allowed.
15. It is my understanding that the agency conducted the following community consultation before it entered into the CARM agreement:
1. **consultation on its policy on Community Affairs Resourcing and Management Agreements⁶ (the CARM agreement policy):**
 - on 2 March 2012 a letter was sent to all progress associations with which the agency conducts business
 - the consultation period closed on 13 April 2012
 - the CARM Agreement policy was adopted on 17 May 2012.⁷
 2. **consultation on the Draft Community Contribution Scheme (Andamooka and Iron Knob) Policy⁸ (the CCS policy):**
 - on 27 February 2012 the draft CCS policy was released for community consultation in Andamooka and Iron Knob
 - on 5 March 2012 and 6 March 2012 letters were sent to all land owners/occupiers identified on the Land Services Group database in the Andamooka and Iron Knob townships seeking feedback on the CCS policy
 - the consultation period closed on 30 March 2012
 - the CCS policy was adopted on 14 June 2012.
 3. **consultation on the ATMC Community Plan, Financial Plan and Annual Budget:**
 - on 17 April 2012 the agency issued a joint media statement with ATMC and APOMA. The statement announced a public consultation about the ATMC's community plan, financial plan and annual budget
 - the consultation period went for a period of 3 weeks, closing on 4 May 2012
 - the consultation letter and media release do not make reference to the CARM. The 'Andamooka Town Management Committee Community Plan 2012-2015 Incorporating 2012/2013 Annual Financial Plan and 2012/13 Annual Budget' (**community plan**) includes only the following two sentences that refer to the CARM:

Formal funding and service provision arrangements between the OCA and community groups in townships and settlements are made through annual Community Affairs Resourcing and Management (CARM) Agreements.

Through CARM Agreements, communities also decide their own priorities for local services and facilities, prepare community loans, and pay for amenities through local

⁶ Outback Communities Authority, Community Affairs Resourcing and Management Agreements, Policy No. CSD-02, approved 17 May 2012.

⁷ Community Affairs and Resourcing and Management Agreements policy, No CSD-02, version 1, approved 17 May 2012.

⁸ Outback Communities Authority, Community Contribution Scheme (Andamooka and Iron Knob), Policy No. G-13, approved 10 May 2012.

fundraising. The OCA provides advice, guidance and funding assistance to support these efforts.

- the media statement was printed in the two Roxby Downs based papers
 - the agency mailed a letter to all land owners on their database advising them of the consultation
 - the agency placed electronic down-loadable copies of the plan, the media statement and the feedback sheet on its website
 - APOMA also placed electronic copies of the documents on their website
 - the website link was posted on Facebook a number of times to over 200 members
 - hard-copies of the plan and feedback sheet were available at the APOMA office and distributed at the two community information sessions
 - two community information sessions were conducted by Peter Allen and Mark Sutton, both in their capacity as ATMC Members on 26 April 2012 at 2 and 8 pm.
16. I do not consider that any of these three consultations were consultations about the Andamooka CARM agreement. As such, my provisional view was that I did not consider that the agency met its requirements under section 17(4) of the Act to consult with the community before entering into a CARM agreement.
17. The consultations on the CARM agreement policy and the CCS policy (numbered 1 and 2 above) can not be said to have been consultations about entering into the Andamooka CARM agreement as they related to the general rules and process surrounding a CARM and a CCS and not the implementation of the specific Andamooka CARM agreement. As such, I do not consider that these consultations could be said to be community consultations about the CARM agreement, as required by section 17(4) of the Act.
18. The consultation on the ATMC Community Plan, Financial Plan and Annual Budget (numbered 3 above) can not be said to have been a consultation about entering into the Andamooka CARM agreement for two reasons.
19. First, the consultation on the ATMC Community Plan, Financial Plan and Annual Budget can not be said to have been a consultation about entering into the Andamooka CARM agreement as the agency did not follow all of the steps in its consultation policy.
20. Version 3 of the policy was the current policy at the time of the consultation. The policy includes a statement that implies that the policy will only be followed so far as resources permit, as follows:
- In addition to the above minimum requirements, we will engage with people in the outback in relation to all significant matters which may impact on people's lives, whether local or regional issues. We will adopt approaches and practices beyond the public consultation required by law. These approaches may vary depending on the matter under consideration, and our available resources. We believe however that creating opportunities to involve people in identifying issues and developing solutions, means we need to build on the minimum requirements. For this reason, the policy not only outlines how we propose to consult but also to engage as far as our resources permit.
21. However, the policy then clearly sets out the steps that are to be taken in a community consultation. I have considered the steps taken in the consultation on the ATMC Community Plan, Financial Plan and Annual Budget and am of the view that the agency did not follow the policy as it:
- a. allowed a three week period for feedback (not four weeks as stated in version 3 of the consultation policy)

