

Report
Full investigation - *Ombudsman Act 1972*

Complainant	Mr Norman Wilson
Agency	District Council of Mount Barker
Ombudsman reference	2012/04516
Agency reference	12/077918
Date complaint received	14 June 2012
Issues	1. Whether the council breached section 20 of the <i>Aboriginal Heritage Act 1988</i> 2. Whether the council has adequately considered Aboriginal heritage issues as part of its development approval process 3. Whether the council has a duty of care in relation to Aboriginal sites and has failed in that duty

Jurisdiction

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

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the council
- considering the *Aboriginal Heritage Act 1988* and the *Development Act 1993*
- preparing this report.
- providing the council and the complainant 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.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

Responses to my provisional report

In response to my provisional report, the complainant made a number of submissions in relation to whether the council breached section 20 of the Aboriginal Heritage Act, including:

- the word 'discovery' can mean 'the gaining of knowledge of'
- the Wood report identifies areas of land that are sites and accordingly, by reading the report, the council 'discovered' sites
- the 2002 Report includes photographs and descriptions of sites
- a sign in the public car park at Mount Barker Summit states there are a number of small aboriginal sites in the vicinity, and accordingly the council would have had knowledge of the site area and individual sites

These submissions do not alter my view that the council did not breach section 20 of the Aboriginal Heritage Act. I refer to my reasoning below, and comment that in my view Parliament did not intend to create an offence for not reporting knowledge of sites gained in such circumstances. The complainant also notes that a letter from Mr Chris Lawry (council Urban Forest officer) to the complainant identifies the localities of three culturally significant trees and asks for information as to why they are significant. It is not clear to me how Mr Lawry gained knowledge of these sites / objects, and therefore I am not satisfied he or the council 'discovered' them.

The complainant submitted that, in addition to my recommendation that the council should implement a policy to ensure Aboriginal heritage is considered during the development application process, I should recommend the following:

1. Regional Heritage/Management Agreement involving PHA & DCMB;
2. RHA also between the PHA & Developers/Land Owners;
3. Formal participation/membership in the DCMB Development Assessment Panel & process - heritage assessed as normal part of approval for development applications;
4. Engagement of PHA monitors for an development excavations or land clearing.

I do not consider it appropriate that I make such recommendations. In my view, the recommendation I make below should ensure that the associated finding of error is not repeated.

The complainant also submitted a further argument in support of its assertion that the council has a duty of care to protect Aboriginal sites and objects. The complainant stated this is derived from section 28 of the Aboriginal Heritage Act which provides:

A person must take reasonable measures to protect an Aboriginal object that is in that person's ownership or possession as part of a public or private collection.

The complainant submitted that the Peramangk people have created a collection of sites and objects in the Mount Barker area which are now in the possession or ownership of the council and that, therefore, the council has a legal responsibility to protect those sites and objects. In

¹ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR449 at 449-450 per Mason CJ, Brennan, Deane and Gaudron JJ.

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

my view, section 28 is not directed to such circumstances, but rather towards the protection of objects that have been collected. I note the Macquarie Dictionary definition of 'collect' is 'gather together; assemble'.

Mr Ian Greenwood, on behalf of the complainant, also submitted that section 41(2) of the Aboriginal Heritage Act implies a duty of care. That provision states:

Where a body corporate commits a prescribed offence, each member of the governing body of the body corporate is guilty of an offence and liable to the same penalty applicable to the principal offence when committed by a natural person unless it is proved that the member could not by the exercise of reasonable diligence have prevented the commission of that offence.

In my view this section simply creates a liability for the members of a governing body of a body corporate in circumstances where there has been a breach of the Act, and I am not convinced any general duty of care arises from it.

The council responded to my provisional report by commenting that it has been pursuing an improved process in relation to the consideration of Aboriginal heritage issues since this complaint was first known. It stated that it aims to develop and adopt a policy and procedure where the Aboriginal Heritage Branch of the Aboriginal Affairs and Reconciliation Division of the Department of Premier and Cabinet are consulted to establish when and where Aboriginal heritage consultations shall and should occur. It aims to finalise this policy by the end of March 2013. I refer to my specific recommendation that the council should implement a policy to ensure Aboriginal heritage is considered during the development application process in accordance with the Development Plan.

The council also stated it has established:

through the contracting of a recognised Aboriginal heritage and cultural consultant the relevant indigenous group(s) to consult with in determining the presence of Aboriginal heritage significance.

