



**Ombudsman SA**

Investigation into the  
City of Charles Sturt

Final Report

November 2011

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## SUMMARY

In December 2009, the City of Charles Sturt revoked the community status of land in St Clair Reserve under the *Local Government Act 1999*, in order to swap this land with land from the former Sheridan industrial site owned by the state government's property arm, the Land Management Corporation. This swap enabled the council and the state government to deliver on a significant target in the new planning strategy set out in the 30 year Plan for Greater Adelaide, through the establishment of one of the first of fourteen proposed transit oriented developments (TOD) near the Woodville Railway Station adjacent to the St Clair Reserve.

The Land Management Corporation had earlier purchased the Sheridan land from developers for \$15.8m (exclusive of GST) with the intention of achieving the land swap and establishing the TOD.

Some sectors of the council's community expressed concern about the influence of the ALP (in particular the Member for Croydon) in the council's revocation decision, as 12 out of 17 of its councillors were members of the ALP and six were employed within state government. Concerns were also raised about the council's lack of genuine community consultation about the revocation and its inattentiveness to prudential risks about conflict of interest.

The matter was referred to me for investigation by the Legislative Council; and I resolved to use my own initiative investigation powers under the *Ombudsman Act 1972*. My investigation revealed that:

- the community had reason to be concerned about some councillors' potential conflicts of interest in the revocation decision, including those of state government employees and electorate officers of state MPs
- local government legislation fails to match community expectations and capture these conflicts
- some councillors had minimal understanding or appreciation of conflict of interest, and the public officer nature of their roles and responsibilities and what that entails
- there was no evidence that the Member for Croydon exerted improper influence on any councillor and no councillor was wrongly influenced by the views of the Member for Croydon, in relation to the land swap. However, there was evidence that some councillors may have breached the council's code of conduct in how they dealt with some issues arising from the land swap
- although the council followed legislative requirements, it appeared reluctant to engage fully and openly with the community on the land swap
- the council wrongly moved into confidence on each occasion it considered the land swap issue up to the consultation period, and wrongly withheld some information from public access
- the council properly obtained a prudential report, but there were some shortcomings in its preparation, and it did not consider governance risks.

This was an important example of the implementation of TODs under the state government's 30 year plan. It represents an opportunity for state and local government to learn valuable lessons about the need to be open and consultative with the community from the beginning of such large projects.

## OPINIONS

### Conflict of interest

1

Councillor K<sup>1</sup> had an interest in a matter before the council in Item 6.121 on 9 November 2009, which directly concerned the councillor's employing agency (the Department of Planning and Local Government) within the meaning of section 73(3) of the Local Government Act. However, this interest was unknown to Councillor K and the councillor acted reasonably on the basis of legal advice which indicated that there was no conflict of interest. Consequently Councillor K did not contravene section 74 of the Local Government Act.

Councillor C, Councillor D, Councillor G, Councillor J and Councillor P, as members, officers or employees of the Attorney General's Department, the Department of Primary Industries and Resources, the Department of Transport, Energy and Infrastructure and the Department of Treasury and Finance respectively, did not have an interest in the matter under section 73(3).

There was no administrative error made by the council arising from these councillors' actions.

2

The 12 ALP councillors<sup>2</sup> did not have an interest in a matter before the council on 9 November 2009 (or 14 December 2009) within the meaning of section 73(1) of the Local Government Act, due to their membership of the ALP.

3

Councillor J and Councillor P did not have an interest in a matter before the council on 9 November 2009 (or 14 December 2009) within the meaning of section 73(1) of the Local Government Act, due to their employment in the Enfield electorate office.

Further, neither Councillor K, Councillor C, Councillor G nor Councillor D had an interest under section 73(1).

### Bias and open mind

4

On balance, the evidence does not support a conclusion that the ALP councillors approached their decision-making on 9 November 2009 with apprehended bias.

<sup>1</sup> Throughout this report I have anonymised references to councillors, for the reasons explained in Part 1.1.

<sup>2</sup> I have used the term 'ALP councillor' in this report simply for ease of reference, and I do not seek to imply that these councillors were endorsed by the ALP prior to their election.

## Code of conduct<sup>3</sup>

**5**

In allowing the Member for Croydon and the Croydon electorate office to assist in drafting, producing and distributing their constituent letters supporting the land swap, Councillor K, Councillor P, Councillor A and Councillor G may have acted in a manner that was contrary to the code of conduct.

In accordance with section 18(5) of the Ombudsman Act, I report this evidence to the principal officer of the council.

**6**

In writing, as a councillor, an intemperate letter about the St Clair protestors to the press, Councillor M may have acted in a manner that was contrary to the code of conduct.

In accordance with section 18(5) of the Ombudsman Act, I report this evidence to the principal officer of the council.

**7**

In communicating, as a councillor, with a St Clair protestor's employer in order to cause detriment to the protestor, Councillor M may have acted in a manner that was contrary to the code of conduct.

In accordance with section 18(5) of the Ombudsman Act, I report this evidence to the principal officer of the council.

**8**

In seeking, as a councillor, a person to research a St Clair protestor with the intention of gathering information which was detrimental to the protestor, Councillor M may have acted in a manner that was contrary to the code of conduct.

In accordance with section 18(5) of the Ombudsman Act, I report this evidence to the principal officer of the council.

**9**

In forwarding a community member's email to the Member for Croydon, which was received in their councillor capacity, Councillor B may have acted in a manner that was contrary to the code of conduct.

In accordance with section 18(5) of the Ombudsman Act, I report this evidence to the principal officer of the council.

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<sup>3</sup> In the case of alleged breaches of the council's code of conduct, in accordance with section 18(5) of the Ombudsman Act I do not make findings as to whether the evidence which I must report actually amounts to a breach of duty or misconduct. Section 18(5) of the Ombudsman Act provides that 'The Ombudsman must report any evidence of breach of duty or misconduct on the part of a member, officer or employee of an agency to which this Act applies to the principal officer of the agency.'

10

In forwarding a community member's email to the Member for Croydon, which was received in their councillor capacity, Councillor G may have acted in a manner that was contrary to the code of conduct.

In accordance with section 18(5) of the Ombudsman Act, I report this evidence to the principal officer of the council.

## The consultation process

11

The council complied with its obligation under section 194(2)(a) of the Local Government Act to make a report available, and in this respect did not act in a way that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

12

The council complied with the requirement in section 194(2)(b) of the Local Government Act to follow the steps in its public consultation policy, and in this respect did not act in a way that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

13

In failing to engage and consult with its community earlier than it did, in accordance with good administrative practice, the council acted in a way that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

14

In writing directly only to the land owners within 500 metres of the subject land during the consultation process, the council did not act in a way that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

15

The council made sufficient information available to enable the community to make a reasonably informed judgement about the St Clair revocation and land swap; and in this respect the council did not act in a way that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

16

By describing the proposed exchange of the St Clair land and the Sheridan land areas as a 'same for same' swap, the council did not act in a way that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

17

In accepting late submissions in relation to consultation with the community about the St Clair revocation and land swap, the council did not act in a way that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

18

In making a decision to proceed with the land swap notwithstanding the disagreement expressed during the consultation period by some community members, the council did not act in a way that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

### Confidentiality of meetings and documents

19

The council's failure to provide details of its reasons to exclude the public under section 90(2) and 90(3)(d) of the Local Government Act in the meetings of 28 April 2008, 11 August 2008, and 9 June 2009 was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

I recommend under section 25(2) of the Ombudsman Act that in future, the council record details of its reasons for excluding the public in council meetings under section 90(2) and the relevant paragraphs of section 90(3) of the Local Government Act.

20

In relation to the meeting of 28 April 2008, the council's order to keep the council's report, appendices and minutes confidential had no basis in law, as the council had not resolved to order that they be so kept under section 91(7)(b) of the Local Government Act. The council therefore acted contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

I recommend under section 25(2) of the Ombudsman Act that the council ensure in the future to formally adopt and record recommendations of the council administration where appropriate.

21

There was an insufficient basis for the council moving into confidence under section 90(2) and 90(3)(d) of the Local Government Act at the council meeting of 9 June 2009. In doing so, the council acted contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

I recommend under section 25(2) of the Ombudsman Act that in future, the council carefully consider the wording in the paragraphs of section 90(3) before resolving to exclude the public from its meetings.

22

In resolving to keep the council's report and minutes confidential at the council's meeting of 9 June 2009 under section 91(7) the Local Government Act, the council acted contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

I recommend under section 25(2) of the Ombudsman Act that the council in future carefully consider the contents of the relevant documents before placing them under a confidentiality order under the Local Government Act.

23

In ordering that the appendices of the council's report be kept confidential at the meeting of 9 June 2009 under section 91(7) of the Local Government Act, the council acted contrary to law under section 25(1)(a) of the Ombudsman Act.

I recommend under section 25(2) of the Ombudsman Act that the council in future carefully consider the contents of the relevant documents before placing them under a confidentiality order under the Local Government Act.

24

In not expressly alerting the public to the accessibility of the council's report and minutes of its 9 June 2009 meeting during the consultation period, the council did not act in a way that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

### Prudential requirements

25

In failing to consider governance risks such as conflict of interest in the prudential report, the council failed to comply with the intent of section 48(2)(h) of the Local Government Act and acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

I recommend under section 25(2) of the Ombudsman Act that the council review the prudential requirements in section 48(2)(h) of the Local Government Act, and in future consider addressing conflict of interest risks where relevant.

26

In failing to identify the date and author of the prudential report and their credentials, the council acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

Further, in failing to engage an independent person to prepare the prudential report, the council acted in a way that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

While noting the proposed amendments to section 48 under the Local Government (Accountability Framework) Amendment Act 2009 (section 8(7) and (8)), I recommend under section 25(2) of the Ombudsman Act that in the interests of accountability and probity, the council should in future:

1. consider engaging an independent party to prepare a prudential report for larger projects which have involved significant prior contribution by council staff
2. be able to identify not only the author and date of its prudential report, but also
3. be able to demonstrate that the council has turned its mind to the qualifications of the author of the report (section 48(4) of the Local Government Act).

27

The council's failure to obtain land valuations considering future land use in relation to the St Clair land and the Sheridan land, and to address these matters in the prudential report, was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act.

I recommend under section 25(2) of the Ombudsman Act that the council familiarise itself with the prudential issues which should be addressed in section 48(2) of the Local Government Act, especially in relation to obtaining valuations prior to disposal of land and land swap arrangements.

## RECOMMENDATIONS FOR AMENDMENT OF THE LAW

Under section 25(2)(d) of the Ombudsman Act following an investigation in which I find that an administrative error has occurred, I am empowered to make recommendations ‘that any law in accordance with which or on the basis of which the action was taken should be amended or repealed’.

I make the following recommendations for amendment of the law arising from my investigation.

### Register of interests

1

Consideration should be given to amending the Local Government Act to require that council members notify the Chief Executive Officer of any changes to their information which must be recorded on the Register of Interests, as soon as practicable. Failure to do so without reasonable excuse should attract a penalty.

2

Consideration should be given to amending the Local Government Act so that the public is not required to lodge a written application to access a copy of certain parts of a council’s Register of Interests, such as income sources, membership of any political party, any body or association formed for political purposes, any trade or professional organisation, hospitality benefits, and pecuniary gifts.

Consideration should be given to amending the Local Government Act to require that councils provide immediate access to this information via their website.

### Conflict of interest

3

Consideration should be given to amending the Local Government Act to include an objective test for council members’ conflicts of interest.

Consideration should be given to amending the Local Government Act to allow those in attendance at a council meeting to decide whether a particular council member has a conflict of interest or could reasonably be taken to have a conflict of interest.

I propose an objective test as has been adopted by Queensland in section 173(4) of the Local Government Act 2009 (Qld).

4

Consideration should be given to amending section 73(3) of the Local Government Act to include a council member who is a member, officer or employee of any organisation, not just an agency or instrumentality of the Crown.

5

Consideration should be given to amending section 73(3) of the Local Government Act to provide that where a matter directly concerns any organisation of which a council member is a member, officer or employee, the council member will be regarded as having an interest which they must disclose under section 74.

In conjunction, consideration should be given to amending the Local Government Act so that a councillor who has an interest is required to abstain from voting only if they are actually involved in the matter within the organisation of which they are a member, officer or employee.

**6**

There exists a potential for elected members of a council who are also electorate officers (and others engaged under section 72 of the Public Sector Act) to have a conflict of interest in the exercise of their duties

This potential conflict of interest undermines the integrity of local government.

In my view the public sector code of ethics prevents full time public sector employees, such as electorate officers, from becoming elected members of a council because of the potential for a conflict of interest.

I intend to refer this matter to the Under Treasurer for his consideration.

Consideration should be given to amending the Local Government Act to prohibit electorate officers (and others engaged under section 72 of the Public Sector Act) from becoming a council member or nominating as a candidate for council at an election under the Local Government Act.

**7**

Consideration should be given to amending the Local Government (Elections) Act 1999 to require disclosure of political affiliation prior to election.

**8**

Consideration should be given to amending the Local Government Act to remove the application of section 74(4) to some types of non-pecuniary benefits, and to benefits or detriments shared with other ratepayers.

**9**

Consideration should be given to amending the Local Government Act to introduce ongoing mandatory training in relation to conflict of interest for council members.

