



**Assessment Report**  
***Ombudsman Act 1972***

<b>Reporter</b>	The Honourable David Speirs MP
<b>Public officers</b>	The Honourable Dr Susan Close MP The Honourable Stephen Mullighan MP The Honourable Katrine Hildyard MP
<b>Ombudsman reference</b>	2022/07166
<b>Date report received</b>	16 December 2022
<b>Issues</b>	<ol style="list-style-type: none"><li>1. Whether an agency, public authority or public officer acted in a manner amounting to administrative error, maladministration or misconduct in the selection, assessment, determination and administration of sporting and infrastructure grants</li><li>2. Whether the Hon Dr Susan Close MP, the Hon Stephen Mullighan MP, or the Hon Katrine Hildyard MP failed to comply with Part 3 of the Ministerial Code of Conduct, thereby committing misconduct</li></ol>

**Jurisdiction**

On 16 December 2022, I received a report from the Leader of the Opposition, the Hon David Speirs MP. The report concerned grants for local sporting clubs and infrastructure by the Labor Government after its election on 19 March 2022. At the time, I had already commenced assessments of my own initiative in light of media reporting on the issue. I closed the files for my own initiative assessments upon receipt of Mr Speirs' report.

Mr Speirs asked that I investigate the following:

1. Whether there has been an error or failure in public administration in the circumstances of the assessment, designation, approval or administration of the sporting and infrastructure grants
2. Whether any public officer or public authority has committed misconduct in public administration by failing to declare a conflict of interest, or for any other reason, in relation to the assessment, designation, approval, or administration of the sporting and infrastructure grants

3. Whether a public officer or public authority has committed maladministration in relation to the assessment, designation, approval or administration of sporting and infrastructure grants.

I initially assessed the report with the following issues in mind:

- Issue One: Whether an agency, public authority or public officer acted in a manner amounting to administrative error, maladministration or misconduct, where relevant, in the selection, assessment, determination and administration of sporting and infrastructure grants.
- Issue Two: Whether the Hon Stephen Mullighan MP and/or the Hon Katrine Hildyard MP breached Part 3 of the Ministerial Code of Conduct, thereby committing misconduct.

The identification of the Treasurer and Minister Hildyard in issue two was based on the information provided by Mr Speirs in his report to my Office. During my assessment, I also identified a potential issue in the conduct of the Deputy Premier, the Hon Dr Susan Close MP, as it appeared that the Deputy Premier had been the vice patron of one of the sporting clubs that received a grant. I identified this during my assessment of the Treasurer's relationship with the same club. I have therefore included the Deputy Premier in my assessment of issue two.

This inclusion should not be taken as an indication that conflict of interest issues did not arise for other members of Cabinet as I have not undertaken a comprehensive review of the grants against the ordinary returns of each member.

#### ***A jurisdictional barrier in issue one***

Insofar as it concerns conduct that occurred before the State Election on 19 March 2022, issue one is largely outside of my jurisdiction. It has been accepted, by the reporter, the Premier, the respondents, and the Auditor-General, that the grants were devised, assessed and allocated by the South Australian Labor Party while it was in Opposition. The Labor Party is not a public authority within my jurisdiction.

As Members of Parliament, individual members of the Labor Party prior to election were public officers within my jurisdiction.<sup>1</sup> I may consider and investigate whether they acted in a manner that amounted to misconduct or maladministration. However, the information available to me does not clearly identify an individual Member's conduct that either:

- involved a breach of the Standing Orders of either House of Parliament,<sup>2</sup> while the Member was acting in their capacity as a Member of Parliament.<sup>3</sup> Such a breach may amount to misconduct within the meaning of the *Ombudsman Act 1972*
- resulted in the irregular and unauthorized use of public money, the substantial mismanagement of public resources, or that resulted in the substantial mismanagement in or in relation to an official function. Such conduct may amount to maladministration within the meaning of the Ombudsman Act.

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<sup>1</sup> *Independent Commission Against Corruption Act 2012*, sch 1; *Ombudsman Act 1972*, s 3.

<sup>2</sup> I have considered alleged breaches of the Ministerial Code of Conduct separately in issue two.

<sup>3</sup> *Ombudsman Act 1972*, s 4(1).

Furthermore, even if I could identify a specific Member's conduct, it is unlikely that a finding of maladministration in the use of public money would be open to me, given that the grants appear to have ultimately been authorised by Cabinet.

The only decision after the 19 March 2022 State Election that might have included an assessment of the grants was by Cabinet on 9 May 2022. According to the Premier, 'the decision of Cabinet was to approve the funding of these commitments and for the Premier's Delivery unit to work with relevant agencies to deliver these commitments.'<sup>4</sup> In their responses to my enquiries, the representative for the Treasurer and Minister Hildyard explained that Cabinet's decision did not involve any evaluative judgement of the grants or the recipients. According to the Treasurer's representative,

This was not the usual situation where a policy announcement is made regarding the availability of funds to the applicants and where applicants are then assessed against the announced criteria and either approved or refused. The submission containing the package of pre-election commitment, [sic] was brought to Cabinet as a package, and was approved by Cabinet on that basis.<sup>5</sup>

According to Minister Hildyard's representative:

In this case the sporting organisations had been promised the money by the then leader of the opposition on the basis that the commitment would be met in the event that his government was elected.<sup>6</sup>

In a statement to the Economics and Finance Committee on 31 October 2022, the Auditor-General noted that Cabinet submissions are also evidence of approvals required under the Treasurer's Instructions.<sup>7</sup> As the Auditor-General was not provided with evidence of the submission and Cabinet's approval, he was not able to determine whether or not the programs had been properly authorised. I expect that I would encounter similar difficulty given that I cannot compel the production of evidence that relates to Cabinet proceedings.<sup>8</sup> Even if I were to obtain such evidence, Cabinet is not an agency or public authority within my jurisdiction and I could not consider whether its assessment and approval of the grants on 9 May 2022 was affected by administrative error or maladministration.