The complainant's submissions include lengthy comment on this process. However, I am considering this issue as part of another Ombudsman investigation involving the council and the complainant; it will be the subject of a separate report.

Background

1. The complainant is the Chairperson of the Peramangk Heritage Association Incorporated (**the PHA**) which exists, *inter alia*, 'to protect the interests of the Peramangk Traditional Owners, people and Peramangk Kinship Custodians'. The Peramangk assert Aboriginal heritage interests in the Mount Barker area. The complainant has provided written authorisation for Mr Ian Greenwood to act on his behalf in relation to this investigation.
2. On 14 June 2012 the complainant and Mr Ian Greenwood met with my officers to make a complaint about the council. The complaint comprises the issues considered below. To assist the investigation, the complainant provided the following:
 - a report entitled 'Review into some Legal Aspects of the Culturally Modified Trees found within the District of Mount Barker', dated June 2012 and authored by the Peramangk Heritage Association (**the 2012 Report**)
 - a draft "Site Card" for Peraruwa and Kungna Tuko
 - text tabled at the Adelaide Oval Redevelopment section 13 consultation meeting, 4 November 2011
 - a topographical map of the Mount Lofty/Mount Barker area overlaid with (1) the location of culturally modified trees and burial trees (2) the Mount Barker Development Plan Expansion area

- aerial maps showing trees located at 15 Laver Street Mount Barker, 7 Barker Road Mount Barker and 198 Bald Hills Road Mount Barker
- extracts from 'Mountain upon the Plain' by Bob Schmidt (District Council of Mount Barker, 1983), 'Kungna Tuko - A History of Kanmantoo' by A R Mills (1981), 'The Stages of Life of the Women of the Karnemeru (Hill People)', Wikipedia), 'The Ochre Warriors - Peramangk Culture and Rock Art in the Mount Lofty Ranges' by R Coles
- Genealogy - Ancestors of Norman Wilson
- Constitution of the Peramangk Heritage Association
- signatory document providing authority to Norman Wilson as Principal Traditional Owner of the Peramangk dated 31 May 2012 (signed by 60 Peramangk descendants)
- submission to the District Council of Mount Barker entitled 'Optus Lease on Windmill Hill', Peramangk Heritage Association, 12 January 2012
- letter to the council dated 31 May 2012 from the Peramangk Heritage Association regarding Windmill Hill
- emails between Peter McGinn (council's Community Development Officer) and the complainant dated March - May 2012
- extracts from an Honours Thesis entitled 'The Peramangk and Culturally Modified Trees: Significant Heritage Sites', Rhys Roberts, January 2000
- Mount Barker Summit Aboriginal Management Plan Consultancy Brief (which arose from consultation with the Peramangk people via the Peramangk Dreaming Forum)
- report entitled 'Mount Barker Summit Peramangk Heritage Management Plan' dated August 2002 and authored by the 'Aboriginal Cultural Development Foundation' and the 'Peramangk Heritage Association' (**the 2002 Report**). I understand this originated from the 'Peramangk Dreaming Forum' held in 2000 and I note the introduction to the 2002 report provides:
 - ...the council has determined that a Management Plan that addresses Aboriginal Heritage issues should be prepared for Mount Barker Summit Reserve, and has jointly engaged the Aboriginal Cultural Development Foundation Inc and its consulting arm, Anima Loci "Design for the Spirit of Place", to prepare this plan.
- extract from a report entitled 'Tjilbruke (Tjirbruki) Dreaming Tracks Project Toward a Management Framework' (Hassel, November 2002)
- Kaurna Tappa Iri Regional Agreement 2005-2008
- Heritage Agreement document - 'Iron Princess/Whyalinna' precedent document
- map of Mount Barker showing the location of Fairfield.

3. I note that, in addition to the issues I have considered in detail, the complainant asked me to consider whether the council provided the PHA with 'procedural fairness' in relation to the Mount Barker Township Expansion Development Plan Amendment process. This Development Plan Amendment, which rezoned land in the Mount Barker area, was made by the Minister for Planning. The consultation process was undertaken by the Development Policy Advisory Committee, a statutory body set up to advise the Minister. As the council was not the relevant 'agency' in this process, I have not considered this issue.
4. The complainant also alleged that the council failed to communicate with the complainant in relation to a number of other issues, including the Windmill Hill lease. I advised the complainant it would be appropriate to seek resolution of those issues by making an internal complaint to the council in the first instance. I understand there was subsequently some dialogue between the complainant and council. In its response to my provisional report, the council states it consulted with the complainant in relation to Windmill Hill. By contrast, the complainant states that the council has made decisions

in regard to Windmill Hill and the Mount Barker Summit Management Plan without consulting with the PHA, and that as a result he believes he has been denied procedural fairness. These matters are not the subject of this investigation.