**10**

Consideration should be given to amending the conflict of interest provisions in the Local Government Act to include past benefits / inducements.

## Code of conduct

**11**

Consideration should be given to amending the Local Government Act to provide for a single code of conduct with coercive sanctions for breaches, in accordance with the proposals in An Integrated Model – A Review of the Public Integrity Institutions in South Australia and an Integrated Model for the Future, Discussion Paper, 25 November 2010.

**12**

Consideration should be given to amending the Local Government Act to introduce mandatory training for council members to better appreciate their public officer roles and responsibilities, and the significance of the declaration on taking office.

## Valuation of community land

13

Consideration should be given to amending the Local Government Act to require councils to obtain a land valuation before selling or exchanging land, other than where the land is sold for unpaid rates or is transferred without consideration.

## PART 1

---

### INTRODUCTION

## 1.1 NAMING OF WITNESSES

1. Under the *Ombudsman Act 1972 (SA) (Ombudsman Act)*, one of my roles is to express an opinion on whether an agency has made an error in carrying out an administrative act. Where I find evidence of breach of duty or misconduct on the part of a member, officer or employee of an agency, section 18(5) of the Ombudsman Act states that I must report that fact to the principal officer of the agency.
2. In the interests of fairness in any subsequent proceedings and to the extent that it is possible in this report, I have anonymised the councillors who held office in the City of Charles Sturt (**the council**) during the 2006-2010 term (**the relevant period**), by designating letters of the alphabet to each councillor. In relation to other parties, with the exception of the mayor (during the relevant period), the council's Chief Executive Officer (**the CEO**) and the Member for Croydon, I have named them as Witness 1, 2 etc. It is not possible to report on my investigation without identifying the mayor, the CEO and the Member for Croydon.
3. During 2008 and 2009, 12 of the 17 elected members of the council were members of the Australian Labor Party (**ALP**). In the course of my investigation, some parties objected to my use of the term 'ALP councillors' to refer to these councillors. One councillor commented that they are 'councillors who happen to be ALP members, because no-one's actually elected as a Labor member. ...There's no overt party pre-selection.'<sup>4</sup> The state secretary of the ALP also contacted my office and commented that the ALP does not endorse candidates for councils in local government.
4. I accept these submissions.<sup>5</sup> However, rather than use the cumbersome term 'councillors who are members of the ALP' I have used the shortened version 'ALP councillors' in my report simply for ease of reference. I do not seek to imply that these councillors were officially endorsed by the ALP prior to their election.

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<sup>4</sup> Cr G, p21, 21.

<sup>5</sup> Nonetheless, I note that one ALP councillor's electoral return dated 16 December 2010, covering the 2010 local government election, discloses campaign funding of \$4 585.09 from the ALP, and a further \$714.62 from the Shop, Distributive and Allied Employees Association.

## 1.2 JURISDICTION

### Ombudsman Act 1972 (SA)

5. The Ombudsman Act empowers me to investigate ‘administrative acts’ of an ‘agency’, as defined in section 3(1).

#### Meaning of ‘agency’

6. An ‘agency’ is defined to include state government departments, local government councils and certain statutory authorities (section 3(1)). The council falls within the definition of ‘agency’. Organisations such as professional associations, political parties, Ministers of the Crown, and Members of Parliament do not fall within the definition of ‘agency’ under the Ombudsman Act.

#### Meaning of ‘administrative act’

7. The Ombudsman Act defines the word ‘act’ in section 3(1) to include:

- (a) an omission;
  - (b) a decision, proposal or recommendation (including a recommendation made to a Minister of the Crown),
- and the circumstances surrounding an act;

8. The term ‘administrative act’ in section 3(1) is defined to mean:

- (a) an act relating to a matter of administration on the part of an agency to which this Act applies or a person engaged in the work of such an agency; or
- (b) an act done in the performance of functions conferred under a contract for services with the Crown or an agency to which this Act applies,

but does not include—

- (c) an act done in the discharge of a judicial authority; or
- (d) an act done by a person in the capacity of legal adviser to the Crown; or
- (e) an act of a class declared by the regulations not to be an administrative act for the purposes of this definition;

9. The term ‘matter of administration’ is not defined in the Ombudsman Act. However, it is accepted that the term does not include acts of a judicial or legislative nature. In South Australia, the Supreme Court found in the case of *City of Salisbury v Biganovsky* 54 SASR 117 that the Ombudsman has no jurisdiction to investigate matters of policy as opposed to matters of administration.

10. The administrative acts which I am able to investigate include not just the acts of an agency, but also the acts of ‘a person engaged in the work of the agency’.<sup>6</sup> In this way, the acts of council members when engaged in their council activities are susceptible to investigation by the Ombudsman, and I am under a duty to report evidence of breaches of duty or misconduct to the principal officer.<sup>7</sup>

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<sup>6</sup> Ombudsman Act, section 3(2).

<sup>7</sup> Ombudsman Act, section 18(5).

## Power to investigate

11. I may conduct an investigation of an administrative act on receipt of a complaint from a member of the public or on my own initiative (section 13(2)); or on receipt of a referral from a House or Committee of the Parliament (section 14(1)).

## Referral for investigation from a House of the Parliament – section 14

12. Section 14(1) of the Ombudsman Act relevantly provides:

... either House of Parliament ... may refer to the Ombudsman, for investigation and report, any matter that is within the jurisdiction of the Ombudsman and which that House ... considers should be investigated by the Ombudsman.

13. Matters that are referred to me by a House of the Parliament must be within my jurisdiction; and it is mandatory for me to investigate and to report to the referring House's representative in response to such referral (section 14(2)).

## Own initiative investigation – section 13(2)

14. Section 13(1) and (2) of the Ombudsman Act provide:

- (1) Subject to this Act, the Ombudsman may investigate any administrative act.
- (2) The Ombudsman may make such an investigation either on receipt of a complaint or on the Ombudsman's own initiative ...

15. Where I conduct an 'own initiative' investigation, there are mandatory consequences which include:

- where I make a report affecting an agency, allowing the principal officer of the agency a reasonable opportunity to comment (section 18(4))
- reporting evidence of a breach of duty or misconduct on the part of a member, officer or employee of an agency to the agency's principal officer (section 18(5))
- where I consider the administrative act to which the investigation relates has one or more failings described in section 25(1), reporting my opinion and reasons to the principal officer of the agency (section 25(2))
- sending a copy of any report or recommendation to the responsible minister (section 25(3)).

16. I note that section 25, including its remedial recommendatory provisions, does not apply to an investigation conducted under section 14 (section 25(1a)).

17. If I consider it to be in the public interest or in the interests of an agency, I may have a report on an investigation published in such a manner as I think fit (section 26).

## My investigation

18. On 3 December 2009, under section 14(1) of the Ombudsman Act, the Legislative Council referred a matter for my investigation concerning the council and the decision to revoke the community land status of part of the St Clair Reserve (**the referral**). The referral reflected a motion in the Legislative Council on 3 December 2009 of the then Hon David Winderlich MLC:
1. That this Council:
    - (a) Notes general community concern about the influence of the Australian Labor Party on the elected members of the City of Charles Sturt, including:
      - i. the fact that 12 of the 17 Councillors are members of the Australian Labor Party;
      - ii. the fact that 3 Councillors are employed by Labor Members of Parliament; and
      - iii. the influence of the Member for Croydon on elected members of Council.
    - (b) Notes specific concerns about the potential for conflict of interest in the revocation of the community status of land at St. Clair arising from -
      - i. the fact that the revocation of land is essential to the policy objectives of the State Labor Government;
      - ii. the fact that the decision-making process followed by the Council will be assessed by a Labor Minister; and
      - iii. the lack of any strategy adopted by the City of Charles Sturt to manage potential conflicts of interest arising from the role played by ALP members in that Council.
  2. The Legislative Council therefore refers the following matters to the Ombudsman, pursuant to section 14 of the Ombudsman's [sic] Act 1972, for investigation and report -
    - (a) The potential for actual conflict of interest of elected members of the City of Charles Sturt in relation to revoking the community status of land at St. Clair as per section 73 of the Local Government Act;
    - (b) The extent to which the City of Charles Sturt met its obligations under section 48 of the Local Government Act to manage the risk of conflict of interest associated with the revocation of the community status of land at St. Clair; and
    - (c) Any other relevant matter.
19. At the time of receiving the referral, I was investigating four complaints from the public.<sup>8</sup> These complaints concerned the council's revocation of the community land status of part of the St Clair Reserve (**the revocation**). The revocation was necessary to achieve the council's intention of swapping this land for land from the former Sheridan industrial site (**the land swap**). The Sheridan land was owned by the Land Management Corporation (**LMC**). I finalised these complaints on 16 December 2009, and informed the mayor that I did not consider that the council had erred under section 25(1) of the Ombudsman Act.

<sup>8</sup> These are described in Part 2.3 of my report.

20. Despite my investigation of the four complaints, the referral prompted my further consideration of matters of conflict of interest and prudential risk relating to the revocation. I also considered it would be appropriate to review additional issues relating to the revocation and land swap, some of which had been raised in my previous investigation of the four complaints.
21. It is not uncommon for my office to reconsider or review my previous investigations; particularly, for example, when additional evidence is subsequently presented, further witnesses come forward, or I consider that the public interest warrants it, such as in this case.
22. I distilled the essence of the referral as reflecting a concern about the council's actions in relation to the revocation – in particular, about some elected members' membership of the ALP and (a) possible conflicts of interest, and (b) the council's obligations to address prudential issues relating to possible conflict of interest risks under section 48 of the Local Government Act. I also interpreted in paragraph (c) of the referral, the intent of the Legislative Council that I should investigate matters which I considered relevant to the referral which were within my jurisdiction.
23. To allow me greater flexibility and in particular, to provide a remedial focus to my investigation, I decided to incorporate the essence of the terms of the referral into an investigation on my own initiative under section 13(2) of the Ombudsman Act. This is in keeping with the Ombudsman's broad discretionary powers to investigate under the Act.
24. In this regard, I note the comments of the New South Wales Court of Appeal about the role and powers of the Ombudsman. In the case of *Botany Council v Ombudsman* (1995) 37 NSWLR 357, the court held that in exercising the power of external review under the *Freedom of Information Act 1989* (NSW), the Ombudsman was also exercising all of the powers and functions conferred by the *Ombudsman Act 1974* (NSW). Kirby P (as he then was, with Sheller and Powell JJA agreeing) commented at pp 367-368:

Those powers, as the Ombudsman Act reveals, are, as they ought to be, extremely wide. They are not powers which this Court should read down. They are beneficial provisions designed in the public interest for the important object of improving public administration and increasing its accountability, including to ordinary citizens ... . Sadly, the experience of the past (and not only the past) has been of the occasional misuse and even oppressive use of administrative power. One modern remedy against such wrongs has been the creation by Parliaments in all jurisdictions of Australia of the office of Ombudsman. Whilst it may be expected that the Ombudsman will conform to the statute establishing office, a large power is intended. The words of the Ombudsman Act should be given ample meaning.

I consider Kirby P's reasoning equally applicable to the provisions of the SA Ombudsman Act.

## Whistleblowers Protection Act 1993 (SA)

25. The *Whistleblowers Protection Act 1993 (SA)* (**Whistleblowers Protection Act**) requires me to refer to the Anti Corruption Branch of the South Australia Police (ACB) any allegations relating to fraud or corruption. Section 5(5) provides:
  - (5) If a disclosure of information relating to fraud or corruption is made, the person to whom the disclosure is made must pass the information on as soon as practicable to:
    - (a) in the case of information implicating a member of the police force in fraud or corruption –the Police Complaints Authority;
    - (b) In any other case—the Anti Corruption Branch of the police force.
26. In my investigation, I considered that there were such disclosures of information, and I referred them to the ACB. My initial referral occurred on 5 March 2010, and I continued to brief representatives of the ACB as my investigation progressed. On 15 June 2011, I provided further detailed information, and referred further matters to the ACB.
27. I have not been advised of any action which the ACB intends to take regarding these matters.

## 1.3 MY INVESTIGATION

### Commencement of my investigation

28. In view of my adopted approach, by letter dated 14 December 2009, I notified the mayor (as principal officer of the council) of my own initiative ‘full’ investigation under sections 13(2) and 18(1a) of the Ombudsman Act.
29. I resolved also to exercise the powers of a royal commission under section 19 of the Ombudsman Act and the *Royal Commissions Act 1917(SA)* (**Royal Commissions Act**), and obtained oral evidence from some witnesses under oath or affirmation.

### Scoping my investigation

30. As part of the scoping process for my investigation, I considered the referral, my previous investigations and the circumstances surrounding the revocation. My investigation:
  - took formal evidence from 10 witnesses, including the then Hon David Winderlich MLC
  - conducted informal interviews with, and received written submissions from, members of the council’s community
  - obtained records, including email correspondence received and sent by elected members, and confidential council minutes held on the council’s server
  - considered publicly available minutes from the council’s website, Facebook entries, and media reportings
  - obtained on request or summons, relevant records from:
    - the ACB
    - the LMC
    - the Department of Planning and Local Government (DPLG)
    - the Minister for State/Local Government Relations (**the Minister**)
    - the office of the Attorney-General
31. By letter dated 28 January 2009, I alerted interested parties to my investigation and invited them to contact my office if they wished to give evidence. These parties included local state and federal Members of Parliament (including the Member for Croydon); elected members of the 2006-2010 council; and people who had previously approached my office with complaints about the revocation and land swap.
32. I provided an Information Sheet to these parties, advising them of:
  - the relevant provisions of the Ombudsman Act and the Royal Commissions Act
  - the Ombudsman’s powers of investigation<sup>9</sup>
  - how I would conduct and record evidence in interviews
  - the Ombudsman’s discretion in relation to legal representation<sup>10</sup>
  - confidentiality requirements<sup>11</sup>

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<sup>9</sup> Ombudsman Act, section 18(3)(b).