Finally, I have also considered whether administrative error or maladministration may have occurred in the administration of the grants after Cabinet's decision on 9 May 2022. The information before me suggests that the Department for Infrastructure and Transport (DIT) and the Office for Recreation, Sport and Racing (the ORSR) were primarily responsible for the administration of the grants. However, the information provided by Mr Speirs does not clearly identify any evidence of administrative error or maladministration by DIT or the ORSR. With this in mind, I do not consider that it would be in the public interest to investigate further and depart from the Auditor-General's satisfaction with the process delivered by DIT and the ORSR.<sup>9</sup>

For the reasons discussed above, I have not considered issue one further as:

- it appears that the grants were devised and determined by the Labor Party, which is not an agency or public authority within my jurisdiction

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<sup>4</sup> Letter from the Hon Peter Malinauskas MP to the Ombudsman, 19 September 2022.

<sup>5</sup> Letter from the representative of the Hon Stephen Mullighan MP, to the Ombudsman, 28 February 2023.

<sup>6</sup> Letter from the representative of the Hon Katrine Hildyard MP, to the Ombudsman, 28 February 2023.

<sup>7</sup> Evidence to the Economics and Finance Committee, House of Assembly, Adelaide, 31 October 2022, 3 (Andrew Richardson, Auditor-General).

<sup>8</sup> *Ombudsman Act 1972*, s 21.

<sup>9</sup> Report of the Auditor-General, *Report 8 of 2022, Annual report for the year ended 30 June 2022, Part A: Executive Summary*, (2022), 12.

- while I may consider and investigate individual Members of Parliament involved in that process prior to the State Election on 19 March 2022, I have not been able to identify any specific conduct that would cause me to proceed with an assessment of potential misconduct or maladministration
- I cannot consider whether Cabinet properly authorised the grants as Cabinet is not an agency or public authority within my jurisdiction
- I have not identified any information to support an allegation of administrative error or maladministration by DIT or the ORSR in the administration of the grants. In my view, it would not be in the public interest to consider this further, having regard to the work already undertaken by the Auditor-General.

Nevertheless, I concur with the views offered by the Auditor-General in his annual report for 2021-2022; all decisions about the application of public money should occur within the public sector financial framework, and the payment of public money should only occur after all public sector processes are completed.

Pre-election promises should undergo the rigour of the public sector framework. In response to my enquiries, the Premier described the grants as 'election policies'. It is open for a political party to present its intended policies to the public, but I am not persuaded that this is an accurate characterisation of the grants. I agree with the Auditor-General's comments that, ordinarily, election commitments are 'pitched at a broad level'. The award of individual grants to individual clubs, or for local level infrastructure projects, does not have broad or ongoing application. A commitment to develop and deliver a grants program would be more akin to an election policy. If the party responsible for that policy were to form government, the policy's practical application would then pass through the public sector financial framework.

Avoiding the public sector financial framework undermines standards and erodes good culture. It has also presented a significant barrier to independent review by the Auditor-General and my Office.

## Assessment

My assessment has been confined to the second issue raised in the report. A breach of the Ministerial Code of Conduct can give rise to misconduct within the meaning of the Ombudsman Act. The second issue is therefore within my jurisdiction and attracts the protections of the *Public Interest Disclosure Act 2018*. Mr Speirs has consented to the disclosure of his identity as an informant.

My assessment has involved:

- assessing the information provided by the reporter, the Hon David Speirs MP
- considering:
  - the Auditor-General's Annual Report 2021-2022, and the Auditor-General's evidence to the Economic and Finance Committee on 31 October 2022
  - media reporting about the issue
- seeking a response from:
  - the Premier, the Hon Peter Malinauskas MP
  - the Deputy Premier, the Hon Dr Susan Close MP
  - the Treasurer, the Hon Stephen Mullighan MP
  - the Minister for Recreation, Sport and Racing, the Hon Katrine Hildyard MP
- considering the Ministerial Code of Conduct (**the Code of Conduct**)
- preparing this report.

This report details my assessment and decision not to commence an investigation of issue two.

## Standard of proof

The standard of proof I apply in my investigations 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.<sup>10</sup> 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 ...<sup>11</sup>

The standard of proof and the High Court's guidance in *Briginshaw* have been relevant in my decision not to commence an investigation of issue two.

## Procedural fairness

In June 2023, I provided the parties and the Premier with a provisional assessment report detailing my tentative views on this matter. Neither Mr Speirs nor the Premier provided any responses to my provisional assessment report. The Deputy Premier, the Treasurer, and Minister Hildyard each responded to my provisional assessment report via their representative. I have addressed their submissions, where relevant, in the body of this report. Ultimately, I was not persuaded to significantly amend my assessment.