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- b. published a media notice in the two Roxby Downs newspapers, whereas the consultation policy requires that a media notice be published in the Roxby Monitor, Transcontinental, Coober Pedy Times and West Coast Sentinel. The policy also says that the agency will 'explore options in other print media.'
22. As such, it appears that the consultation was not done in accordance with the agency's community consultation policy, as required by section 17(4).
23. Secondly, the consultation on the ATMC Community Plan, Financial Plan and Annual Budget did not specify that it was a consultation on the CARM agreement, as it was required to do by section 17(4) of the Act. The media release, the letters to landowners and the feedback forms all say that it was a community consultation on the ATMC Draft Community Plan, Financial Plan and Annual Budget, not on the Andamooka CARM agreement.
24. I have examined the consultation documents, and the references to CARM agreements in them are negligible. As such, even if the agency claims that this consultation was the consultation it was required to undertake under section 17(4) of the Act, in my view, a member of the public would not be able to comprehend that the consultation was about, or even related to, a CARM agreement.
25. The CARM agreement is referred to in the ATMC Community Plan, Financial Plan and Annual Budget, as follows:
- Formal funding and service provision arrangements between the OCA [the agency] and community groups in townships and settlements are made through annual Community Affairs Resourcing and Management (CARM) agreements.
26. Further, the CCS is referred to in the letter that was sent to land owners and in the media release, as follows:
- The final Community Plan, Financial Plan and Budget, for the first time in Andamooka, will result in the introduction of community contributions from land-owners for provision of services identified in the plans.
27. I can find no other references to the Andamooka CARM agreement or CCS in the consultation documents. In my view, if this consultation was in fact the consultation that was undertaken by the agency to fulfil the requirement under section 17(4), the consultation should have been clearly named as such and explained as such.
28. In my view, none of the above community consultations were consultations about the CARM agreement as required by sections 17(4) and 14(1)(c) of the Act. As such, the agency did not in fact undertake community consultation in relation to the Andamooka CARM agreement as required by the Act.
29. In its response to my provisional report, the agency submitted that it considered that my interpretation of 'community' (being those living and working in and around Andamooka) was wrong. The agency submitted that the 'community concerned' that section 17(4) requires must be consulted with 'before a community affairs resourcing and management agreement is entered into, varied or substituted' means the community organisation which is subject to the agreement, being APOMA. The agency submits that it did consult with APOMA.
30. I do not consider that it is necessary for me to consider whether the 'community concerned' for the purposes of section 17(4) means those living and working in and around Andamooka, or whether it means the community organisation which is subject

to the agreement, being APOMA. Section 17(4) is clear that the agency must consult in accordance with its public consultation policy. I remain of the view that it did not do so.

31. I note that while this is a technical error, I do not consider that the agency acted without diligence and good faith. My view is that the error has resulted from the agency's inflexible public consultation policy and a belief that by consulting with APOMA it was consulting with the community at large. I do not consider that the agency was purposely attempting to deceive the community in any way.

Opinion

In light of the above, my final view is that the agency acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the agency review and revise its public consultation policy. I also recommend that the agency develop a community engagement / public consultation checklist to ensure that it complies with the requirements of the Act.

Whether the agency had valid authority for the community contribution scheme

32. The complainant has submitted that if the agency has failed to comply with the requirement in section 17(4) of the Act to consult about the CARM agreement for Andamooka, then the CARM agreement is not valid.
33. Section 21(3)(a) is clear that a CCS may only be imposed if it is authorised by a CARM agreement. Therefore, if the CARM agreement is invalid it would follow that the CCS is also invalid.
34. As it is my view that the agency did not properly consult the community in relation to the CARM agreement, as required by sections 17(4) of the Act, it therefore is my view that the Andamooka CARM agreement is invalid. As a CCS can not be imposed without a valid CARM agreement it is my final view that, in imposing the Andamooka CCS, the agency acted contrary to law. However, I note that this error has turned on a technical interpretation of section 17(4) and a relatively minor failure to adhere with its public consultation policy. In maintaining my view that the agency acted in a manner that was contrary to law, I do not consider that the agency knowingly or intentionally did so.

Opinion

In light of the above, my final view is that the agency acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

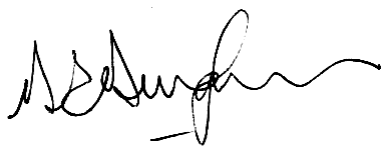
I have given consideration to whether I should make any further recommendation under section 25(2) of the *Ombudsman Act 1972* to rectify the agency's administrative error, and specifically, whether I should recommend that the agency reimburse people who have paid instalments of the Andamooka CCS. The agency, in its response to my provisional report, submitted that the consequences of reimbursement to people who have paid instalments of the Andamooka CCS would be considerable. Consequences of such a recommendation would include disruption to the provisional of essential services to Andamooka and, as such, it would not be in the public interest to make such a recommendation.

I agree with the views of the agency and have determined that I should not make a recommendation that the agency should reimburse people who have paid instalments of the Andamooka CCS. I do not consider that the error was one that caused any substantial hardship to people. I do consider that any action that resulted in CCS monies not being

available for community use would cause hardship to the community, and therefore would not be in the public interest.

Final comment

In accordance with section 25(4) of the Ombudsman Act, I request that the agency report to me by 2 August 2103 on what steps have been taken to give effect to my recommendations that it review and revise its public consultation policy and develop a community engagement / public consultation checklist; and, if no such steps have been taken, the reason(s) for the inaction.

A handwritten signature in black ink, appearing to read 'Richard Bingham', with a long horizontal flourish extending to the right.

Richard Bingham
SA OMBUDSMAN

24 May 2013