<sup>10</sup> Ombudsman Act, section 18(3)(c).

<sup>11</sup> Ombudsman Act, section 18(2) and section 22.

- the offences of:
    - hindering and obstructing an Ombudsman investigation without lawful excuse<sup>12</sup>
    - failing or refusing to comply with any lawful requirement of the Ombudsman, without a lawful excuse<sup>13</sup>
    - wilfully making a false statement in a material particular to the Ombudsman or his delegates<sup>14</sup>
  - my obligation to refer to the ACB allegations relating to fraud or corruption under the Whistleblowers Protection Act.
33. During the week of 8 February 2010, I advertised my investigation in The Advertiser and the local community press, and called for evidence from the public.
34. My officers and I inspected the St Clair Reserve and surrounds with the assistance of the CEO.

### **Conclusion of scoping the investigation and notifying council members**

35. Once the scoping process was concluded, by letter dated 1 April 2010, I wrote to council members advising of the scope of my investigation; foreshadowing my wish to take evidence; and requesting copies of their documentation. I informed the elected members that I had determined that my investigation would focus principally on:
- A. Responsibilities of councillors under the Local Government Act 1999 and Council's Council Members Code of Conduct Policy, including
    - any possible impacts of membership of a political party
    - possible caucusing and voting as a block
    - any possible impacts of the actions of people external to the Council, including actions of the Member for Croydon
    - any potential for actual conflict of interest - membership of the ALP; employees of Members of Parliament; and employees of a state government entity
    - acting without bias, and with integrity and respect
  - B. Confidentiality orders in relevant Council meetings leading up to the revocation of community land status and the land swap
  - C. The consultation process and the decision by the Council not to hold a public meeting in relation to the revocation and the land swap
  - D. Prudential risk in relation to the revocation and land swap
    - whether the Council met its obligations under section 48 of the Local Government Act 1999 to manage any potential risk of conflict of interest
  - E. Use of Council information and records management issues in relation to the revocation and the land swap
36. I asked the council members to produce copies of electronic and hard copy documents generated, sent or received by them in relation to the above issues and the revocation and land swap, including information on their personal computers and computers provided by their place of employment (including personal and place of employment email accounts).

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<sup>12</sup> Ombudsman Act, section 24(a).

<sup>13</sup> Ombudsman Act, section 24(b).

<sup>14</sup> Ombudsman Act, section 24(c).

## Defining the administrative act and the issue of legal representation

37. On 21 and 23 April 2010, I received correspondence from the council's solicitors advising that they had been instructed by their client to assist certain elected members during my investigation.
38. The council's solicitors firstly requested that I particularise the administrative acts which I was investigating; and secondly, they asked whether each of the elected members could have legal representation in my investigation and at interview.
39. I replied by letter dated 30 April 2010 as follows:

Subject to my terms of reference, the administrative acts I am considering are evolving during my interviews. As you may be aware, this is usually the case with an investigation by my Office; and sometimes, it is not until the conclusion of interviews with the parties that specific administrative acts falling within the terms of reference may crystallise. A person whose rights, interests or legitimate expectations might be materially affected by my reporting functions may then be provided with my provisional views about these acts, and afforded the opportunity to comment and respond, prior to my forming my final views and releasing my Final Report. I have adopted this approach having regard to the nature and purpose of my functions and powers and the statutory context.

In my letter of 1 April 2010, I provided to each Councillor the issues and circumstances which my investigation is considering, to assist them to prepare for their interviews. At this stage, the administrative acts which I will ultimately consider are those arising out of those issues and circumstances. However, provided that the subject matter of my investigation falls within my terms of reference, I do not propose to outline in any more detail the potential issues or administrative acts, or to confine the factual subject matter of the investigation, in advance of an interview with any particular person.

### The question of legal representation

I take the view that the specific provision in section 18(3)(c) of the *Ombudsman Act 1972* prevails over the more general provision in section 13 of the *Royal Commissions Act 1913*, and therefore it is for me to determine whether a person may have legal or other representation. If I am wrong in that regard, I rely in any event on the discretion conferred by section 13 of the *Royal Commissions Act*.

I am contemplating interviewing each Councillor in the absence of legal representation, under the provisions of section 18(3) of the *Ombudsman Act 1972*. After the interviews, I will consider the evidence and form my provisional views. Where those views may be adverse to a particular Councillor, subject to what is said below, at this stage I propose to provide that Councillor with the opportunity to respond - with the assistance of legal representation if they so wish.

### Confidentiality and conflict

For purposes related to the integrity of the investigation, I will be requiring each of your clients to maintain confidentiality in respect of the content of their interviews. These requirements will extend to preventing your clients from divulging information to any other person except their legal advisors for the bona fide purpose of obtaining legal advice, provided that I am satisfied that the legal advisors do not have a conflict of interest and/or duty arising out of or in connection with the investigation and the maintenance of each client's

obligations of confidence. I hold the *prima facie* view that Norman Waterhouse has an actual or potential conflict of interest in providing legal advice and representation for the Councillors in these circumstances.

The question of whether there is an actual or potential conflict of interest will also be relevant to the exercise of my discretion to permit your clients to be legally represented by any representative of your firm at any subsequent interview.

I invite your comments in this regard.

I would find it useful to discuss my proposed approach to this phase of the investigation, and hear your and your clients' views on the matter before I finalise my thoughts.

I wish to set up a brief meeting within the week, to this effect. Can you please indicate your and your client's availability for a meeting on Thursday 6 May 2010 at my Office between 1 - 2pm.

40. The Deputy Ombudsman and I subsequently met with the council's solicitors on 6 May 2010 to discuss these two issues. By letter dated 12 May 2010, I confirmed my approach in my investigation, which did not permit legal representation. Parties are rarely legally represented in my investigations, as in my view the natural justice process set out section 18(6) of the Ombudsman Act is sufficient to accord appropriate procedural fairness.

### **Legal proceedings initiated by the council**

41. On 16 June 2010 after my investigation had completed formal interviews with 24 witnesses, the CEO notified me that the council (comprising 10 councillors and the mayor at the time) had resolved at its most recent meeting as follows:

#### **Motion**

1. That the City of Charles Sturt notes advice from Councils' legal advisors dated 4 June 2010.
2. Council resolves to instruct its legal advisors to take legal action to seek declaratory relief or judicial review to:
  - (a) overturn the Ombudsman's refusal to specify the 'administrative acts' the subject of his present investigation into the City of Charles Sturt;
  - (b) require the Ombudsman to permit those the subject of his interviews to have legal representation at the interview and to provide transcript to them of that interview
3. Council further instructs its legal advisors to seek clarification from the Ombudsman that he will await the resolution of the legal action referred to above prior to continuing with his present investigation activities.
4. Should the Ombudsman decline the Council's invitation to cease his present activities until the resolution of the legal action set out above, Council instructs its legal advisors to seek injunctive relief preventing further investigative activities by the Ombudsman until the resolution of the legal action.

5. Council delegates to the Chief Executive Officer the power to enact the above resolutions and provide any further instructions to Council's legal advisors consistent with the above.
6. That pursuant to Section 91(7) of the Local Government Act 1999, Council hereby orders that the report to Council and appendices of this item be kept confidential for a period of 12 months [Note: The grounds for this order are outlined in the resolution above whereby the matter was considered in confidence by Council under Section 90(2)].  
**Moved Councillor Rau, Seconded Councillor Angelino  
Carried Unanimously**

42. In the interests of seeking early resolution, I advised the CEO that I agreed to suspend my investigation subject to two caveats:
  - I would continue to consider whether there were any matters which I needed to refer to the ACB in accordance with section 5(5) of the Whistleblowers Protection Act
  - I would need to advise those persons having an interest in the investigation that it is suspended; and in doing so, I would explain the basis upon which the council was taking legal proceedings.
43. I notified all council members, witnesses and interested parties accordingly, including the President of the Legislative Council.
44. On 8 July 2010, proceedings were issued.
45. After communicating with the council, I was prepared to go to mediation in the hope of expediting my investigation.

### **Meditated settlement of the legal proceedings**

46. On 9 November 2010, the council and I reached a tentative mediated settlement. The terms of the settlement are set out in Appendix A.
47. On 19 November 2010, the outcome of state local government elections was announced. Five of the council members did not recontest their seats, and three were unsuccessful in regaining their seat, as well as the mayor. The new mayor had been vocal in the community in protesting against the revocation and land swap.
48. The mediated settlement was endorsed by the newly constituted council on 13 December 2010.
49. The terms of settlement maintained the focus of my investigation contained in my letter dated 1 April 2010, but provided further information to witnesses, and confirmed the administrative act and details of issues and events I was considering.
50. I agreed to provide a document showing this further information, entitled 'Further description of the administrative act' to all witnesses. I defined the administrative act as 'the proposal submitted in November 2009 and resubmitted in December 2009, by the City of Charles Sturt to the Minister for State/Local Government Relations, to revoke the Community Land status of part of the St Clair Reserve' (**the administrative act**) and set out a number of contextual issues. This document is Appendix B.

51. Although I have a discretion in section 18(3)(c) of the Ombudsman Act to determine whether parties may be legally represented in an investigation, I also agreed that witnesses were able to have legal representation in their interviews, on the proviso that the legal representatives for each were different from those of the council, and from each other.
52. The mediated outcome also allowed elected members from the 2006-2010 council and other witnesses to be provided with copies of their transcripts, with the requirement that they be kept confidential and not be disclosed to any other party except for the purposes of obtaining legal advice.
53. In light of the mediated outcome, I offered elected members from the 2006-2010 council and other witnesses the opportunity to be re-interviewed by my investigation.
54. Ten elected members and six witnesses requested access to their transcript. However, none sought a further interview by my investigation after receipt of their transcript.

### Resumption of my investigation

55. On 4 January 2011, I informed elected members from the 2006-2010 council and other witnesses that I was resuming my investigation in light of the mediated outcome of the legal action. My investigation recommenced taking evidence and continued to receive approaches from members of the community about their concerns.

### Further challenges to my jurisdiction

56. After recommencing my investigation and arranging interview times, solicitors for two council members during the relevant period, further challenged my jurisdiction. I responded by postponing my investigation's interviews and offering remaining council members and their legal representatives the opportunity to make further submissions regarding any jurisdictional concerns.
57. I received no further submissions.
58. My investigation again resumed conducting interviews. However, solicitors for Councillor E questioned the legal basis for my investigation and other matters. I initially responded; but later formed the view that it was in the public interest to prepare and release my provisional report to the council and affected parties on the basis of the evidence before me, rather than delay my investigation any further.
59. I considered that the council, council members during the relevant period and other parties who would receive my provisional report would have the opportunity to consider my provisional views and respond with their comments accordingly, before I finalised my report.

### Release of my provisional report

60. On 29 June 2011, I released my confidential provisional report to key parties in my investigation. This was to enable these parties to provide further submissions on my version of the facts gathered in my investigation and to

respond to my tentative views and potentially adverse comments, before I concluded my investigation and formed my opinions. I was also mindful of section 18(4) of the Ombudsman Act, which provides that before I make a report affecting an agency, I must allow the principal officer of the agency ‘a reasonable opportunity to comment on the subject matter of the report’.

61. I released my provisional report to the (current) mayor of the council, all elected members during the relevant period, the Member for Croydon and the Member for Enfield. I released provisional views 7, 8, 9 and 10 of Part 4 of my provisional report to the particular members of the community involved in the relevant events. I also released provisional view 16 of Part 5, and Parts 6 and 7 of my provisional report to the members of the community who had made extensive submissions to my office about the issues dealt with in those parts.
62. I notified the President of the Legislative Council of the release of my provisional report, but did not provide a copy to him.
63. I subsequently invited the state secretary of the ALP to provide any comment in relation to matters affecting the ALP. He declined to add any further comment to that provided by the Member for Croydon, and that outlined in Part 1.1.<sup>15</sup>

## Responses to my provisional report

64. In response to my provisional report, I received substantive written submissions from the following parties (or their legal representatives):
  - the CEO
  - the (current) mayor
  - Councillors B, G, K, H, M, J and P
  - the Member for Croydon
  - the community member referred to in what is now opinion 9 in Part 4
  - a community member who made submissions in relation to what is now opinion 16 in Part 5.
  - a community member who made submissions in relation to Part 5.
65. Councillor C responded to my office that the provisional report was fair, and chose to make no comment. However, the councillor did not agree with the entirety of the report’s contents. Councillor A also did not wish to respond, and thanked my office for its ‘patience and conscientious efforts with this investigation’.<sup>16</sup> Councillor D commented that the report was ‘fair’. Councillor L also commented that the report was ‘fair’, and agreed with the report. The legal representative of Councillor O advised that they had no submissions to make in relation to my provisional report.
66. I received no contact or response to my provisional report from the (former) mayor, Councillors E, F, I, N or the Member for Enfield.
67. I have addressed in this final report what I consider to be some of the parties’ more pertinent written submissions in response to my provisional report. In some instances, I have changed my provisional view; and in other instances, I have set out the parties’ arguments and addressed them in response.