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<sup>10</sup> 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.

<sup>11</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

## Background

1. After its election on 19 March 2022, the Labor Government proceeded to approve, enter into agreements, and administer grants for local sporting clubs and infrastructure projects. The grants had been included in the Labor Party's pre-election commitments and announcements. Between 70 and 90 sporting clubs or multi-club facilities were identified in these commitments.<sup>12</sup>
2. On 9 May 2022, the Premier brought a submission to Cabinet for the grants' approvals. According to the Premier, the Treasurer and Minister Hildyard, Cabinet did not undertake an 'evaluative judgement' of the grants in issue. Rather, the grants were presented as a package for approval.<sup>13</sup>
3. Based on their responses to my enquiries, I understand that the Treasurer and Minister Hildyard did not declare conflicts of interest of any kind in relation to the Cabinet submission. I asked each whether they had submitted a particular form used to formally declare a conflict of interest but neither indicated whether or not they had done so. Nevertheless, each maintain that they did not have a conflict of interest of any kind.
4. In response to my provisional assessment report, the Deputy Premier, via her representative, explained that she had reviewed her diary and discovered that she was not present at the Cabinet meeting on 9 May 2022. Accordingly,

[the Deputy Premier] did not participate in any way in the cabinet meeting of 9 May and was therefore not in any position to formally declare a conflict of interest even if she had one (which she denies).<sup>14</sup>
5. I have considered this clarification alongside the respondents' other submissions later in this report.

### *The Port Adelaide District Hockey Club, the Deputy Premier, and the Treasurer*

6. One of the clubs to whom a commitment had been made was the Port Adelaide District Hockey Club (**the PADHC**). The commitment was for a grant of \$750,000.
7. Minutes of the PADHC's annual general meeting on 18 February 2022 include a resolution for the Deputy Premier and the Treasurer to be appointed as vice patrons for the 2022 season. The PADHC's annual reports for 2018, 2019, 2020 and 2021 also list the Deputy Premier and the Treasurer as vice patrons. In 2017, the PADHC received a \$500,000 grant from the ORSR to upgrade its changerooms. In a blog post announcing this, the PADHC thanked a number of stakeholders for their support of the application, including 'Susan Close MP' and 'Stephen Mullighan MP'.<sup>15</sup> Media reporting at the time

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<sup>12</sup> In response to my enquiries, the Premier explained that commitments were made for 72 sporting club grants. The list provided by the Premier included multi-club facilities. On 30 May 2022, the ORSR sought Minister Hildyard's approval to commence agreements for 77 grants, and for the Minister to delegate responsibility for a further 12 grants to another Minister.

<sup>13</sup> Above n 4, n 5, n 6.

<sup>14</sup> Letter from the representative of the Hon Dr Susan Close MP to the Ombudsman, 10 July 2023.

<sup>15</sup> Port Adelaide District Hockey Club, 'PADHC Awarded \$500K State Government Funding for Changerooms Upgrade' <<https://padhc.com.au/news/padhc-awarded-500k-state-government-funding-for-changerooms-upgrade/>> accessed 10 February 2023.

stated that 'Local MP Susan Close assisted the club in putting their grant together', and included comments from Dr Close about the needs of the PADHC.<sup>16</sup>

8. The Deputy Premier's Facebook page includes a number of posts about the PADHC, including but not limited to:
  - a post about her presence alongside the Hon Stephen Mullighan MP and the Hon Mark Butler MP at 'Sponsors Day' in 2021
  - a post in January 2022 about the Labor Party's commitment to award the PADHC \$750,000, if elected.
9. The PADHC was not listed under the Deputy Premier's professional associations or directorships in the Registrar's Statement for 2021, although the Deputy Premier's vice patronage of another sporting club, the Port River Sailing Club, was listed under directorships and recorded as being 'non-voting'. The Deputy Premier's professional associations included 'Local organisations associated with the Port Adelaide Electorate' but specific organisations were not identified.<sup>17</sup> The Deputy Premier's directorships in the Registrar's Statement for 2022 included 'Patron/Vice-Patron etc of various sporting and community clubs in the electorate (all non-voting).<sup>18</sup> Specific sporting and community clubs are not identified.
10. In response to my enquiries and in response to my provisional assessment report, the Deputy Premier's representative explained that the Deputy Premier:
  - is not, and has never been, a vice patron of the PADHC,<sup>19</sup> but 'accepts that the PADHC apparently regard her as a vice patron' and 'will take the matter up with the PADHC'<sup>20</sup>
  - did not describe herself as a vice patron in Facebook posts relating to the PADHC.
11. As the Deputy Premier has publicly engaged with the PADHC over a number of years, and lent her active support to the club's interests in 2017, I am satisfied that a fair-minded observer could reasonably conclude that the Deputy Premier is a vice patron of the PADHC and has been for a number of years.
12. The Registrar's Statements for 2021 and 2022 list the Treasurer's vice patronage of the PADHC under his directorships.<sup>21</sup> In response to my initial enquiries, the Treasurer's representative confirmed that the Treasurer accepted the role of vice patron of the PADHC in May 2022 and that he included the position in his Register of Member's Interests 'each year'.<sup>22</sup> The response did not clarify how long the Treasurer has held the position.