5. By email dated 5 July 2012 to Mr Andrew Stuart, the Chief Executive Officer of the council, Ms Emily Strickland of this office requested some information in relation to the second aspect of the complaint. By email dated 13 July 2012 Mr Greg Parker (General Manager, Council Services) provided:

- a. a summary of all development applications received in relation to the Mount Barker Development Plan Amendment Urban Growth Zone (**the MDPA area**) for the period 2010 to July 2012
- b. copies of documents in relation to seven of those development applications entitled 'Government Administrative Interests' which state, *inter alia*, that there are

No Aboriginal Heritage interests...
...recorded on the Land Ownership and Tenure System (L.O.T.S.) for this property at the date of lodgement of the application

Other Government Department may have administrative interests recorded but this has not been searched by the Department of Planning and Local Government (Planning Services).

- c. advice that at that point no development applications in relation to the MDPA area had gone to the DAP for their consideration, and that 'no Aboriginal Heritage interests were recorded against any of the subject allotments/parcels'.

6. By letter dated 26 July 2012 I notified the council I would be conducting a preliminary investigation into the complaint and by letter dated 23 August 2012 I requested further information from the council. Mr Stuart provided me with a response dated 25 September 2012, including a desk top survey undertaken as part of the Ministerial DPA by Connor Holmes P/L and authored by Vivien Wood (**the Wood Report**).

7. On 26 November 2012 the complainant provided me with the following additional material:

- letter dated 30 May 2012 from Mr Chris Lawry (Urban Forest Officer, District Council of Mt Barker) to Mr Norman Wilson re 'Culturally significant trees'
- letter dated 30 May 2012 from Mr Andrew Stuart to Norman and Florence Wilson re 'Lease of council land - Windmill Hill and other items'
- painting circa 1850 of Aboriginal people on banks of River Torrens - described as 'Depicts typical occupation/heritage zone around culturally modified tree...'
- memorandum from Peramangk Heritage Association to Heidi Crow, Nerida Saunders, Andrew Stuart, Greg Parker, Alice Gorman, Emily Strickland re 'Section 6.2 Application, District of Mt Barker'
- memorandum from Peramangk Heritage Association to Heidi Crow, Nerida Saunders, ccd to Emily Strickland re meeting held between PHA and Aboriginal Heritage Branch on 2 October 2012
- email from Alice Gorman (ACHM) to Mr Norman Wilson dated 12 October 2012 inviting him to participate in a survey for the Dutton Road upgrade on 17 October 2012
- letter from Mr Norman Wilson to Alice Gorman (ACHM) dated 30 October 2012 regarding site survey

- submission from Mr Norman Wilson to the Minister for Aboriginal Affairs dated 28 September 2012 regarding seeking a delegation under section 6(2) of the Aboriginal Heritage Act
- 'A guide to the South Australian Aboriginal Heritage Act (1988)', Compiled by the Aboriginal Heritage Branch, Department of Environment & Planning.

Whether the council breached section 20 of the *Aboriginal Heritage Act 1988*

8. The complainant asserts that the council has breached section 20 of the Aboriginal Heritage Act in failing to report the existence of Aboriginal sites to the Minister for Aboriginal Affairs. Section 20 provides:

(1) An owner or occupier of private land, or an employee or agent of such an owner or occupier, who discovers on the land—

(a) an Aboriginal site; or

(b) an Aboriginal object or remains,

must, as soon as practicable, report the discovery to the Minister giving particulars of the nature and location of the site, object or remains.

Maximum penalty:

(a) in the case of a body corporate—\$50 000;

(b) in any other case—\$10 000 or imprisonment for 6 months.

(2) This section does not apply to the traditional owner of the site or object or to an employee or agent of the traditional owner.

(3) The Minister may direct a person making a report to take such immediate action for the protection or preservation of the remains as the Minister considers appropriate.

(4) A person must not, without reasonable excuse, fail to comply with a direction of the Minister under this section.

Maximum penalty: \$2 000 or imprisonment for 3 months.