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<sup>15</sup> Telephone conversation with Deputy Ombudsman, 26 September 2011.

<sup>16</sup> Email from Cr A, 6 July 2011.

68. In accordance with the obligations in section 18(2) and 22 of the Ombudsman Act, I have treated the submissions as private, except to the extent that it is necessary to disclose them for the purposes of this report.
69. In their responses to my provisional report, two councillors and the Member for Croydon<sup>17</sup> submitted that I should interview Councillor E. In the event, I decided not to do so, because I was satisfied that any further information which the councillor could provide in relation to the administrative act would be minimal, and I did not wish to further delay my investigation and final report. I also invited one councillor to arrange for Councillor E to set out their recollections about a particular event, but I did not receive any further evidence.
70. In responding to my provisional report, Councillor H suggested that I should also:
- interview an officer of the Department of Education and Children's Services, 'because of the unique relationship between the Woodville High School, the Minister for Education and the City of Charles Sturt and St Clair Reserve Land created by the Recreation Grounds (Joint Schemes) Act 1947 confirmed in 1950 and varied by the State Governor in 1960, 1965, 1971 and 1974'
  - interview the Member for Cheltenham, as Minister for Education, in connection with conversations he had with departmental officers prior to amendments to the same Act
  - investigate 'the desecration of the grave site of World War 2 Veteran Mr Harry Guy, a West Croydon Ward Councillor for the council in 1951 and 1952 and his wife Gweneth placed at St Clair Reserve in 1993'
  - interview 'the family survivors of those 1,072 Woodville Citizens who made representation to the Woodville council by way of a petition presented to a meeting of the council in 1943 calling for the acquisition of the St Clair Reserve as a memorial to "those brave men and women fighting overseas".'
71. I consider that these issues relate to the substance of the council's decision on the land swap, which is a matter of policy, rather than to the administrative process adopted by the council in carrying out the administrative act. I declined to investigate them further.
72. As I have stated previously, my investigation proceeded under section 13(2) of the Ombudsman Act, although it was triggered by the referral from the Legislative Council under section 14(1). I note that section 14(2) of the Ombudsman Act obliges me to provide a copy of my final report to the Legislative Council. In addition to this, and to my obligation to provide the council's principal officer and the Minister with a copy of my final report (section 25(2) and (3)), I consider there is a public interest in the public release of my final report under section 26 of the Ombudsman Act. My reasons are:
- the many complaints I received about aspects of the St Clair revocation and land swap

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<sup>17</sup> Letters from legal representative for Cr B, 13 July 2011, p2 and 18 August 2011, p2; letter from Cr H, 18 August 2011, p1; letter from legal representative for Member for Croydon, 18 August 2011, para 91.

- the extensive reporting during the latter part of 2009 and early 2010 in the media in South Australia about the St Clair revocation and land swap
- the lessons learned from my investigation and final report may be of benefit to other councils in local government in:
  - governance matters - including elected member accountability, councillor membership of political parties; conflict of interest, and expectations of councillor conduct
  - confidentiality of meetings requirements
  - prudential requirements for large projects
  - the need for close community engagement by councils in the implementation of the state government's 30 year Plan for Greater Adelaide.

### Conduct of elected members of the 2006-2010 council

73. Although the administrative act in question concerns the council, I have necessarily considered evidence about the conduct of individual elected members. The document 'Further description of the administrative act' (Appendix B) includes the following:
- (a) the manner of discharge by councillors of the council of their responsibilities in respect of the administrative act under the *Local Government Act 1999 (SA)* (**LG Act**) and council Members Code of Conduct policy, including:
- any possible impact of a councillor's membership of a political party
  - any potential or actual conflict of interest due to councillors being
    - members of a political party
    - employees working in the offices of members of Parliament
    - employees of a State Government entity
  - the duty to hold council meetings in public
  - bringing an open mind to decision-making
  - acting without bias
  - acting with integrity and respect
74. It was put to me by the council and some councillors, both during the course of my investigation and in response to my provisional report, that I lack jurisdiction to consider these matters. They variously suggested that I do not 'actually define in any precise way what the Administrative Act actually is';<sup>18</sup> that issues relating to councillor conduct are matters of policy and outside my jurisdiction for this reason;<sup>19</sup> and that the matters concerning the conduct of councillors are not sufficiently related to the administrative act.<sup>20</sup>
75. I do not agree with their submissions. The administrative act is defined in the document set out in Appendix B. Questions of councillor conduct are not matters of policy, and in my view the conduct of elected members surrounding a council decision properly falls within a definition of 'the circumstances surrounding an act'.<sup>21</sup>

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<sup>18</sup> Letter from legal representative for Cr G, 29 August 2011, para 15.

<sup>19</sup> Response from the CEO, 18 August 2011, attached table pp3-4; Letter from legal representative for Cr G, 29 August 2011, para 16-19; letter from legal representative for Cr M, 18 August 2011, p2.

<sup>20</sup> Response from the CEO, 18 August 2011, attached table p4.

<sup>21</sup> See the definition of 'act' in Ombudsman Act, section 3.

76. These submissions put to me in particular that in a previous report relating to a complaint about the council's actions in the land swap,<sup>22</sup> I expressed the view that the question of whether membership of a political party ought to disqualify a person from being a councillor is a matter of policy, and consequently outside my jurisdiction. I remain of that view. However, that is a different question from the question of whether councillors' membership of the ALP was relevant to the way in which the administrative act was performed. As I have noted elsewhere, in my view councillors' membership of the ALP is relevant to an understanding of the context, history and background to the administrative act.

77. Further, in considering whether an investigation into a council carried out under section 272(1) of the Local Government Act was beyond power, the Supreme Court of South Australia recently made it clear that the conduct of individual elected members may inform an investigation into the conduct of a council. White J stated:

Section 272 is principally concerned with the conduct or omissions of a council itself rather than of the individual members of that council. However, this does not mean that an investigation of a council's conduct may not involve an examination of the conduct of its members. Because councils can act only through human agents, sometimes it will be the conduct of individual councillors which comprises, or is part of, the relevant conduct of a council. Further, an irregularity in the conduct of the affairs of a council for the purposes of s 272(1)(a)(ii) may arise from the conduct of an individual councillor.<sup>23</sup>

78. Doyle CJ similarly held:

The investigation that is authorised by the Terms of Reference (limited as indicated by me) is an investigation into the conduct (or failure to act) of the Council. The factual circumstances specified in the Terms of Reference are to be investigated to the extent that they throw light on the Council's conduct. They are not independent subjects for investigation and report. That limits the extent to which the investigator should investigate these matters, and make findings about the conduct of individuals. However, I emphasise that this does not exclude an investigation into the conduct of individuals. Drawing the line will be difficult. That is a result of the manner in which the Terms of Reference are expressed.<sup>24</sup>

79. It should be noted that these comments were made in the context of section 272 of the Local Government Act.
80. In summary, I am empowered to investigate acts relating to matters of administration on the part of a council and 'a person engaged in the work of' the council; and indeed, section 18(5) of the Ombudsman Act compels me to 'report any evidence of breach of duty or misconduct on the part of a member, officer or employee' to the principal officer of the council.

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<sup>22</sup> Report on a complaint to the Ombudsman, 16 December 2009. This is discussed in Part 2.3 of my report, under the heading Complaint 1.

<sup>23</sup> *Paterson & Ors v Macpherson & Anor; Zacherakis v Macpherson & Anor* [2011] SASCFC 49 (27 May 2011) at para 127.

<sup>24</sup> *Paterson & Ors v Macpherson & Anor; Zacherakis v Macpherson & Anor* [2011] SASCFC 49 (27 May 2011) at para 23.

## Standard of proof

81. The standard of proof applied in my investigation 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. The decision in *Briginshaw* recognises that questions of fact vary greatly in nature, and greater care is needed in scrutinising the evidence in some cases.<sup>25</sup> It is best summed up in the following statement by 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.<sup>26</sup>

## Total evidence taken

82. In total, my investigation took 118 hours of evidence on transcript from 28 witnesses, including:
- 16 elected members from the council during the relevant period
  - the Chief Executive Officer of the LMC
  - four members of the council community
  - three former elected members of the council
  - two former officers of the council
  - the Member for Croydon
  - the former Hon David Winderlich MLC.
83. My investigation conducted informal interviews with or received written submissions from 23 members of the public.
84. My investigation also received a written submission from the CEO of the council in response to questions from my investigation.

## Consultation

85. My investigation consulted with:
- officers of the Office of State/Local Government Relations within DPLG in relation to the *Local Government (Accountability Framework) Amendment Act 2009* (SA)
  - officers of the Department of Treasury and Finance
  - the Office of Ethical Standards and Professional Integrity
  - officers of the Victoria Ombudsman in relation to two parliamentary reports: Conflict of Interest in Local Government dated March 2008, and Investigation into the alleged improper conduct of councillors at Brimbank City Council dated May 2009
  - Mr Kym Kelly, former Chair, Local Government Governance Panel of the Local Government Association of South Australia (**LGASA**)
  - Pyper Leaker Surveying Services.

<sup>25</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336 applied in *Neat Holdings Pty Ltd v Karajan Holding Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449 at 449-450 per Mason CJ, Brennan, Deane and Gaudron JJ.

<sup>26</sup> *Briginshaw v Briginshaw* (1938) 60 CLR at 361-362.

86. In his response to my provisional report, the Member for Croydon questioned whether it was appropriate for me to have consulted Mr Kelly, for reasons relating to the professional relationship between the two. I did not engage Mr Kelly as a consultant, and he did not provide any advice to my investigation in relation to the conduct of individuals. I discussed with him his experience as Chair of the LGASA Governance Panel, to determine whether there were any matters directly relevant to my investigation. I determined that there were not.

### Acknowledgement of the CEO and staff of the council

87. During my investigation, the CEO provided my investigation with ready access to the council's records management system and the council staff.
88. I take this opportunity to record my thanks to the CEO and his staff for their helpful assistance in my investigation.

### Observations of the evidence of some council members

89. During my investigation, I found that some council members were witnesses of credit; however, others were evasive and at times dishonest in their evidence. There was a lack of willingness by many to talk about their association with the ALP, with each other, and also with the Member for Croydon.
90. I note that the local press reported that my investigation interviewed council members in 'often long session'.<sup>27</sup> I comment that this is true in the case of some interviews; and was often due to my investigation revisiting questions to elicit truthful responses.
91. Of equal concern is that in their evidence, some council members appeared to fail to appreciate their 'public officer' roles and concomitant duties and responsibilities under the Local Government Act. Rather, they saw themselves as volunteers in the community. With some council members, my investigation sensed that they perceived that this somehow diminished the need for accountability in the exercise of their responsibilities as a council member.

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<sup>27</sup> Weekly Times Messenger, 'Charles Sturt councillors unsettled by Ombudsman's probe', 17 June 2010.

## PART 2

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# CONTEXT OF THE ADMINISTRATIVE ACT

## 2.1 ROLES AND RESPONSIBILITIES – COUNCILS AND ELECTED MEMBERS

92. I have considered the issues raised in my investigation in relation to the administrative act and the circumstances surrounding it, against the statutory framework relating to the roles and responsibilities of a council and council members. This framework emphasises their accountability to their communities. It outlines the requirements of council members and councils to uphold ethical principles and laws designed to protect the public interest and to preserve public trust and confidence in the integrity of local government. I list the relevant statutory provisions below.

### Principal role of a council

93. The principal role of a council, articulated in section 6 of the Local Government Act, is to provide for the government and management of its area at the local level and, in particular—

- (a) to act as a representative, informed and responsible decision-maker in the interests of its community; and
- (b) to provide and co-ordinate various public services and facilities and to develop its community and resources in a socially just and ecologically sustainable manner; and
- (c) to encourage and develop initiatives within its community for improving the quality of life of the community; and
- (d) to represent the interests of its community to the wider community; and
- (e) to exercise, perform and discharge the powers, functions and duties of local government under this and other Acts in relation to the area for which it is constituted.

### Functions of a council

94. Section 7 of the Local Government Act sets out the functions of a council, which range from planning for the future development of its area and providing services and facilities for residents and ratepayers, to providing infrastructure support, managing the environment and promoting its area and attracting business, commerce, industry and tourism.