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<sup>16</sup> Ashleigh Pisani, 'Port Adelaide Districts Hockey Club scores \$500,000 boost for new changerooms', *Messenger West & Beaches*, 17 August 2017 (online), <<https://www.adelaidenow.com.au/messenger/west-beaches/port-adelaide-and-districts-hockey-club-scores-500000-boost-for-new-changerooms/news-story/25ea5867a435986455df912dd08ef165>> accessed 21 February 2023.

<sup>17</sup> Registrar of Members' Interests, House of Assembly, Parliament of South Australia, 'Register of Members' Interests, June 2021' 5-6.

<sup>18</sup> Registrar of Members' Interests, House of Assembly, Parliament of South Australia, 'Register of Members' Interests, June 2022' 5-6.

<sup>19</sup> Letter from the representative of the Hon Dr Susan Close MP, to the Ombudsman, 7 March 2023.

<sup>20</sup> Above n 14.

<sup>21</sup> Above n 17, 16-17; above n 18, 16.

<sup>22</sup> Above n 5.



Minister Hildyard

13. On 30 May 2022, the ORSR provided a minute to Minister Hildyard, stating:

As the lead agency for the implementation of the South Australian Government's policy on recreation, sport and Racing, the ORSR has been tasked with administering the sport and recreation commitments.

Majority [sic] of these commitments will be administered via grant agreements (approximately \$94 million), executed with the most relevant party for delivery on the commitment.

...

To expedite the Grant Agreement and payment process and to achieve the current financial year timeline, it is recommended that approval is given to ORSR to execute Grant Agreements and payments of these commitments under the existing delegation register.

It should be noted that 12 election commitments have been identified as a potential or perceived conflict of interest for you as the Minister for Recreation, Sport and Racing (see attachment 2). ORSR recommends that these 12 commitments are forwarded to another Minister for approval...<sup>23</sup>

14. On 31 May 2022, Minister Hildyard gave approval for the ORSR to execute the grant agreements for 77 grants, and noted that the remaining 12 would be sent to another Minister for approval. The following attachment to the ORSR's minute listed the grants to be referred to another Minister:

Attachment 2 – Election Commitments for approval by alternative Minister	
Commitment	Commitment Amount
Surf Life Saving Equipment - Christies Beach	\$20,000
Surf Life Saving Equipment - Port Noarlunga	\$20,000
Surf Life Saving Equipment - South Port	\$20,000
Morphett Vale Bowling Club Upgrades	\$322,500
Morphett Vale Memorial Sports Complex Upgrade	\$350,000
Reynella Sports and social club	\$570,000
Aldinga sport park unisex changerooms	\$825,000
Old Noarlunga oval changerooms	\$900,000
Happy Valley sports club	\$1,000,000
South Adelaide Football Club	\$1,000,000
Knox Park - Southern Athletics Hub	\$1,100,000
The Cove Sports and Community Club	\$2,500,000
<b>TOTAL</b>	<b>\$8,627,500</b>

Figure 1: Minute from the Office for Recreation, Sport and Racing to the Hon Katrine Hildyard MP, Minister for Recreation, Sport and Racing, 30 May 2022, attachment two.

15. Some of the grants listed in the attachment concern infrastructure and facilities which might provide a benefit to multiple sporting clubs and community groups. From the

<sup>23</sup> Minute from the Office for Recreation, Sport and Racing to the Hon Katrine Hildyard MP, Minister for Recreation, Sport and Racing, 30 May 2022.



minute and attachment alone, it is not possible to identify all of the associations and interests that prompted the ORSR's advice and Minister Hildyard's decision to refer these grants to another Minister.

16. The Registrar's Statements for 2021 and 2022 include the following declarations by Minister Hildyard that are either specifically identified in the ORSR's minute or which might be relevant:
- '(Previously) Board Member – Southern Football League
  - 'Member – Christies Beach Surf Lifesaving Club'
  - 'Member and Sponsor – O'Sullivan Beach Lonsdale Football Club'
  - 'Member – South Adelaide Football Club'
  - 'Patron – Southern Athletic Club'
  - 'Patron – Coastal Districts Athletics Club'
  - 'Sponsor and Patron – Southern Tigers Basketball Club'
  - 'Patron – South Port Surf Lifesaving Club'
  - 'Vice Patron – Port Noarlunga Surf Life Saving Club'
  - 'Patron – Christies Sailing Club'
  - 'Sponsor – Christies Beach Football Club'.<sup>24</sup>
17. In response to my initial enquiries, Minister Hildyard's representative stated that, as at 9 May 2022 and subsequently, Minister Hildyard was 'a member of the Christies Beach Surf Life Saving Club, a member of the South Adelaide Football Club, a vice patron of the Port Noarlunga Surf Lifesaving Club, a patron of the Southport Surf Lifesaving Club and a patron of the Southern Athletic Club'.<sup>25</sup> On the information available, I am unable to confidently conclude whether these 5 clubs were the only clubs with whom Minister Hildyard had some association and which benefitted from the 12 grants listed in the ORSR's minute. If this is the case, the benefit to the five clubs would have been significant. Minister Hildyard did not clarify this point in response to my provisional assessment report.
18. On 31 May 2022, Minister Hildyard provided a minute to the Hon Tom Koutsantonis MP, Minister for Infrastructure and Transport. Therein, Minister Hildyard stated:
- I have identified 12 election commitments where I have a potential or perceived conflict of interest (see attached) and am therefore seeking your agreement to consider approving ORSR to execute Grant Agreements and payments under the existing delegation register.<sup>26</sup>
19. In response to my initial enquiries and in response to my provisional assessment report, Minister Hildyard's representative advised that Minister Hildyard, and not the ORSR, first identified 'the unlikely possibility of a perception of a conflict of interest'. Minister Hildyard then instructed the ORSR to prepare the minute, and include a request for another Minister to approve grants 'for organisations situated within or adjacent to her electorate'.<sup>27</sup>
20. Despite this, Minister Hildyard has maintained that she did not have a conflict of interest, whether actual, potential or apparent, in relation to the grants at any point in

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<sup>24</sup> Above n 17, pp 10-11; above n 18, 9-10.

