

Report

Full investigation - *Ombudsman Act 1972*

Complainant	Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>
Agency	City of Charles Sturt
Ombudsman reference	2012/05612
Date complaint received	23 July 2012
Issues	Whether an elected member failed to declare a conflict of interest under the <i>Local Government Act 1999</i>

Jurisdiction

This investigation stemmed from a disclosure made under the protections of the *Whistleblowers Protection Act 1993* (**the original disclosure**). It alleged that an elected member of the City of Charles Sturt (**the council**) had failed to declare a conflict of interest.

In order to protect the identity of the whistleblower, I commenced an own initiative investigation under section 13(2) of the *Ombudsman Act 1972*.

I note that under the definition of 'administrative act' in section 3 of the *Ombudsman Act* I am entitled to investigate 'an act relating to a matter of administration on the part of a person engaged in the work of ... an agency'. Further, under section 74(5a) of the *Local Government Act 1999* (**the Act**) I am empowered to investigate an allegation of a breach of section 74.

In my view these two provisions provide the jurisdictional basis for me to investigate whether an elected member failed to disclose a conflict of interest.

Investigation

My investigation has comprised:

- assessing the information provided in the original disclosure
- seeking a statutory declaration from Cr Tolley Wasylenko
- considering sections 73 and 74 of the Act
- preparing a provisional report, and seeking comment from Cr Wasylenko
- considering Cr Wasylenko's comments
- preparing a revised provisional report and seeking comment from Cr Wasylenko and the council
- considering the responses
- preparing this final report.

Standard of proof

The standard of proof applied is on the balance of probabilities. However, in determining whether that has been met, in accordance with the *Briginshaw* principle I have borne in mind the nature of the allegations and the consequences if they were to be upheld. That decision recognises that questions of fact vary greatly in nature, and greater care is needed in scrutinising the evidence in some cases.¹ It is best summed up in the following statement of Dixon J:

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 to the reasonable satisfaction of the tribunal.²

Responses to my provisional reports

Cr Wasylenko responded to my provisional report by letter dated 20 August 2012. He made the following points:

- he confirmed the content of his statutory declaration that in his view he acted honestly, truthfully and in accordance with his role and statutory obligations as an elected member
- he maintains his belief that he did not have a conflict of interest, but admits in hindsight that 'it may have been prudent for [him] to formally register that [he] lives on the street, and not simply rely on words during the debate'. He notes that his interest was acknowledged in emails dated 5 April 2012 at 7.13 pm and 10 April 2012 at 3.18pm
- he noted that the mayor lives near by and across the road to the St Clair reserve, but that this fact has not disentitled her from participating in council decisions relating to it. He considers that the issue raised in this investigation 'is far removed by comparison'
- he considers that the fact that the relevant motion included a requirement that a more appropriate replacement tree should be planted 'in the same location subject to council's Tree and Streetscape Policy' means that he would not have obtained any benefit or detriment from the passage of the motion. The replacement tree has already been planted
- he did not dispute the staff report but considers that 'the tree was inappropriate for its location and if such a tree were requested today, it would not be planted. This tree was a mistake from a decision in the past'
- he stated that the tree's needles and some root intrusion contributed to blocked drains, and that the assets of both council and the property owner required protection
- he considers that 'an impartial fair minded observer could and would form an opinion that, I was for filling (sic) my obligations as a local elected member on behalf of constituents within my role as the local Ward Councillor and as a member of council'
- he considers that 'it will now be necessary to seek legal advice where grey areas or doubtful conditions apply'.

Cr Wasylenko also responded to my revised provisional report on 28 August 2012 as follows:

I feel there is not much more I can say other than reinforce that I strongly believe I did not contravene any Legislation or Acts as prescribed.

....

¹ see *Briginshaw v Briginshaw* (1938) 60 CLR 336. Applied in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449 at 449-450 per Mason CJ, Brennan, Deane and Gaudron JJ

² *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362

I thank you for your access and comment. I will certainly take steps if similar "grey area" issues arise in the future and obtain legal advice provided by Council for Councillors in the area of conflicts.

The council's Chief Executive Officer advised me on 25 October 2012 that the council had no comment on my revised provisional report.

Background

1. The original disclosure alleged that at a meeting of the council's Asset Management Committee (**the committee**) held on 18 June 2012, a committee member, Cr Tolley Wasylenko, failed to disclose an interest in Item 3.51, titled 'Tree located in front of 29 Johnson Street Royal Park'. The tree is situated on the eastern side of Johnson St, near to its intersection with Henry St; and outside a property at 29 Johnson St owned by Cr Edgar Agius.
2. At the committee meeting the item (i.e. removal of the tree) was not recommended for approval by the Technical Officer Arboriculture. However, Cr Wasylenko moved a motion that the tree should be removed, which was seconded by Cr Jim Fitzpatrick. This motion was carried.³
3. At a subsequent meeting of the full council held on 25 June 2012 (**the council meeting**), the committee decision was adopted. The relevant motion was moved by Cr Stuart Ghent as Presiding Member of the Asset Management Committee, and was seconded by Cr Wasylenko. The motion was carried unanimously.
4. I note that at both the committee and council meetings, Cr Agius as the owner of a property adjoining the tree made a deputation seeking removal of the tree. As he was not a member of the committee, he was not present for its deliberations on Item 3.51. In the case of the council meeting, he declared a conflict of interest, and left the room.
5. It appears to me that the committee made its decision having regard to the submissions made by Cr Agius in his deputation, and on the basis that the tree was likely to cause damage to his property at 29 Johnson St; and that litter from the tree may block drains, thus contributing to flooding in the area in high rainfall events.
6. The original disclosure alleged that Cr Wasylenko and his wife are the owners of a property situated at 28 Johnson Street, Royal Park (**the property**). This property is situated on the western side of Johnson St, and on the other side of Henry St from the tree. Cr Wasylenko has confirmed these facts.
7. I understand that following the council's decision, the tree has now been removed and replaced by a tree which complies with the council's Tree and Streetscape Policy.