### Objectives of a council

95. Under section 8, the Local Government Act provides that a council must in the performance of its roles and functions:

- (a) provide open, responsive and accountable government;
- (b) be responsive to the needs, interests and aspirations of individuals and groups within its community;
- (c) participate with other councils, and with State and national governments, in setting public policy and achieving regional, State and national objectives;

- (d) give due weight, in all its plans, policies and activities, to regional, State and national objectives and strategies concerning the economic, social, physical and environmental development and management of the community;
  - (e) seek to co-ordinate with State and national government in the planning and delivery of services in which those governments have an interest;
  - (f) seek to facilitate sustainable development and the protection of the environment and to ensure a proper balance within its community between economic, social, environmental and cultural considerations;
  - (g) manage its operations and affairs in a manner that emphasises the importance of service to the community;
  - (h) seek to ensure that council resources are used fairly, effectively and efficiently;
  - (i) seek to provide services, facilities and programs that are adequate and appropriate and seek to ensure equitable access to its services, facilities and programs.<sup>28</sup>
96. Section 122 of the Local Government Act requires councils to develop and adopt Strategic Management Plans in relation to their activities. Section 122(2) requires that these plans 'should ... address the strategic planning issues within the area of the council, with particular reference to (and in a manner consistent with) the state government's Planning Strategy'.
97. Further, these plans are required to state councils' objectives and the extent to which *inter alia*:
- they have participated with other councils, and with state and national governments, in setting public policy objectives
  - their objectives are related to regional, state and national objectives
  - they have given consideration to regional, state and national objectives and strategies which are relevant to the economic, social, physical and environmental development and management of their areas.
98. Under the *Development Act 1993 (Development Act)*, it is stated that councils' Development Plans should seek to promote the provisions of the state government's Planning Strategy (section 23(3)). Further, under section 30(1)(a) of the Development Act, councils are obliged to prepare a Strategic Directions Report that, *inter alia*, addresses the strategic planning issues within the area of the council, with particular reference to the state government's Planning Strategy.

## Role of council members

99. Section 59(1) of the Local Government Act provides that the role of a member of council is:
- (a) as a member of the governing body of the council–
    - (i) to participate in the deliberations and civic activities of the council;

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<sup>28</sup> This provision is amended by section 5 of the *Local Government (Accountability Framework) Amendment Act 2009* to delete 'in the performance of its' and substitute 'act to uphold and promote observance of the following principles in the performance of its'; and insert paragraphs (j) 'achieve and maintain standards of good public administration' and (k) ensure the sustainability of the council's long-term financial performance and position'. This amendment has yet to be proclaimed.

- (ii) to keep the council's objectives and policies under review to ensure that they are appropriate and effective;
- (iii) to keep the council's resource allocation, expenditure and activities, and the efficiency and effectiveness of its service delivery, under review;
- (b) as a person elected to the council—to represent the interests of residents and ratepayers, to provide community leadership and guidance, and to facilitate communication between the community and the council.<sup>29</sup>

## Declaration on taking office

100. Section 60 of the Local Government Act provides that a member of a council must, at or before the first council meeting, make a declaration before a Justice of the Peace or another person authorised to take declarations under the *Oaths Act 1936* to 'undertake to discharge [their] duties conscientiously and to the best of [their] abilities'.<sup>30</sup>

## General duties of elected members

101. Section 62 sets out the 'general duties' of council members:

- (1) A member of a council must at all times act honestly in the performance and discharge of official functions and duties.
- (2) A member of a council must at all times act with reasonable care and diligence in the performance and discharge of official functions and duties.
- (3) A member or former member of a council must not, whether within or outside the State, make improper use of information acquired by virtue of his or her position as a member of the council to gain, directly or indirectly, an advantage for himself or herself or for another person or to cause detriment to the council.

Maximum penalty: \$10 000 or imprisonment for two years.

- (4) A member of a council must not, whether within or outside the State, make improper use of his or her position as a member of the council to gain, directly or indirectly, an advantage for himself or herself or for another person or to cause detriment to the council.

Maximum penalty: \$10 000 or imprisonment for two years.

- (5) If a person is convicted of an offence against this section, the court by which the person is convicted may, if it thinks that action under this subsection is warranted, in addition to (or in substitution of) any penalty that may be imposed under a preceding subsection, by order do one or more of the following:

- (a) require the person to attend a specified course of training or instruction, or to take other steps;
- (b) suspend the person from any office under this Act for a period not exceeding two months;
- (c) disqualify the person from any office under this Act;

<sup>29</sup> Section 59 was amended by section 10 of the *Local Government (Accountability Framework) Amendment Act 2009*. Section 10 inserts subparagraph (iv) of section 59(1)(a) which adds that a council member's role is 'to ensure, as far as practicable, that the principles set out in section 8 are observed.' Section 10 has yet to commence operation.

<sup>30</sup> *Local Government (General) Regulations 1999*, regulation 6, Schedule 1, Form 2.

- (d) disqualify the person from becoming a member of a council, a committee of a council or a subsidiary of a council for a period not exceeding five years.
- (6) If a person is disqualified under subsection (5)(c), the office immediately becomes vacant but proceedings for a supplementary election to fill the vacancy (if required) must not be commenced until the period for appealing against the conviction of an offence against this section has expired or, if there is an appeal, until the appeal has been determined.

## Council members are fiduciaries

- 102. A council and its elected members also fall within the definitions of ‘public agency’ and ‘principal’, and ‘public officers’ or ‘fiduciaries’ respectively under Part 6 of the *Criminal Law Consolidation Act 1935 (SA)* (*Criminal Law Consolidation Act*).<sup>31</sup> This part deals with unlawful bias.
- 103. Section 148 makes it a criminal offence for a fiduciary to exercise unlawful bias, that is where the fiduciary:
  - has received or expects to receive a direct or indirect benefit from a third party for exercising a fiduciary function in a particular way, and exercises a fiduciary function in the relevant way without appropriate disclosure of the benefit or expected benefit
  - and the fiduciary's failure to make appropriate disclosure of the benefit or expected benefit is intentional or reckless.
- 104. Section 150 of the Criminal Law Consolidation Act covers the criminal offence of bribery of a fiduciary.
- 105. Section 150 also makes it a criminal offence for a person to bribe a fiduciary to exercise unlawful bias.

## Abuse of public office

- 106. Council members and former council members fall within the definition of ‘public officers’ under Part 7 of the Criminal Law Consolidation Act. This part creates offences in relation to public officers including bribery and corruption (section 249); offences by public officers such as improper exercise of power or influence and improper use of information, with the intention of securing a benefit or causing detriment (section 251); and offences in relation to appointment to a public office (section 253).

## Register of interests

- 107. Sections 64 to 67 and Schedule 3 of the Local Government Act require council members to disclose their private interests such as sources of income, positions in organisations, gifts, assets and debts. This may include details of people related to an elected member.
- 108. Council members are also required to disclose their memberships of ‘any political party, any body or association formed for political purposes or any trade or professional organisation’.

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<sup>31</sup> *Criminal Law Consolidation Act 1935*, sections 145(1) and 146(1)(c).

109. This information is required to be disclosed in the form of a 'primary return' or 'ordinary return', and is maintained on a Register of Interests by the Chief Executive Officer of the council (section 68). This information is publicly accessible.
110. These provisions are separate from the conflict of interest provisions of the Local Government Act.

## Remuneration

111. Council members do not earn a salary for performing their roles. Section 76 of the Local Government Act was amended (commencing 14 January 2010), to provide for the Remuneration Tribunal to set council members' allowances.<sup>32</sup>
112. Before the amendment, elected members' remuneration was set by the councils, subject to the minimum and maximum amounts prescribed in the *Local Government (Members Allowances and Benefits) Regulations 1999*.
113. During the relevant period City of Charles Sturt councillors were eligible to receive \$15,000 annual allowance; presiding members and deputy mayors were eligible to receive \$18,750 annual allowance; and the mayor was eligible to receive \$60,000 annual allowance.<sup>33</sup>

## Conflict of interest

114. Council members have a duty to act in the public interest and to avoid conflicts of interest.
115. The Local Government Act sets out the obligations of council members to declare certain interests and to abstain from voting on matters in relation to 'interests' and 'conflicts of interest' that arise under the Act.
116. A council member will not have a relevant interest that could give rise to an actual conflict of interest other than in the circumstances set out in sections 73(1) and (3) of the Local Government Act. Under the Act, a conflict of interest must be declared where
  - the council member or a person with whom the council member is closely associated would, if the matter were decided in a particular manner, receive or have a reasonable expectation of receiving:
    - a direct pecuniary benefit or detriment
    - an indirect pecuniary benefit or detriment, or
    - a non-pecuniary benefit or detriment; or
  - the councillor is a member, officer or employee of an agency or instrumentality of the Crown and the relevant matter directly concerns that agency or instrumentality.

<sup>32</sup> Determination Number 6 of 2010.

<sup>33</sup> City of Charles Sturt Annual Reports: 2006-2007, p15; 2007-2008, p13; 2008-2009, p15. See *Local Government (Members' Allowances & Benefits) Regulations 1999*, regulation 4.

## Bias

117. The common law rules of natural justice or procedural fairness require that council members make decisions free from bias. They must bring an open mind and approach their decision-making impartially. This is a separate, additional requirement from the conflict of interest provisions (although a bias may be based on an interest or arise out of pre-judgment).
118. In addition to actual bias, the common law recognises ‘apprehended bias.’ The test for determining if a council member’s decision-making is tainted with apprehended bias is an objective one, being:

whether a fair-minded, lay observer might reasonably apprehend that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the question which must be decided.<sup>34</sup>
119. Only a limited class of persons is entitled to enforce the requirements of procedural fairness in administrative decision-making. The requirements can be enforced only when a decision affects the rights, interests or ‘legitimate expectations’ of an individual.<sup>35</sup>
120. However, in my view there is a legitimate expectation that councillors will consider all matters fairly and impartially, and with an open mind.<sup>36</sup> I accept that the concept of maintaining an open mind does not require that a decision-maker should have an ‘empty’ mind, and that it is not reasonable or practicable to expect that a person will have no pre-existing personal views or preferences. I accept also that an elected member of a council frequently will have strong views about community issues, often expressed prior to election, and that this is an important manifestation of the representational role of elected members.
121. In summary, members of a council are entitled to hold and express views, but what is important is that they should be able to reconsider them in light of all the evidence and arguments presented when making decisions which directly affect the interests of an individual.

## Code of conduct

122. Section 63 of the Local Government Act provides that a council must prepare and adopt a code of conduct to be observed by the members of the council.
123. A code of conduct is a public declaration of the desired standards of behaviour that the council has agreed its members should demonstrate when carrying out their council role. The City of Charles Sturt has a code of conduct (**the code of conduct**), as part of its Council Members Code of Conduct Policy (**the code of conduct policy**).<sup>37</sup>
124. The code of conduct policy sets out a mechanism for complaint handling in relation to suspected breaches of the code of conduct by the elected members.

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<sup>34</sup> *Johnson v Johnson* [2000] HCA 48 at 11.

<sup>35</sup> *Kioa v West* (1985) 159 CLR 550.

<sup>36</sup> For example, the council’s Code of Conduct for Elected Members requires councillors ‘to be informed, impartial and have due regard for both individuals and the wider community, and short and long term considerations in reaching decisions...’

<sup>37</sup> City of Charles Sturt, Council Members Code of Conduct Policy (Reference Number 1.1), last reviewed December 2008.

### Other relevant statutory provisions

125. There are other statutory provisions which are applicable to the issues which I have considered in my investigation. These provisions relate to the council's and elected members' responsibilities regarding:
- revocation of community land status classification (Local Government Act, section 194)
  - a council's responsibilities to hold meetings open to the public except in certain circumstances (Local Government Act, section 90)
  - publicly accessible minutes of council meetings (Local Government Act, section 91)
  - the prudential requirements of a council (Local Government Act, section 48)
126. I set out these provisions later in this report.

## 2.2 OVERVIEW OF THE REVOCATION AND LAND SWAP

### Introduction

127. As part of a proposed redevelopment of land in the Cheltenham Woodville precinct (**the precinct**) within the council, the council and the LMC proposed to swap part of St Clair Reserve (**the St Clair land**) with part of the former Sheridan industrial site (**the Sheridan land**). The land swap was not possible without the council first revoking the community land status over part of the St Clair Reserve under the Local Government Act. The land swap was considered necessary to facilitate the possible future development of the existing St Clair site as a transit oriented development near the Woodville Railway Station (**the TOD**). TODs are a feature of the state government's future planning strategy.
128. My investigation found that the genesis of the idea of developing the precinct and the land swap dated back to 2004.
129. In August 2004 the South Australian Jockey Club announced its intention to sell the Cheltenham Park Racecourse site.
130. Also in 2004, Stockland Pty Ltd (**Stockland**) purchased the former Sheridan site.
131. Given the size and location of these sites, in August 2004, the council asked the state government to work with it to undertake integrated planning for the precinct. In a letter to the Premier dated 5 August 2004, the then CEO of the council wrote:

This is a unique opportunity to combine the resources of the three adjacent (including Council) landowners to create a new master planned village with benefits for Adelaide's north-west suburbs. The timing is right to showcase creative, sustainable development with community based outcomes, and the possibility of a new village centre near high quality open space and a fast rail link to the city. The magnitude of the site enables aspirations for low cost housing, efficient use of land and natural resources and a reduction in car dependency to be incorporated into the project.<sup>38</sup>

132. The state government agreed that there was a need for a coordinated and integrated planning approach and appointed the LMC, the government's land supply and development arm, to work with the council to start this planning.<sup>39</sup>
133. The Sheridan site was rezoned from industrial to residential via a Ministerial Plan Amendment Report under the Development Act dated 25 January 2007.
134. On 26 November 2007 AV Jennings Limited and Urban Pacific Limited were announced as the successful joint venture development consortium (**the Woodville JV; the developer**) for the Cheltenham Park Racecourse. On 14 August 2008 the zoning of the Cheltenham Park Racecourse was changed from special uses to residential via a Ministerial Development Plan Amendment under the Development Act.

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<sup>38</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p5.

<sup>39</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p6.