<sup>25</sup> Above n 6.

<sup>26</sup> Minute from the Hon. Katrine Hildyard MP, Minister for Recreation, Sport and Racing to the Hon Tom Koutsantonis MP, Minister for Infrastructure and Transport, 3 May 2022.

<sup>27</sup> Above n 6.

time. Rather, the advice in the ORSR's minute and the referral to Minister Koutsantonis arose 'out of an abundance of caution.'<sup>28</sup>

21. Minister Hildyard's request to Minister Koutsantonis is less ambiguous. It states that Minister Hildyard had identified 12 election commitments where she had a potential or perceived conflict of interest. If Minister Hildyard did have a conflict of interest, her request to Minister Koutsantonis may have been an appropriate way of dealing with that conflict of interest, although other steps are also required under clause 3.3 of the Code of Conduct.
22. I have not received any information to suggest that similar action was taken in the Cabinet meeting of 9 May 2022, nor that Minister Hildyard spoke with the Premier about this matter.

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<sup>28</sup>

Above n 6

## The Ministerial Code of Conduct

23. Relevant sections of the Code of Conduct are as follows:

### 3. CONFLICTS OF INTEREST

#### 3.1 Obligation

A minister should avoid situations in which their private interests conflict, have the potential to conflict or *appear* to conflict with their public duty.

[Original emphasis]

#### 3.2 Nature of Conflicts of Interest

A conflict of interest may exist when a Minister is influenced or appears to be influenced by private interests. Private interests include not only a Minister's financial interests and other interests but the financial and other interests of the Minister's spouse, domestic partner or children.

There are many circumstances in the context of the Minister's position in which conflicts of interest may arise. For example, a conflict may arise where a Minister:

- has a significant financial interest in the company with whom the Government is contracting;
- has a personal interest in the outcome of a process; or
- receives a right or commission in return for the provision of a benefit.

A conflict of interest does not only encompass actual or direct conflicts of interest between a Minister's public duty and private interests. A potential or perceived conflict of interest may also constitute a conflict of interest.

#### 3.3 Disclosure of Actual, Potential or Apparent Conflicts of Interest

Ministers are under an obligation to advise the Premier (or in the case of the Premier, Cabinet) in writing as soon as possible after becoming aware of any conflict of interest between their public duty and private interests.

The advice to the Premier (or in the case of the Premier, Cabinet) should contain sufficient detail of the conflict of interest in order to enable the Premier (or Cabinet) to consider and determine the most appropriate course of action to be taken in the circumstances.

Where circumstances change after an initial disclosure has been made, so that new or additional facts become material, the Minister must promptly disclose the further information.

This obligation is additional to a Minister's obligation to notify the Cabinet Office of their private interests under the *Members of Parliament (Register of Interests) Act 1983*.

The fact that the Minister has raised an actual, potential or perceived conflict of interest with the Premier will be recorded on the Cabinet Register. This record is available for scrutiny by the Auditor-General.

If a Minister has any doubt as to whether or not an interest is likely to constitute a conflict of interest, the Minister should promptly consult the Premier (or in the case of the Premier, Cabinet).

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### 3.5 Cabinet Deliberations

It is the responsibility of all Ministers to bring conflicts of interest to the attention of Cabinet, even if the conflict arises out of an interest already recorded in the Cabinet Register.

All proposals intended to go before Cabinet must contain a written statement by submitting Ministers as to whether they have an actual or potential conflict of interest in relation to the proposal under consideration. This statement must be included on all Cabinet submission Cover Sheets. If a Minister indicates the existence of a conflict, details of the conflict must be disclosed in the Appendix to the Cabinet submission using the form set out in *Appendix 3* to this Code.

Ministers should also use the form set out in Appendix 3 to declare their interest in any matters brought to Cabinet. The form should be tendered to the Premier or acting Cabinet Chair for consideration before Cabinet's deliberation on the relevant matter. The form should be used to record the attitude of Cabinet to the issues and the action taken in response to them. The Premier will also sign all forms and copies will be filed in the Cabinet Register.

A Minister must not participate in any deliberations on a matter in respect of which a conflict of interest has validly been disclosed by that Minister and must withdraw from the Cabinet room during those deliberations.

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## 4 DEALING WITH DIFFERENT TYPES OF CONFLICTS OF INTEREST

The following paragraphs set out in more detail particular measures that should be taken based on experience obtained from observing the actions of previous governments.

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### 4.3 Non-public Bodies

Ministers should declare their involvement in pressure groups and other non-public organizations whose objectives may conflict with Government policy (other than local community, charitable, voluntary and sporting organizations).