9. The complainant argues that the council has been put on notice that Aboriginal heritage sites exist in areas of land owned by council. In particular, the complainant points to the Wood Report which at page 14 refers to two primary sources which indicate that at first settlement there were large numbers of Aboriginal people living at the springs just to the south of Mount Barker summit and at the 'Fairfield' property. The latter falls within the MDPA area. The complainant argues that these accounts provide evidence these areas are Aboriginal heritage sites and, accordingly, as council owns land on these sites (for example the ovals forming part of the proposed development), it was under an obligation to report that to the Minister pursuant to section 20 of the Aboriginal Heritage Act.

10. Similarly, the complainant points to paragraph 13 on page 85 of the 2001 report which states that the Mount Barker Summit Conservation Reserve, Twin Peaks (including the white ochre site) and the surrounding Eagle landform be registered as sites 'as these constitute a Sacred Site to the Peramangk'. Again, the complainant argues the council, as landowner, had an obligation to report that site to the Minister.

11. I turn to the former example first. It is not entirely clear that the council in fact owns land comprising the areas referred to by Wood. That said, I have proceeded on the basis that it does. I note that section 3 of the Aboriginal Heritage Act defines 'private land' to include land alienated from the Crown in fee simple and land occupied under a lease, licence or agreement for sale and purchase with the Crown.
12. Section 3 defines 'Aboriginal site' as follows:
 - an area of land—
 - (a) that is of significance according to Aboriginal tradition; or
 - (b) that is of significance to Aboriginal archaeology, anthropology or history,
 and includes an area or an area of a class declared by regulation to be an Aboriginal site but does not include an area or an area of a class excluded by regulation from the ambit of this definition...
13. Arguably, the fact that there is evidence that large numbers of Aboriginal people camped in these areas means they are areas of significance to Aboriginal history and accordingly are 'Aboriginal sites'.
14. However, section 20 refers to a land owner who 'discovers on the land' an Aboriginal site. In my view, this wording evinces an intention by Parliament that the discovery of (the gaining of knowledge of) the site occurs on the land, and that, in turn, the landowner is provided with physical evidence of the site. The receipt of the Wood Report by the council referring to primary sources which indicate these sites were occupied by Aboriginal people does not amount to discovering a site on its land. In the event that Wood had done field work in the area and reported evidence of occupation, I may have come to a different view. Accordingly, I am not of the view that section 20 applies in this instance.
15. I am similarly of the view that the receipt of the 2001 Report by council does not amount to discovering 'on the land' an Aboriginal site. If there was evidence that council officers were shown the white ochre for example, I would be inclined to the view that the section 20 obligation had been invoked.
16. I note that section 23 of the Aboriginal Heritage Act provides makes it an offence to damage, disturb or interfere with a site. The fact that a person had prior information about the possible existence of a site may assist in a prosecution under that section.
17. I consider below whether the council, on receipt of the above information, had an obligation to make further enquiries.

Opinion

In light of the above, I consider that the council, with respect to section 20 of the Aboriginal Heritage Act, 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 has adequately considered Aboriginal heritage issues as part of its development approval process

18. The complainant alleges that the council has not adequately turned its mind to Aboriginal heritage issues when considering development applications which fall within

the Mount Barker Township Expansion area (that is the area which was re-zoned under the Mount Barker Development Plan Amendment).

19. Pursuant to section 34(23) of the *Development Act 1993* the council delegates its powers and functions as a 'relevant authority' to consider development applications either to council staff or to the council Development Assessment Panel (**the DAP**). I note that the list of development applications within the MDPA area from 2010-2012 provided to me by council shows that a council delegate gave consent to 14 development applications. The DAP did not consider any in this time.

20. Objective 62 in the Mount Barker Development Plan provides:

The conservation of places of historical value to indigenous and non-indigenous cultures.

21. The text following the Objective states, *inter alia*:

The Aboriginal Heritage Act 1988 applies to any sites, objects and remains of Aboriginal significance. Due to a lack of comprehensive survey information, places of Aboriginal significance have not been listed within the Development Plan. None-the-less, whenever development is proposed, care should be taken to consider the likelihood that a place of Aboriginal significance may exist and be affected by the intended development. All Aboriginal sites, objects and remains are protected under the Aboriginal Heritage Act 1988. Additional consents may be required under this Act. Where evidence of likely Aboriginal significance occurs, all reasonable measures should be taken to ensure that such significance is conserved.

The council's submissions

22. The council's submissions commence with an explanation of the nature of the Development Plan and how it is to be applied in the context of making a planning decision:

Objective 62, like all other provisions of the Development Plan, does not create any obligations. The Supreme Court has on many occasions had cause to comment that the Development Plan is a planner's document, that it is not a legal statute and should not be interpreted like one. The Development Plan contains guidelines within which a planning judgment must be made.