- 135. The rezoning of the Sheridan site and the Cheltenham Park Racecourse site covered approximately 75 hectares<sup>40</sup> and was seen by the council to represent a development opportunity for the area. The council considered that both sites should not be considered in isolation and that their availability for housing and development presented benefits and options not only for the development of the two areas but also for their integration within the surrounding environs.
- 136. On 27 March 2008 the Woodville JV purchased the Sheridan site from Stockland; and advised the council that they intended to integrate the development of the two sites.<sup>41</sup>

### Background to the revocation and land swap

- 137. The CEO informed my investigation that the suggestion of a land swap first arose in the council's Cheltenham Racecourse Redevelopment Reference Group. This reference group was established as a forum for elected council members to review the opportunities, issues and options should the Cheltenham Park Racecourse redevelopment proceed. The agenda of the group's first meeting on 22 November 2004 stated:

Council's St Clair Reserve, the 12ha of land including the recreation centre, the oval and the two soccer fields is the link between the proposed open space developments, and Woodville Road. This site is a gateway to the major part of the site, and allows the opportunity to reshape area [sic] near the Railway Station and Woodville Road. While there is no intention to reduce the area of open space for public use, **there will be opportunities [sic] plan for land swaps** to integrate this land into the overall development for maximum benefit to the new community and to the existing communities.<sup>42</sup>

- 138. The CEO advised that the meeting of the Redevelopment Reference Group was reported at a council meeting on 13 December 2004, but there was no specific reference in the council minutes to opportunities for a land swap.
- 139. Following the Woodville JV's acquisition and proposal to develop the Sheridan and Cheltenham Park Racecourse sites, the council staff met with them to discuss opportunities to realise the council's broader aspirations for the precinct. The idea of developing on part of the St Clair Reserve was discussed. The CEO informed my investigation that the council staff advised the Woodville JV that any development on the St Clair site would have to be replaced with an equal area of open space.<sup>43</sup>
- 140. The council first formally considered the land swap at its meeting on 28 April 2008. The council endorsed in principle the concept of a land swap arrangement involving the redevelopment of the St Clair site and the land surrounding the Woodville Railway Station. The council authorised the CEO to commence investigations into the community land revocation process under the requirements of the Local Government Act, and to commence negotiations with the Woodville JV on the potential for future redevelopment and land swap arrangements.<sup>44</sup>

<sup>40</sup> City of Charles Sturt, Report to council from Manager Planning and Development, St Clair Community Land Revocation, 26 October 2009, Item 6.117, p21.

<sup>41</sup> City of Charles Sturt, Woodville Road Revitalisation Strategy - Consultant's Project Brief, November 2008.

<sup>42</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p9.

<sup>43</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p31.

<sup>44</sup> City of Charles Sturt, Council Minutes, 28 April 2008, Item 13.3, p17.

141. However, on 15 May 2008 the Woodville JV informed the council that they were withdrawing from exploring the land swap with the council for commercial reasons, and they were not prepared to hold land subject to investigations, consultation and a revocation process.<sup>45</sup>
142. I understand that the council then commenced discussions with the LMC about the possibility of a land swap.<sup>46</sup> The council reportedly put the proposition to the LMC that it consider purchasing land from the Woodville JV to potentially facilitate the land swap with the council. The LMC agreed to this proposal and subsequently determined to purchase 4.7 hectares of the Sheridan site from the Woodville JV to allow for a swap with the council of 4.7 hectares of the St Clair Reserve. By letter dated 1 August 2008 the LMC wrote to the council advising that:

On the assumption that LMC satisfactorily concludes the purchase of the Woodville site from the JV, in relation to the St Clair Reserve land, subject to Cabinet approval, LMC is willing to enter into a contract with Council to swap that Woodville land for an equivalent amount of St Clair land, subject to revocation of the community land status associated with the latter site.<sup>47</sup>

143. In August 2008 the LMC reached an agreement with the Woodville JV in relation to various land transactions (subject to Cabinet approval) including the acquisition of 4.7 hectares of the Sheridan site. On 15 December 2008, approval was given by Cabinet for the LMC to acquire the Sheridan land at a purchase price of \$15.8m exclusive of GST; and subject to the revocation of the community land status over the St Clair land, for the LMC to swap the Sheridan land with the council for 4.7 hectares of the St Clair site.<sup>48</sup>
144. At a confidential council meeting on 11 August 2008, the council's Manager Planning and Development presented a report with appendices conveying the interest in proceeding with the land swap with the LMC. The report updated the council on communications with the LMC, and advised that:

The involvement of the LMC in a possible land swap allows for broader Council and State government objectives around keeping Brocas Avenue closed, enhanced St Clair Oval facilities, TOD, housing choice and affordability, relocation of Trident Plastics and rezoning of this site and the overall revitalisation of the Woodville Road Precinct to be achieved.

The basis for investigating the land swap concept as endorsed by Council has not changed as a consequence of the LMC involvement.<sup>49</sup>

145. The report further states that:

It is not known when Cabinet may consider the LMC's involvement however there is a sense or [sic] urgency within the State Government to quickly proceed on this matter as it provides the opportunity to establish a TOD under the governments [sic] recently announced public transport plan and State Planning Reforms. As potentially the first TOD under the new transport and planning regime the development of the site could be a shining example to the community of the merit of this type of development.<sup>50</sup>

<sup>45</sup> City of Charles Sturt, Report to council from Manager Planning and Development, Information Report - St Clair Oval Land Swap, 11 August 2008, Item 13.4, p3.

<sup>46</sup> City of Charles Sturt, Report to council from Manager Planning and Development, Information Report - St Clair Oval Land Swap, 11 August 2008, Item 13.4, p3.

<sup>47</sup> City of Charles Sturt, Report to council from Manager Planning and Development, Information Report - St Clair Oval Land Swap, 11 August 2008, Item 13.4, Appendix C, p9.

<sup>48</sup> Minutes forming Enclosure to the Treasurer from the Minister for Infrastructure, Re: Woodville Precinct - proposed land transactions by Land Management Corporation to facilitate a transit-oriented development, June 2009, p1.

<sup>49</sup> City of Charles Sturt, Report to council from Manager Planning and Development, Information Report - St Clair Oval Land Swap, 11 August 2008, Item 13.4, p4.

<sup>50</sup> City of Charles Sturt, Report to council from Manager Planning and Development, Information Report - St Clair Oval Land Swap, 11 August 2008, Item 13.4, p4.

146. At a confidential council meeting on 9 June 2009, the council resolved to endorse the land swap, subject to the revocation. The council authorised the mayor and the CEO to sign and affix the common seal to numerous agreements to facilitate the land swap. The council considered a prudential report (**the prudential report**), as well as a review of the prudential report by the council's internal auditor, Deloitte Touche Tohmatsu (**the Deloitte review**). The council also endorsed a proposed Communications and Engagement Plan – St Clair Community Land Revocation.<sup>51</sup>

### **Revocation of the community land classification of the St Clair land**

147. In order to achieve the land swap, the council was required to revoke the community status of part of the St Clair site. Section 194(2) of the Local Government Act provided for this process as follows:

- (2) Before a council revokes the classification of land as community land –
  - (a) the council must prepare a report on the proposal containing –
    - (i) a summary of the reasons for the proposal; and
    - (ii) a statement of any dedication, reservation or trust to which the land is subject; and
    - (iii) a statement of whether revocation of the classification is proposed with a view to sale or disposal of the land and, if so, details of any Government assistance given to acquire the land and a statement of how the council proposes to use the proceeds; and
    - (iv) an assessment of how the implementation of the proposal would affect the area and the local community; and
    - (v) if the council is not the owner of the land - a statement of any requirements made by the owner of the land as a condition of approving the proposed revocation of the classification; and
  - (b) the council must follow the relevant steps set out in its public consultation policy.<sup>52</sup>

148. Section 194(3) provides that a council must submit the revocation proposal to the Minister with a report on all submissions made as part of the public consultation process. If the Minister approves the proposal, the council may then make a resolution revoking the classification of the land.
149. The council's obligations under section 194 of the Local Government Act are to prepare and submit to the Minister a report covering the matters listed in section 194(2)(a), and to follow the relevant steps set out in its public consultation policy (section 194(2)(b)).
150. The council therefore was required to conduct a public consultation process regarding the revocation. The consultation process commenced on 14 August 2009. The formal submission period went for 28 working days from Friday 14 August 2009 to Wednesday 23 September 2009 (**the consultation period**). The feedback from the community was reported in the Consultation Report - St Clair Community Land Revocation (**the consultation report**). This report was received by the council at its meeting on 26 October 2009.<sup>53</sup>

<sup>51</sup> City of Charles Sturt, Council Minutes, 9 June 2009, Item 13.6, p28.

<sup>52</sup> Section 194(2)(a) was amended by section 27 of the *Local Government (Accountability Framework) Amendment Act 2009* (No 81 of 2009), and came into operation on the 8 April 2010. This amendment requires a council's report to be 'made publicly available'.

<sup>53</sup> City of Charles Sturt, Council Minutes, 26 October 2009, Item 6.117, p5.

151. On 9 November 2009, the council considered the consultation report and resolved to proceed with the next stage of the revocation process. A proposal was submitted to the Minister in accordance with section 194(3) of the Local Government Act.<sup>54</sup> The Minister later purported to approve the proposed revocation; and on 23 November 2009 the council purported to resolve to revoke the community status of part of the St Clair site.<sup>55</sup>
152. Following a Supreme Court challenge<sup>56</sup> by members of the community, the Minister for State/Local Government Relations consented to an order that her approval of the proposed revocation be declared null and void, and that the council's proposal should be considered afresh. This rendered the council's decision on 23 November 2009 a nullity.
153. On 10 December 2009 the Minister for Southern Suburbs approved the revocation proposal as a delegate of the Minister for State/Local Government Relations. On 14 December 2009 the council decided again to revoke the community status of the land.<sup>57</sup>

## TODs

154. Apart from achieving integrated development within the precinct, one of the council's key motivations for the revocation and land swap was to facilitate the potential establishment of a TOD at the Woodville Railway Station, which would contribute to the revitalisation of Woodville Road.<sup>58</sup> A TOD comprises mixed-use development (residential, commercial and retail), normally at a higher density, that is integrated with public transport.<sup>59</sup>
155. Both the state government and the council had been investigating the possibilities and benefits of TODs for some time prior to the possibility of a land swap being raised.
156. The idea of implementing TODs was steadily developed from the planning that had been undertaken by the council at least since 2004. In a letter to the Minister for Infrastructure dated 3 December 2004, I understand that the then CEO of the council wrote about the outcomes in developing the precinct:

These outcomes might include:

- transport oriented mixed use development based around the possible light rail upgrade project ...<sup>60</sup>

## *QED Report*

157. In April 2005 the council and the LMC initiated investigations into and consultation on the planning directions for the precinct. QED Pty Ltd (**QED**) was appointed as a consultant to undertake the project, which included investigating opportunities and constraints, and community consultation on future planning directions for the precinct. TODs were mentioned in the consultant brief, as specific expertise was required for the project. Two stages of community consultation were reportedly undertaken. In stage 1 the community contributed towards a vision and a set of nine urban design

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<sup>54</sup> City of Charles Sturt, Council Minutes, 9 November 2009, Item 6.121, p4.

<sup>55</sup> City of Charles Sturt, Council Minutes, 23 November 2009, Item 6.125, p3.

<sup>56</sup> *Alexander v Ors v The Minister for State/Local Government Relations* (SCCIV-09-1784).

<sup>57</sup> City of Charles Sturt, Council Minutes, 14 December 2009, Item 6.131, p3.

<sup>58</sup> City of Charles Sturt, Council Minutes, 9 June 2009, Item 13.6, p29.

<sup>59</sup> City of Charles Sturt, Report to council from Manager Planning and Development, St Clair Reserve Community Land Revocation Consultation, 9 November 2009, Item 6.121, p7.

<sup>60</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p23.

principles for the precinct. TODs were discussed with the community during stage 1 of the consultation at an evening workshop held on 15 June 2005.

158. The nine urban design principles resulting from the consultation were:

- Principle 1 - Establish 'green' corridors, usable open space and vistas through the precinct.
- Principle 2 - Create sustainable, quality communities with housing choice and places for people.
- Principle 3 - Develop walking and cycling networks and improve connections to adjacent communities.
- Principle 4 - Build density and diversity around inter-connected activity centres, public transport and open space.
- Principle 5 - Improve access and safety and discourage through traffic.
- Principle 6 - Create a community that builds on local identity and is outward looking, welcoming and visually accessible.
- Principle 7 - Respond appropriately to adjacent urban form (land use, character and structure).
- Principle 8 - Reinforce and connect with the existing District Centre and create a revitalised focus for economic and community activity.
- Principle 9 - Manage the impacts of adjacent land and transport.<sup>61</sup>

159. In stage 2 the community reportedly provided feedback on these principles.<sup>62</sup> The final results were released on 12 January 2006 in the document Long Term Planning for the Cheltenham Woodville Precinct, Consultation Report - Stage 2.<sup>63</sup> QED's findings identified the potential of the Cheltenham Woodville precinct to increase density around an activity centre, public transport node and public open space; as well as offering additional housing choice and creating a revitalised focus for economic and community activity.<sup>64</sup>

#### *LMC broad concept plans*

160. On behalf of the state government in July 2006, the LMC undertook a consultation process about the future use of the Cheltenham Park Racecourse site. The LMC prepared three broad concept plans. All three concept plans refer to a 'possible new railway station with opportunities for some local shops and higher density housing'.<sup>65</sup>

#### *The council's Strategic Planning Framework*

161. In April 2007, the council commenced an extensive review of its strategic planning framework (as required under section 122 of the Local Government Act) and embarked on the preparation of a community plan, which provided a 20-year vision for the area. This became the Community Plan - Shaping the Western Suburbs 2027, which was approved for public notification by the council on 10 December 2007.<sup>66</sup> The community plan was reportedly developed in conjunction with the community. It included 'higher density housing serviced by well used transport hubs.'<sup>67</sup>

<sup>61</sup> Sheridan Site PAR, 8 June 2006, p92.