**Whether the Hon Dr Susan Close MP, the Hon Stephen Mullighan MP, or the Hon Katrine Hildyard MP failed to comply with Part 3 of the Ministerial Code of Conduct, thereby committing misconduct**

24. Via their representative, the respondents each relied on the same arguments in their responses to my initial enquiries. Each maintained that they did not have a conflict of interest within the meaning of the Code of Conduct because:
1. They were not the Minister responsible for the Cabinet submission.<sup>29</sup> Minister Hildyard also noted that she was one of a number of Ministers present to consider the package of electoral promises at the Cabinet meeting on 9 May 2022.<sup>30</sup>
  2. Their involvement in the clubs in question carries no rights or responsibilities and derives no benefit or remuneration. The role of vice patron is 'purely ceremonial and honorary'.<sup>31</sup> Minister Hildyard's response implied that 'a mere member' derives even less.<sup>32</sup>
  3. Clause 4.3 carves out an exemption for Ministerial involvement in sporting organisations.
25. I do not consider that point one is supported by a careful reading of the Code of Conduct.
26. Regarding point two, I am inclined to conclude that memberships, vice patronage and patronage in this matter *may* give rise to private interests.
27. However, with clause 4.3 in mind, it is not clear to me how the Code of Conduct intends for such interests to be managed. In its current form, the Code of Conduct may be read to exclude a large number of organisations from a Minister's conflict of interest obligations. While I do not agree with this interpretation, I accept that it is reasonably open to the respondents.
28. I address each point further below. Before doing so, I will deal with the Deputy Premier's absence from the Cabinet meeting on 9 May 2022.
29. If the Cabinet meeting on 9 May 2022 was the only instance in which the Deputy Premier might have had some involvement in deliberation or decision-making in relation to the grants, it may not have been necessary for the Deputy Premier to declare that she had a conflict of interest, if one had arisen.
30. I note for completeness that the obligation to declare or otherwise deal with a conflict of interest does not only arise when a matter is brought before Cabinet. If a Minister becomes aware of any conflict of interest between their public duty and their private interests, clause 3.3 of the Code of Conduct requires them to advise the Premier in writing as soon as possible. Furthermore, if they have any doubt as to whether a conflict of interest has arisen in a particular situation, clause 3.3 provides that they should consult the Premier.

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<sup>29</sup> The Premier also emphasised this in his response to my enquiries.

<sup>30</sup> Letter from the representative of the Hon Katrine Hildyard MP, to the Ombudsman, 11 July 2023.

<sup>31</sup> Above n 5.

<sup>32</sup> Above n 6.

31. I am not aware of any instance, other than the Cabinet meeting on 9 May 2022, in which the Deputy Premier's alleged interest might have come into conflict with her duty as a Minister. Therefore, on the information available, it does not appear that a situation arose in which the Deputy Premier had a conflict of interest due to her relationship with the PADHC that ought to have been declared and managed in accordance with the Code of Conduct. Nevertheless, the Deputy Premier has made a submission similar to those of the Treasurer and Minister Hildyard and I have addressed each of those submissions generally below.

*Responsibility for Cabinet submissions*

32. I do not accept that only the Minister responsible for a Cabinet submission is obliged to consider and declare a conflict of interest. The Code of Conduct's approach to conflicts of interest would be exceptionally narrow and somewhat arbitrary if this was the case. In any event, I do not consider that a careful reading of clause 3.5 supports this view. The clause begins:

It is the responsibility of *all* Ministers to bring conflicts of interest to the attention of Cabinet, even if the conflict arises out of an interest already recorded in the Cabinet Register.

[My emphasis]

33. The clause then specifically requires the Minister responsible for a Cabinet submission to declare a conflict of interest, if relevant, using the form provided in Appendix 3 to the Code of Conduct. Later, clause 3.5 also provides that 'Ministers should use the form... to declare their interest in *any* matters brought to Cabinet' [my emphasis]. In my view, the expectation in clause 3.5 is that all Ministers use the form in Appendix 3 if a conflict of interest is identified for any matters before Cabinet, regardless of whether they are responsible for a matter's submission.

*A Minister's membership or patronage*

34. As membership and patronage involve different kinds of engagement with an organisation, I will deal with each separately.
35. I am not persuaded that a member of a sporting or community organisation *cannot* have a private interest in the organisation receiving a grant. In response to my enquiries, the Premier drew my attention to explanatory notes in the Commonwealth's Register of Member's Interests.<sup>33</sup> The notes provide that, 'generally, it would be expected that membership of a local community, sporting or charitable organisation would not pose or be seen to pose a potential conflict of interest.' Clear guidance to this effect is not included in Part 3 of the current Code of Conduct nor is it universal across Australian jurisdictions. For example, Members of the Legislative Assembly of the ACT are expected to declare their membership in community organisations and sporting clubs.<sup>34</sup> Furthermore, Federal Ministers have come under scrutiny in recent years for conflicts of interest arising from membership in local sporting organisations that have received grants.<sup>35</sup>

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<sup>33</sup> Above n 4.

<sup>34</sup> Explanatory notes, *Legislative Assembly for the Australian Capital Territory*, Register of Member's Interests, Declaration of Member's Interests, March 2021.