³ The motion was as follows:

Motion

1. That the Swamp Oak (*Casuarina glauca*) located on the road reserve in front of 29 Johnson Street, Royal Park which was assessed against council's Tree and Streetscape Policy be removed.
2. That an appropriate tree be planted in the same location subject to council's Tree and Streetscape Policy.

Moved Councillor Wasylenko, Seconded Councillor Fitzpatrick **Carried**

Whether Cr Wasylenko failed to disclose an interest at a council meeting

8. The first issue is whether Cr Wasylenko's ownership of the property was such as to require him to declare an interest. Under section 73 of the *Local Government Act 1999*, he would have had an interest in the item being considered by the council if:
 - either he or a person with whom he 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
 - either he or a person with whom he 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.
9. Section 74 of the Act requires that a member who has an interest in a matter within these terms must disclose it to the council, and must not participate in a council's debate on the matter. This includes proposing or seconding a motion, participating in discussion, being present in the room, and voting on the matter.
10. A secondary question is whether Cr Wasylenko's wife was a person 'closely associated' with him. Under section 73(2) of the Act:
 - (2) A person is closely associated with a member of a council—
 - (g) if that person is a relative of the member.

Paragraph (c) of the definition of 'relative' in section 4 of the Act includes a spouse or domestic partner. I therefore conclude that because Cr Wasylenko's wife is 'closely associated' with him for the purposes of sections 73 and 74, his obligations arise in respect of her interest as well.
11. The second question is whether Cr Wasylenko or his wife would have received, or would have had a reasonable expectation of receiving, a benefit (or suffering a detriment) from the council's decision on the item.
12. I consider that based on the facts as they are outlined in the council officer's report for the committee meeting, Cr Wasylenko would have obtained a non-pecuniary benefit or detriment from the removal of the tree. His property is situated within three houses of the tree (albeit diagonally opposite across an intersection), and in my view the tree affected the visual amenity, ambience and flooding risk of the area.
13. I note that under section 73(1) of the Act, a councillor does not have an interest if the benefit or detriment '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.' I think it reasonable to conclude that the benefit or detriment of the removal of the tree would be shared by a limited number of residents in its near vicinity, and I do not consider that this amounts to 'a substantial class of persons' within the meaning of this section.
14. I therefore conclude that Cr Wasylenko had an interest, and an obligation to disclose the interest under section 74(1) of the Act. The minutes for the committee and council meetings do not record such a disclosure.
15. My view therefore is that Cr Wasylenko's failure to disclose an interest at the relevant meetings breached section 74(1) of the Act.

16. I note that under section 74(5) of the Act, the fact that a member of a council failed to declare an interest:
- ... does not, of itself, invalidate a resolution or decision on that matter, but, if it appears that the non-compliance may have had a decisive influence on the passing of the resolution or the making of the decision, the District Court may, on the application of the council, the Minister or a person affected by the resolution or decision, annul the resolution or decision and make such ancillary or consequential orders as it thinks fit.
17. I note also that section 74(4b) provides that in certain circumstances, after an interest has been disclosed, a member is able to continue to participate in the meeting. However, this provision is not applicable to the present circumstances, and there is no doubt that if Cr Wasylenko had an interest he was required to withdraw from the meeting.
18. In this case, in the absence of evidence:
- from individual committee and council members and
 - of the voting numbers
- it is difficult for me to determine whether Cr Wasylenko's failure to declare his interest was decisive. However, bearing in mind the necessary standard of proof as outlined above, it appears that it was not. I also note the fact that the relevant motion at the committee meeting, which was moved by Cr Wasylenko, was carried without a division being called. This would indicate that the view which Cr Wasylenko put was accepted by the full committee.
19. Similarly at the council meeting, the relevant motion was carried unanimously. I therefore conclude that Cr Wasylenko breached section 74 of the Act, but that his failure to declare an interest was not decisive.

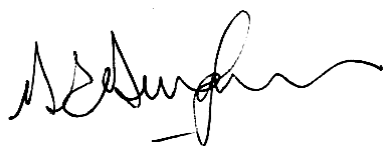
Opinion

Cr Wasylenko had an interest in Item 3.51, titled 'Tree located in front of 29 Johnson Street Royal Park', which was considered at the Asset Management Committee meeting held on 18 June 2012, and at the council meeting held on 25 June 2012. In failing to disclose this interest, Cr Wasylenko was in breach of section 74(1) of the *Local Government Act 1999*.

My view is that in failing to declare an interest Cr Wasylenko acted in a way which was contrary to law within the meaning of section 25(1)(a) of the *Ombudsman Act 1972*.

It appears that Cr Wasylenko's failure to comply with section 74 did not have a decisive influence on the outcome of the committee's consideration of Item 3.51, or on the council's adoption of the committee decision. Accordingly, I do not consider that the council fell into administrative error as a result of Cr Wasylenko's failure.

Under section 18(5) of the *Ombudsman Act 1972*, I report to the mayor Cr Wasylenko's failure to declare an interest in the item.



Richard Bingham
SA OMBUDSMAN

26 October 2012