<sup>62</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p7.

<sup>63</sup> Long Term Planning for the Cheltenham Woodville Precinct: Consultation Report - Stage 2, QED Pty Ltd, 12 January 2006.

<sup>64</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p7.

<sup>65</sup> City of Charles Sturt, Report to City Policy & Services Committee from Acting Manager, Planning and Development, Cheltenham Racecourse - Community Consultation - Broad Concept Plans, 9 October 2006, p9.

<sup>66</sup> City of Charles Sturt, Community Plan - Shaping the Western Suburbs 2027.

<sup>67</sup> City of Charles Sturt, Community Plan - Shaping the Western Suburbs 2027, p21.

### GHD Report

162. TODS were also specified in the Draft Consultant Brief for the Cheltenham Park Racecourse Environs Master Plan and Policy Framework, dated July 2007. GHD Pty Ltd (**GHD**) was appointed to prepare the master plan. The brief included *inter alia* the requirement to assess and examine opportunities to establish and showcase TOD development opportunities. GHD prepared two development scenarios for the future development of the Cheltenham Park Racecourse site and its environs - Concept Plan 1 and Concept Plan 2.<sup>68</sup> Concept Plan 2 was the preferred option of the council.<sup>69</sup> It proposed *inter alia* a TOD at the corner of Cheltenham Parade and Woodville Road along the rail line.

### SA government policy objectives and the 30 year plan

163. A central platform to the state government's planning reforms has been to accommodate Adelaide's future growth within transport corridors.
164. The South Australia Strategic Plan was launched by the state government in March 2004. The plan articulated six key objectives intended to guide the future development of the state. Objective 1 stated: 'Growing prosperity. Increasing South Australia's population to two million people by 2050'.<sup>70</sup>
165. In December 2007 the state government released the Planning Strategy for Metropolitan Adelaide which aimed *inter alia* to:
- ...
  - improve the transit focus and mix of uses within district activity centres and encourage increased housing densities in the surrounding area
  - improve transit focus of neighbourhoods and encourage growth and redevelopment in appropriate areas
  - maximise existing services and facilities by creating transit focused activity centres surrounded by increased housing densities
  - ...<sup>71</sup>

### State Planning and Development Review

166. On 19 June 2007, the state government announced a review of the planning and development system, the State Planning and Development Review. On 27 March 2008 the Report of the Planning and Development Review Steering Committee (compiled over the previous eight months) was presented to the Minister for Urban Development and Planning for consideration by Cabinet. The final report was released on 10 June 2008 (**the PDR Report**). Key recommendations of the PDR Report included:
- partnership between local and state government
  - the need for increased density of housing to cater for population growth
  - transport corridors with potential TODs located along those corridors

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<sup>68</sup> City of Charles Sturt, City Development Committee Report, 5 November 2007, Item 3.41, Appendix A, p11.

<sup>69</sup> City of Charles Sturt, Report to council from Manager Planning and Development, 28 April 2008, Cheltenham Racecourse and Environs Future Development, Item 13.3.

<sup>70</sup> <http://www.saplan.org.au/t122-target-fact-sheet>

<sup>71</sup> Planning Strategy for Metropolitan Adelaide, December 2007, Legend – Figure 1.

- joint teams from Planning SA; the Department of Transport, Energy and Infrastructure; the LMC; relevant local government authorities; and key state government agencies to identify priority sites such as potential TODs
  - as a matter of urgency the state government should implement the development of TODs to accommodate growth
  - the LMC becoming the lead project management and implementation agency for TODs.<sup>72</sup>
167. Specifically, the PDR Report stated in its Executive Summary that urgent reforms were needed; and emphasised the need for a new plan to ensure managed housing and employment growth, and transportation and infrastructure.<sup>73</sup> The report proposed changes to the planning system, from strategic planning through to development assessment; and provided support for regional planning, TODs and higher density development along transport corridors. The PDR Report stated:
- A new Regional Plan for Adelaide**
- A new Regional Plan for Adelaide is essential to ensuring the State meets its population target and other strategic objectives. It must articulate where housing and employment growth should occur; where land should be conserved; and how transport and infrastructure will support population growth and economic expansion. This Report sets a new direction for Adelaide, allowing it to grow by 250,000 people,<sup>74</sup> 130,000 jobs and 11 Transit Oriented Developments.
168. Recommendation 13 of the PDR Report stated:

**Recommendation 13: Transit Oriented Developments**

- a) As a matter of urgency, State Government should implement the development of Transit Oriented Developments (TODs) to accommodate growth. These will become a central feature of a Regional Plan for Adelaide. TODs are generally a mix of high-density, high-quality housing located with employment, mass transit connections, services and recreational activities.
- b) There should be new implementation arrangements to achieve the rollout of TODs including:
  - Planning SA being given the lead responsibility for identifying TODs, programming their roll-out, coordinating and preparing structure plans, coordinating other agencies in implementation tasks, and working jointly with local government on broad objectives and land use priorities;
  - The Land Management Corporation becoming the lead project management and implementation agency for TODs and taking responsibility for land assembly, the preparation of structure plans particularly for government land holdings and where relevant, the disposal of government sites (the Corporation should not have a development role in TODs);
  - A business model should be developed by the Department of Treasury and Finance and the Land Management Corporation to capture the value created by increased densities and changed uses on government land (this is not a development contribution), with the proceeds used for improvements to existing infrastructure; and
  - The Government should consider the creation of urban design panels to work with State Government agencies, local government and private developers (where relevant) to ensure best practice design outcomes for TOD sites.

<sup>72</sup> Report to the Minister for Urban Development and Planning and Development Review Steering Committee for Consideration by Cabinet, 27 March 2008, pxxvi.

<sup>73</sup> Report to the Minister for Urban Development and Planning and Development Review Steering Committee for Consideration by Cabinet, 27 March 2008, pi.

<sup>74</sup> Report to the Minister for Urban Development and Planning and Development Review Steering Committee for Consideration by Cabinet - Executive Summary and Recommendations, 27 March 2008, pix.

- c) Structure plans should be used as the main tool for achieving TODs. They should set outcomes and provide incentives for best practice water and energy efficiency in TODs, having regard to housing affordability.
- d) TODs should be considered State significant development and the rezoning and development assessment process should be the responsibility of the Minister for Urban Development and Planning. TODs should also be the subject of structure plans to allow major issues to be brought forward for resolution and subsequent development applications to be assessed as complying development.<sup>75</sup>

169. The PDR Report featured a proposed TOD at Cheltenham.<sup>76</sup>

170. The PDR Report highlighted the role of the LMC and TODs:

**Roles and responsibilities – Land Management Corporation and Planning SA**  
State Government project teams should be formed to start work on the corridors and TODs as a matter of urgency.

TOD teams should be made up of:

- Local government strategic planners;
  - The Land Management Corporation;
  - Specialist design experts;
  - Planning SA; and
  - State Government experts, particularly from transport and infrastructure agencies.
- ...

The Land Management Corporation should be the key implementation and project management arm of TODs.<sup>77</sup>

171. In response to the PDR Report, the Deputy Premier initiated a planning reform agenda for South Australia. On 10 June 2008 the Deputy Premier issued a Media Release in response to the report, which announced that:

... the planning reforms will encourage Transit Oriented Developments, or TODS: higher density and well designed neighbourhoods to be located along Adelaide's enhanced train, tram and bus corridors.<sup>78</sup>

172. The Premier also announced initiatives to transform rail and tram networks in Adelaide in the 2008-2009 state budget. The Premier said:

In this year's State Budget we've announced the biggest single investment ever by a State Government in Adelaide's public transport system. It delivers initiatives to transform Adelaide's network into a vibrant, state-of-the-art system providing faster, cleaner, more frequent and efficient services for train, tram and bus commuters.<sup>79</sup>

173. A key part of the process of the planning reforms agenda was preparing an update to the Planning Strategy, to be called the 30 Year Plan for Greater Adelaide.<sup>80</sup>

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<sup>75</sup> Report to the Minister for Urban Development and Planning and Development Review Steering Committee for Consideration by Cabinet - Executive Summary and Recommendations, 27 March 2008, pxxvi.

<sup>76</sup> Final Report of the Planning and Development Review Steering Committee, 27 March 2008, p75, Map 6.2.

<sup>77</sup> Final Report of the Planning and Development Review Steering Committee, 27 March 2008, p77.

<sup>78</sup> Government of South Australia, Media Release, Action Now to Create Australia's Best Planning System, 10 June 2008.

<sup>79</sup> New Connections, Department for Transport, Energy and Infrastructure, Special Budget Edition.

<sup>80</sup> <http://www.dplg.sa.gov.au/plan4adelaide/html/home.cfm>

### **30 year Plan for Greater Adelaide**

174. The first step in the preparation of the 30 Year Plan for Greater Adelaide was released by the state government in November 2008 in the document Directions for Creating a New Plan for Greater Adelaide. The document stated that transport corridors would be the organising principle of any new plan for Greater Adelaide and that these corridors will include TODs. The nine-month consultative process to develop the new 30-year Plan for Greater Adelaide then commenced with a series of workshops between state and local government.
175. On 6 July 2009 the draft plan for consultation, Planning the Adelaide We All Want - Progressing the 30 year Plan for Greater Adelaide, was released for consultation. The draft plan outlined the development of TODs next to mass transit lines. One of the targets of the policy was to:
- Ensure transit corridors contain a network of cycle ways, walkways and greenways to provide cooling and to create liveable and attractive locations for a diverse population.<sup>81</sup>
176. One target included delivery of '13 high-order transit-oriented developments'<sup>82</sup> and to 'prepare Precinct Requirements for transit-oriented developments'.<sup>83</sup> Further, 'Cheltenham/Woodville' was listed as a 'priority development', along with six other developments.<sup>84</sup>
177. The final 30 Year Plan for Greater Adelaide was released on 17 February 2010. It highlighted the importance of TOD sites, referring to transit corridors as 'the critical land-use arrangement to achieve a more compact, efficient and liveable region' and as 'supporting the creation of a new network of open space and greenways'.<sup>85</sup> The Plan designates Woodville Railway Station as a future transit oriented development site, one of 14 significant TODs in the metropolitan area.<sup>86</sup>
178. The land swap appears to have been consistent with facilitating the state government's planning strategy and council's strategic planning framework. I note the provisions of section 8 of the Local Government Act which require councils to consider and work with state government in its planning objectives.
179. The land swap presented an opportunity for a TOD to be developed adjacent to the Woodville Railway Station, and for the state government to deliver on its new policy direction.

<sup>81</sup> Planning the Adelaide We All Want - Progressing the 30-Year Plan for Greater Adelaide, 6 July 2009, p76.

<sup>82</sup> Planning the Adelaide We All Want - Progressing the 30-Year Plan for Greater Adelaide, 6 July 2009, p80.

<sup>83</sup> Planning the Adelaide We All Want - Progressing the 30-Year Plan for Greater Adelaide, 6 July 2009, p80.

<sup>84</sup> Planning the Adelaide We All Want - Progressing the 30-Year Plan for Greater Adelaide, 6 July 2009, p80. The final 30 Year Plan for Greater Adelaide was released on 17 February 2010; and designated Woodville Railway Station as a future TOD site.

<sup>85</sup> 30 Year Plan for Greater Adelaide, 17 February 2010, p71.

<sup>86</sup> 30 Year Plan for Greater Adelaide, 17 February 2010, p78.

## 2.3 PREVIOUS INVESTIGATIONS ABOUT THE REVOCATION AND LANDSWAP

180. During and after the consultation period I received four complaints under the Ombudsman Act from members of the public.

### Complaint 1

181. In this complaint, the first allegation was that the council had failed to comply with its public consultation policy. Principle 3.1b of the policy states:

- ensure information is easily understood, relevant, consistent and accessible to identified stakeholders within a reasonable timeframe

182. The complaint alleged in effect that the council had breached this principle in three ways:

1. The council had misleadingly described the proposal as ‘an equivalent land swap’ so that there was no net loss of community land. The complainant alleged that part of the Sheridan site was already required open space and that there would be a net loss of community land of 2.98 hectares as a result of the land swap. On the evidence before me, I concluded at the time that the council had not erred.
2. The brochure the council used for the consultation process was not objective. I concluded that the materials did not misrepresent what was proposed. Further, I was satisfied at the time that if a community member was left in any doubt, additional information was available from the council.
3. The consultation undertaken did not involve a sufficient number of people, as it only canvassed residents within 500 metres of the St Clair site. I noted and accepted the council’s response to this allegation. I considered that it was reasonable to view the decision to send letters and information to land owners residing within 500 metres, in the context of the overall consultation process. I concluded that the council had complied with its public consultation policy and its Communications and Engagement Plan, and for that reason had not fallen into error.