<sup>35</sup> Katie Burgess, 'Sports rorts: Bridget McKenzie resigns after Gaetjens finds new conflict of interest', *The Canberra Times* 2 February 2020 (online) <<https://www.canberratimes.com.au/story/6609889/mckenzie-resigns-after-investigation-finds-new-conflict-of-interest/>> accessed 27 July 2023.

36. In any event, the explanatory notes to which the Premier refers include the term 'generally'. This does not mean that membership will never give rise to a conflict. Rather, it will depend on the facts.
37. For example, according to the Registrar's Statements for 2021 and 2022, Minister Hildyard is a member of the Christies Beach Surf Life Saving Club. The club received a \$20,000 grant to purchase equipment, as did the other surf life saving clubs that appear for Minister Hildyard in the 2021 and 2022 Registrar's Statements. Arguably, a member could have a private interest in the club purchasing equipment that is of benefit to the member's engagement with the club. Equipment might improve a member's capacity to assist the club in its functions, or increase the member's enjoyment of the club's facilities and activities. Again, this would ultimately depend on what Minister Hildyard's membership involves but I do not accept that membership *cannot* give rise to an interest.
38. That said, membership accounts for a limited number of relationships in issue in this matter. Most relationships are those of patron or vice patron. It has been suggested that because the Deputy Premier's, the Treasurer's, and Minister Hildyard's patronage or vice patronage of various sporting organisations is non-remunerative and non-voting, no private interest arises.
39. I accept that a private interest is not as clear for a patron or vice patron as it may be for a member, but I am not satisfied that the relationship could not, as a general rule, give rise to an interest. In my view, the relationship is something more than mere attendance. At the very least, a patron or vice patron lends their name to an organisation and expresses more active support of its objectives.
40. It could be suggested that patronage only serves the interests of the club, and no interest arises on the part of the patron. I am not prepared to accept this as a general proposition when patronage occurs in a political environment. While it serves to connect a community with its Parliamentary representative, community engagement can also serve a personal, political purpose to bolster a politician's reputation and potentially improve their prospect of re-election. On that basis, it could give rise to a private interest.
41. Whether any private interest exists and, if so, whether it comes into conflict with a Minister's public duties will again depend on the circumstances of the particular relationship. Given my reasoning below, it has not been necessary for me to investigate that issue in any detail in this matter. Nevertheless, I consider it necessary to clarify my view for future reference; that, in certain circumstances, patronage or vice patronage could give rise to a private interest.
42. I note for completeness that, in response to my provisional assessment report, the Treasurer accepted that patronage and vice patronage may give rise to a conflict of interest. However, the Treasurer maintained that a conflict of interest did not arise in the specific circumstances of his vice patronage of the PADHC<sup>36</sup> because:
- 'The role of vice patron... is purely ceremonial and honorary. It carries no rights..., no responsibilities, no duties and is of course unremunerated.'<sup>37</sup> Further, the Treasurer submitted that he receives no benefit from his vice patronage of the PADHC

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<sup>36</sup> Letter from the representative of the Hon Stephen Mullighan MP, to the Ombudsman, 17 July 2023.

<sup>37</sup> Above n 5.



- his support of the PADHC is akin to his support of sporting clubs and community groups in his electorate, 'many of which do not have the role of vice patron'<sup>38</sup>
  - he was not the Minister responsible for the Cabinet submission on 9 May 2022
  - clause 4.3 of the Code of Conduct provides that involvement in sporting organisations is not a matter that Ministers must declare.
43. Ultimately, as I have not commenced an investigation and make no findings regarding the Treasurer's conduct, it has not been necessary to specifically interrogate the Treasurer's vice patronage of the PADHC. Nevertheless, to the extent that the Treasurer's submissions propose certain interpretations of the Code of Conduct, each of the points above are addressed in this report as I consider it necessary to examine the interpretations proposed and adopted in apparent unison by three senior Ministers.

*An exemption under clause 4.3*

44. I am not entirely satisfied that clause 4.3 provides clear exemption for Ministerial relationships with certain groups but I accept that, in its current form, the Code of Conduct may allow for this interpretation.
45. It is relevant that Part 4 of the Code of Conduct is titled 'Dealing with different types of conflict of interest'. This suggests to me that a conflict of interest has already been identified under Part 3. Part 4 provides guidance on what to do in certain circumstances. There is nothing in Part 3, which guides Ministers on how to identify conflicts of interest, to suggest that an interest in a sporting organisation (alongside the other organisations listed in parentheses at the end of clause 4.3) cannot generate a conflict of interest.
46. Furthermore, the language used in clause 4.3 might suggest that it concerns Ministerial relationships with a specific kind of organisation. Firstly, it requires declarations of involvement by Ministers where the objectives of pressure groups and other non-public organisations may conflict with Government policy. The excluded organisations originate from and focus on the community. Arguably, Ministerial relationships with such organisations are not of the kind that clause 4.3 seeks to avoid. Secondly, the clause uses the term 'involvement', which might be intended to amount to something less than or separate to an interest.
47. This possible reading extends the obligations on Ministers; it seeks to avoid the perception of influence from persuasive organisations in circumstances where an actual interest has not arisen. The clause then excludes a number of organisations from its expectations.
48. This is but one interpretation of clause 4.3. I have not been able to identify any guidance from the development of the Code of Conduct, or its application to date, that suggests this is how clause 4.3 is intended to be read and applied. Therefore, in my view, it is reasonably open for the respondents to argue that conflicts of interest are specifically excluded where the Ministerial relationship is with a charity, local community group, sporting club or volunteer organisation. I do not agree that this interpretation is correct, but I concede that it is at least arguable.