It is well accepted that provisions of a Development Plan are guidelines. A development application for development must be assessed against those guidelines...

... the task of the planning authority is to weigh the benefits and detriments, in other words, to weigh 'the pros and the cons' of the proposed development by reference to the Plan...

...The development assessment task will thus involve identifying all of the Development Plan provisions relevant to a particular proposal; determining whether those provisions speak for or against the proposed development and distilling from the relevant provisions the overall intent, purpose and the desired character of the subject zone...

...In this context it is clear that Objective 62, like all other provisions, creates no obligations. In making a planning judgment on any particular application it is to be considered in conjunction with [sic] other relevant provisions of the Development Plan.

23. The council also points out that the *Aboriginal Heritage Act 1988* creates a separate and distinct system of regulation for the protection and preservation of Aboriginal heritage and, in particular, that it is the Minister under that Act that may authorise damage, disturbance or interference of an Aboriginal site, objects or remains (that is, the planning authority cannot make such an authorisation).

24. The council observes that Objective 62 is a council-wide general provision and that it falls under the heading Heritage Places - State and Local:

This suggests that the provisions that follow are intended to deal principally with both indigenous and non indigenous items that are places of State heritage significance pursuant to the provisions of the Heritage Places Act 1993 or are local heritage places designated as such in the Council's Development Plan. It is likely to be this reason that Objective 62 references the term 'places' of historic value.

25. The council notes that the text of Objective 62 suggests that places of Aboriginal significance have not been listed in the Development Plan 'due to a lack of comprehensive survey information'. It points to the last sentence of the text of the Objective and submits:

Council suggests that where a development application is proposed and evidence provided that the development is within either an area of Aboriginal significance or may well affect an item of Aboriginal significance then this will be a matter for consideration for the relevant authority with all other relevant provisions of the Development Plan.

26. In response to my queries about the documents entitled 'Government Administrative Interests', the council explained that all land division applications are lodged with the State Government's Development Assessment Commission (**the DAC**) which coordinates the consultation with the State agencies that may have an interest in the development. DAC provides the council with a copy of the comments received from all State agencies. The council submits:

These comments specifically list Aboriginal Heritage Interests as an item of consideration and Council to date has relied entirely upon the consolidated response process undertaken by DAC including comments provided by LOTS Administration to flag any Aboriginal heritage issues that may exist.

27. The council submits that the nature of inquiry undertaken by it will depend upon the particular development proposed and that:

where there is evidence of likely Aboriginal significance we would make further inquiries which would include visiting the site and a request to the applicant seeking them to address the issues...

28. The council says it does not have knowledge of any specific Aboriginal sites within the MDPA area and that the Wood Report did not identify any sites of significance within the relevant area. Council staff have visited the properties for which development approval has been sought and have not observed any trees that may have cultural significance.

29. In response to my specific query as to how Aboriginal heritage issues are being considered as part of D/091/10, a land division to create 491 additional allotments at Wistow park, the council stated:

- no significant sites were identified within the Wood Report
- DAC has not informed the council of any issues of state significance in this area
- to date the council has no other specific information or evidence of items of likely Aboriginal significance 'that would otherwise influence Council's processing or decision on the subject application under the Development Act'
- all existing mature trees in good health will be retained in council reserve areas and therefore protected.

30. I agree with the council's submissions, insofar as it provides an explanation of the nature of the Development Plan. That said, I refer to section 33 of the Development Act which provides:

(1) A development is an approved development if, and only if, a relevant authority has assessed the development against, and granted a consent in respect of, each of the following matters (insofar as they are relevant to the particular development):

(a) the provisions of the appropriate Development Plan ("development plan consent")...

31. In my view, this requires the relevant authority to assess the development against all relevant provisions of the Development Plan. Further, it is my view that Objective 62 is relevant as it states:

whenever development is proposed, care should be taken to consider the likelihood that a place of Aboriginal significance may exist and be affected by the intended development

32. The fact that this Objective is a council-wide provision does not abrogate the responsibility of the relevant authority to consider it. The weight the relevant authority accords Objective 62 will vary in the circumstances, but it nevertheless must be considered. In other words, it is my view that the relevant authority should turn its mind to consider the likelihood of whether a place of Aboriginal significance may exist and be affected by the intended development. I do not agree with the council's submission that Objective 62 relates only to registered heritage items; in my view its wording makes it clear it extends beyond this.