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<sup>38</sup> Above n 5.

49. In response to my provisional assessment report, Minister Hildyard's representative expanded on the Minister's view that the clause excludes involvement in sporting organisations, and explained that:

It was at all times [Minister Hildyard's] view, reasonably held, that the word "involvement" in clause 4.3 is a protean word and that both the content of the clause and the purpose of the ministerial code is to cover situations where a minister is a member, a patron or vice patron of a sporting club or organisation and is not involved in any decision-making role in such organisation.<sup>39</sup>

50. I do not accept the interpretation that both clause 4.3 and the Code of Conduct are intended to exclude Ministerial involvement in an organisation in all situations except where the Minister has some role in decision-making. Nothing in the Code of Conduct or the clause itself supports such an interpretation. Furthermore, it is easy to imagine a situation where a person has an interest, such as through the receipt of a benefit from their involvement in a group, but has no involvement in the decision-making in that group.
51. Setting this aside, I accept that a Minister may read clause 4.3 as it is written and assume that their involvement in a sporting organisation need not be declared and managed as a conflict of interest.
52. In assessing this matter, I have had regard to the standard of proof applied in my investigations. As a contrary view appears reasonably open, and the consequence of an adverse finding is significant, I am not confident that, were I to investigate this matter, it would be open for me to conclude that the Deputy Premier, the Treasurer, and Minister Hildyard failed to comply with the Code of Conduct. In its current form, the Code of Conduct may be read to permit a Minister to exclude local community, charitable, voluntary and sporting organisations from their conflict of interest obligations.
53. I offer comment on whether this exception is appropriate at the end of this report. Setting aside my reservations on whether the exception promotes transparency and ethical conduct by Ministers, I consider it open for the respondents to rely on clause 4.3.

## Opinion

For the reasons outlined above, I am not inclined to accept the respondents' submissions that:

- only the Minister responsible for a Cabinet item is obliged to declare a relevant conflict of interest
- a Minister's membership, vice patronage or patronage of a sporting club cannot give rise to an interest that might conflict with their public duties.

However, it may have been reasonably open for the respondents to conclude that clause 4.3 provides an exception for their membership, vice patronage or patronage with a number of clubs that received significant government grants. If I were to commence an investigation, it is unlikely that I could confidently conclude otherwise, having regard to the standard of proof applied in my investigations. It would not be in the public interest to pursue such an investigation. I therefore decline to investigate this matter.

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<sup>39</sup> Above n 30.

## Comment

In accordance with section 29B(2)(c) of the Ombudsman Act, I may prepare a report setting out matters arising in the performance of my functions that I consider to be in the public interest to disclose. The events in issue in this matter have been the subject of scrutiny by the Auditor-General, in Parliament, and in media reporting. Although I have determined not to investigate this matter, I am concerned about the lack of clarity for the identification, declaration and management of Ministerial conflicts of interest. If certain clauses of the Code of Conduct, in its current form, can reasonably be read to exclude Ministerial conflicts of interest with community groups that might receive large amounts of public money, the scrutiny that this matter has received to date suggests that such an exclusion is out of step with public expectation.

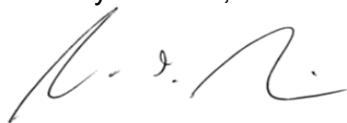
The Code of Conduct formalises our expectation that Ministers conduct themselves ethically and transparently. Where Ministers are shielded by the confidentiality of Cabinet, and where large amounts of public money are being allocated, public expectation and confidence is especially important. As Ombudsman, I cannot compel the production of Cabinet documents.<sup>40</sup> I am mindful of the difficulty encountered by the Auditor-General in obtaining copies of such documents by request alone. I expect I would encounter the same difficulty.

It is not lost on me that I have considered serious allegations regarding Ministerial conflicts of interest twice in little more than a year. This suggests to me that the Code of Conduct does not provide sufficient guidance to Ministers to ensure that their conduct meets public expectation. As with the avoidance of the public sector financial framework, unclear guidance on the ethical conduct of Ministers may erode good culture and public confidence in public administration.

I understand that the Department of the Premier and Cabinet's review of the Code of Conduct is ongoing. It has been reportedly delayed by resolving the definition of a conflict of interest.<sup>41</sup> While it continues, I suggest that the review amend the Code of Conduct to provide clearer guidance on:

- what the 'other interests' to which the current Code of Conduct refers might include
- whether Ministerial relationships with community, charity and sporting organisations might give rise to a private interest
- whether such an interest might conflict, or appear to conflict, with a Minister's public duties
- how a Minister ought to declare and manage such a conflict of interest
- how this is to be recorded and made available to scrutiny so that the public may be confident in the ethical conduct of Ministers.

In accordance with section 29B(2)(c), I raise these suggestions for the attention of the Attorney-General, the Premier, and each of the Houses of Parliament.



Wayne Lines  
SA OMBUDSMAN

8 August 2023

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<sup>40</sup> *Ombudsman Act 1972*, s 21.

<sup>41</sup> Andrew Hough and Kathryn Bermingham, 'Labor agrees to ICAC recommendations after mystery minister bombshells', *The Advertiser*, 8 March 2023.