33. I now turn to consider whether the council delegate did meet this obligation in respect of the 14 development applications approved between 2010 and 2012 within the MDPA area. Arguably, the council delegate did so by considering the documents entitled 'Government Administrative Interests' which state there are no Aboriginal interests recorded on LOTS. However, it is my understanding that the LOTS system does not record such interests, and it is unclear whether the DAC process involved consulting with the Department for Premier and Cabinet's Aboriginal Affairs and Reconciliation Division.

34. In any event, in my view, the council arguably had some 'evidence of likely Aboriginal significance' in the area before it. The Wood report effectively put the council on notice that there were Aboriginal people living at Mount Barker Creek and at Fairfield at settlement. Further, Wood concluded that

previous cultural heritage studies highlight the possibility that further sites may be present within the current study area, particularly in close proximity to water courses. These could include scarred trees (including shelter trees), campsites/stone artefact scatters, painting and engraving sites, burials and stone arrangements, all sites of potential significance to Aboriginal archaeology, anthropology history and/or tradition.

35. In light of this information, it is my view that the council was under an obligation to take 'all reasonable measures' to ensure any Aboriginal heritage is conserved; that is, the council delegate should have done more to ensure heritage would not be damaged as a result of the proposed development. I acknowledge the council's submission that this may involve visiting the site and writing to the applicant about their obligations under the Aboriginal Heritage Act. Further, I note that visiting the site may be useful given the council has been advised by the complainant that there are significant numbers of culturally modified trees in the Mount Barker area (via the 2002 Report and the 2012 Report). In the circumstances, I am of the view that the council erred in not taking any

positive measures to ensure the protection of likely Aboriginal heritage within the area of the 14 development applications considered by the council delegate.

36. I note that the council has addressed one site of concern to the complainant. I understand that the complainant informed the council in July 2012 that a tree at 5 Laver Street was culturally significant. The council has advised that when that allotment was created in 2009, the tree was protected by Significant Tree Regulations. When these were amended in November 2011, that protection was removed. The council granted Development Plan Consent to a dwelling on the land in May 2012. Following receipt of information as to the tree's cultural significance in July 2012, the council drew this to the attention of the owner of the property who has subsequently agreed to retain the tree.

Opinion

In light of the above, I consider that the council, in failing to consider Aboriginal heritage issues in accordance with the Development Plan in respect of 14 development applications considered in the MDPA area, acted in a manner that was unlawful 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 council adopt a policy or procedure to ensure Aboriginal heritage is considered during the development application process in accordance with the Development Plan.

Whether the council has a duty of care in relation to Aboriginal sites and has failed in that duty

37. The complainant refers to paragraph 1.4 of the 2002 Report which states:

The City of Onkaparinga revealed legal advice in September 2000, in relation to Duty of Care relative to Aboriginal Cultural Heritage and Native Title legislation, which was incorporated into a report to Council. We believe these same Duty of Care issues are equally applicable to all Councils and their activities....

...There is a duty of care on bodies such as Councils and catchment boards to avoid disturbing or destroying sites without the permission of the Minister. Hence, a precautionary approach in respect to site existence or otherwise, is prudent.

38. In particular, the complainant argues that the council has been put on notice about the existence of Aboriginal sites in the Mount Barker area and that, accordingly, the council has a duty of care to ensure sites are not damaged or disturbed.
39. Subject to my views in relation to the assessment of development applications (see above) and whilst I agree it would be prudent of the council to adopt a risk management approach to minimise the risk of damage, disturbance or interference to sites, I am not of the view that the council is legally bound in this way. In my view, the common law does not invoke such a duty, and the Aboriginal Heritage Act, whilst it operates to protect Aboriginal sites, object and remains, it does not create a 'duty of care'. (By contrast, the *Aboriginal Cultural Heritage Act 2003* (Qld) creates a formal, statutory 'duty of care' by prescribing that anyone carrying out any activity on any land (including freehold) anywhere in Queensland is required to take:

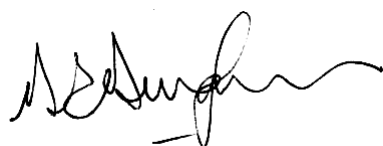
...all reasonable and practicable measures to ensure their activity does not harm Aboriginal cultural heritage...)

Opinion

In light of the above, I consider that the council does not have a general 'duty of care' in relation to Aboriginal heritage sites and accordingly has not acted in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

Final comment

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by **22 April 2013** 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.



Richard Bingham
SA OMBUDSMAN

22 February 2013