183. The second allegation was that the council had failed to comply with the obligations under section 194 of the Local Government Act. I examined the report which the council had prepared to meet the requirements of the section (a copy of which could be found in the 9 November 2009 report to the council). Based on this, I concluded that the council had complied with its obligations under section 194.

184. The third allegation concerned councillors’ conflicts of interest in considering the revocation. The complainant alleged that some of the councillors who were members of the ALP had a conflict of interest under the Local Government Act because the ALP position on the land swap had been determined by the state government. The complainant alleged that the decision by the council to defeat a motion calling for a public meeting on 12 October 2009, for example, (despite receiving a petition from 260 people stating that the consultation process was inadequate and the community needed to be better informed) was influenced by their affiliation to the ALP.

- 185. I indicated that in the circumstances, membership of a political party was not in itself an ‘interest’ which required declaration under the conflict of interest provisions of the Local Government Act. I considered that I had no evidence of a voting pattern that was inconsistent with the normal range of views likely to be expressed by councillors on an issue which is of significant interest to the future of their community, and which had generated substantial community interest. The complainant also alleged that some councillors had a conflict of interest in dealing with the St Clair land swap because they worked as members of staff for ALP Ministers and/or ‘have appeared on Labour [sic] party promotional material’. At the time of the complaint, I had no evidence suggesting an administrative error on the part of the council in this regard and decided not to investigate this issue further.
- 186. The fourth allegation concerned section 194 and the requirement that a report contain ‘a statement of any dedication, reservation or trust to which the land is subject’. I considered that the relevant report did so, and determined that there was no administrative error. The report also noted that the classification of part of the St Clair site could not be revoked unless and until the scheme was further varied to exclude the St Clair land from the scheme.<sup>87</sup> This required confirmation by the Governor and the council, which was additional to the Minister’s approval under section 194(1) of the Local Government Act. I noted that both these requirements must be met before revocation could be effected by the council.

## Complaint 2

- 187. On 29 October 2009, I received a complaint alleging that there was a lack of explanation and appropriate public consultation in relation to the revocation. I examined the report which the council prepared to meet the requirements of section 194 of the Local Government Act,<sup>88</sup> and determined that on the evidence available, the council had taken reasonable steps to provide information to the community about the revocation and the land swap. I found that the council had complied with its public consultation policy.
- 188. The complaint also raised concerns that the council had decided not to hold a public meeting regarding the land swap proposal.
- 189. I noted that under section 93 of the Local Government Act there was no legal obligation to hold a public meeting; and in this case, it was reasonably open to the council to proceed as it did. I considered that there was no administrative error in this regard.

## Complaint 3

- 190. On 29 October 2009, I received a complaint alleging a lack of proper explanation and appropriate public consultation in relation to the revocation. My conclusion regarding this complaint was the same as in complaint 2 above. I considered that the council had complied with the public consultation policy.

<sup>87</sup> City of Charles Sturt, Report prepared in accordance with the requirements of section 194 of the *Local Government Act 1999* – Revocation of land as community land, Appendix Q to report to council from Manager Planning and Development, Cheltenham Racecourse Site and St Clair Reserve and Sheridan Land Exchange, 9 June 2009, Item 13.6, p2.

<sup>88</sup> Ibid.

191. The complaint also alleged that inappropriate views were expressed by the mayor in the media and by a councillor. The complainant alleged that the mayor had publicly stated that ‘this land swap and development will go ahead’, despite the fact that the final vote on the revocation had not yet taken place. The complainant claimed that in making such a public statement the mayor would not be bringing an open mind to the council meeting to vote on the issue. I noted that previously the council had made a decision in principle to support the land swap, and that the mayor could well have been intending to reflect that earlier council decision in his public statements, and thus there was no administrative error in his actions.
192. The complaint alleged that the councillor ‘thwarted’ ... ‘the efforts of some councillors to allow for more consultation’, and questioned the councillor’s motives considering that the councillor represented a ward far away from the St Clair site. I determined that I had no evidence of administrative error in the actions of the councillor.

#### Complaint 4

193. On 13 November 2009, I received a complaint alleging that the council:
  1. circulated misleading information in the council brochure in relation to the revocation. The complaint alleged that members of the community may have mistaken it for a newsletter rather than document calling for consultation. The response by the council to this allegation was:

The information provided to the community was presented in a way that was considered to encourage people to read it (by using colours and strong visuals) and explain a complex proposal in as straightforward a manner as possible...<sup>89</sup>

I accepted this explanation and determined that on my reading of the materials, the proposal was not misrepresented in the manner alleged.
  2. failed to provide sufficient information, for example in relation to land values. I examined the public consultation policy and the report prepared by the council.<sup>90</sup> The report contained a detailed response to criticisms such as this. I determined that on the evidence before me, the council had taken reasonable steps to provide information to the community about the land swap.
  3. failed to consult sufficiently widely. The complainant alleged that the consultation undertaken did not involve a sufficient number of people, as it only canvassed residents within 500 metres of the St Clair reserve. I noted and accepted the council’s response to this allegation, which stated:

The consultation approach not only meets but exceeds the requirements of the Local Government Act 1999 and the Council’s consultation policy...<sup>91</sup>

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<sup>89</sup> City of Charles Sturt, Report to council from Manager Planning and Development, St Clair Reserve Community Land Classification Revocation Consultation, 9 November 2009, Item 6.121, p123.

<sup>90</sup> City of Charles Sturt, Report to council from Manager Planning and Development, St Clair Reserve Community Land Classification Revocation Consultation, 9 November 2009, Item 6.121, p25.

<sup>91</sup> City of Charles Sturt, Report to council from Manager Planning and Development, St Clair Reserve Community Land Classification Revocation Consultation, 9 November 2009, Item 6.121, p39.

194. I also considered the council's overall consultation process and the information available, and I determined that it was reasonable to view the decision to send letters and information to land owners residing within 500 metres, in the context of the overall consultation process.
195. I concluded that the council had complied with its public consultation policy, and its obligations under section 194 of the Local Government Act.

### **Outcome**

196. I released my final reports on all four complaints on 16 December 2009.
197. At a council meeting on 24 May 2010, the CEO reported to the council on the results of my investigations. My final reports were published on the council's website as appendices to the CEO's report.

## 2.4 COUNCILLORS' MEMBERSHIP OF THE ALP

198. In order to consider the manner of the discharge by the council members of their responsibilities in respect of the administrative act under the Local Government Act and the code of conduct, my investigation took evidence to assist in understanding in particular the impact (if any) on some council members of their membership of the ALP during the relevant period. My investigation also took evidence to understand the involvement of the Member for Croydon with these council members in the exercise of their responsibilities as elected members.
199. I set out below some of the evidence given to my investigation by the council members and the Member for Croydon. This evidence provides a context and informs the issues arising in my investigation concerning the councillors' decision-making in relation to the revocation and land swap, as set out in the 'Further description of the administrative act' (see Appendix B).

### Background

200. The City of Charles Sturt exists by virtue of two amalgamations, the first in August 1993 between the Town of Hindmarsh and the City of Woodville (becoming the new City of Hindmarsh/Woodville), and then in January 1997 between the City of Hindmarsh/Woodville and the City of Henley and Grange (becoming the new City of Charles Sturt).
201. Historically, Labor has generally held the seats at the state and federal level in the council area. During the relevant period, the area of the council covered all or parts of the state electoral districts of Adelaide, Cheltenham, Colton, Croydon, Enfield, Lee and West Torrens; and parts of the federal districts of Adelaide, Hindmarsh and Port Adelaide.

### Councillors' membership of the ALP

202. During the revocation and land swap process between 2008 and 2009, 12 out of 17 of the council's elected members were members of the ALP.<sup>92</sup> I name these council members as Councillors A, B, C, D, E, F, G, H, J, K, M and P. Councillor F joined the ALP in June 2008; and the membership of Councillor A lapsed in 2010 (Councillor A had joined the party six months prior to becoming a councillor in 2006).<sup>93</sup>
203. In their evidence to my investigation, some ALP councillors as well as the Member for Croydon commented that they belong to different factions within the ALP. The Member for Croydon said:
  - A. in our conversation today there is an assumption that the Australian Labor Party operates in a monolithic fashion. Of course, that's simply not true. In the St Clair vote there were Labor councillors for and against and there were non-Labor councillors for and against. The Labor Party has several factions. [Councillor K] and I are in completely different and competing factions and as I've said earlier, [Councillor H] and the other Labor councillors were barely on speaking terms.<sup>94</sup>

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<sup>92</sup> I have noted previously that some councillors objected to my office's use of 'ALP councillor'. One councillor commented that they are 'councillors who happen to be ALP members, because no-one's actually elected as a Labor member. ...There's no overt party pre-selection.' (Cr G, p21, 21). I agree with the councillor's comments. I have used the term 'ALP councillor' in my report simply for ease of reference.

<sup>93</sup> Cr A (T1) p27.

<sup>94</sup> M for C, p32, 20.

204. My investigation was told that the apparent rift between Councillor H and the other councillors may be attributable to Councillor H's apparent alignment with a former ALP federal member for Port Adelaide who ran a campaign opposing the sale of Cheltenham Park Racecourse and spoke out against the revocation and land swap. Councillor H consistently opposed the revocation and land swap; and expressed concerns publicly on several occasions about conflict of interest and code of conduct issues in relation to the other ALP councillors and their support of the revocation and land swap.
205. Some of the ALP councillors appeared to be active in their sub-branches, while others were not. At least two had held positions as delegates at the state level.
206. During the relevant period, Councillor J and Councillor P were employed in the Enfield electorate office. Councillor P also obtained occasional relief work in other ALP electorate offices.
207. Councillor C also worked in ALP electorate offices. However, from 2008, Councillor C was employed within the Attorney General's Department and seconded as a ministerial liaison officer for the Minister for Veteran's Affairs who was the Member for Croydon at that time.
208. Councillor K, Councillor G and Councillor D were also employed in state government departments during the relevant period. As electorate office staff, Councillor J and Councillor P were nominally employed in a state government department.
209. My investigation was told that two councillors had recruited ALP members for the Croydon electorate. The Member for Croydon is the godfather of the child of Councillor C; and Councillor G was claimed in the press by the Member for Croydon as 'a friend of mine for many years'.<sup>95</sup>

### **Assistance given by ALP councillors to state and federal ALP candidates and MPs**

210. Most of the ALP councillors told my investigation of the varying degrees of assistance that they had provided and continue to provide state and federal Members of Parliament (**MPs**) or candidates by:
- putting up corflutes at election time
  - volunteering on election day, handing out how-to-vote cards, and scrutineering
  - distributing flyers and letterboxing
  - recruiting members.

### **Assistance provided to ALP councillors by MPs and their electorate offices**

211. In varying degrees, most of the ALP councillors told my investigation that during the relevant period and beforehand, they sought assistance from, or assistance was offered and provided to them by local ALP MPs and/or their electorate office staff. This included:

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<sup>95</sup> ABC Radio 891, 11 November 2009.

- providing advice about getting onto council
- providing advice regarding campaigning for council
- providing support for their council candidature
- arranging street corner meetings for the councillors' ward constituents
- guidance in letter drafting, layout and proof reading their council documentation
- providing printing facilities for production of their council letters and flyers
- providing volunteers to assist in enveloping, directly distributing letters to their ward residents, or letterboxing flyers.

### Being a councillor and a member of the ALP

212. The evidence of some of the ALP councillors revealed that being a councillor and a member of the ALP was sometimes inextricably linked. Elected members of a council under the Local Government Act may of course belong to any organisation or political party. Difficulties only arise if their duties and responsibilities in relation to both are in conflict. In my view, there were occasions during the relevant period when the boundaries between some councillors' membership of the ALP and their responsibilities as councillors were rather blurred. Notable occasions were:

- a meeting at a barbecue at Parliament House arranged by the Member for Croydon after the 2006 council election, at which it was discussed who would be presiding members of council committees, members of the Development Assessment Panel (**the DAP**), and the council's four deputy mayors
- the Member for Croydon's and the Croydon electorate office's involvement in producing letters for community street corner meetings for Councillors P, A, and G
- the Member for Croydon's and the staff of the Croydon electorate office's assistance in drafting, producing and distributing letters for Councillors K, P, A and G in support of the revocation and land swap towards and after the conclusion of the revocation process
- certain email communications by Councillor B and Councillor G with the Member for Croydon

I consider these occasions in different parts of this report.

213. Some of the ALP councillors also gave evidence about occasional gatherings at councillors' houses and other venues for what one ALP councillor termed 'like-minded' ALP councillors,<sup>96</sup> where they would discuss council issues. One such occasion was a gathering at the house of Councillor M on 29 November 2009, to which the Member for Croydon was invited. I refer to this later.

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<sup>96</sup> Cr M, pp131-132.

214. Councillor D told my investigation that while some of the councillors were ALP members, they were also friends, partly because of the amount of time that they had spent with each other as councillors. Councillor D said:

over time we have come to become friends. We're keen to meet because of our membership to [sic] the political parties, but over time to remain friends because of our association on the council.

- A. It's a long-winded answer, but the alliance exists as a friendship alliance, not necessarily a political alliance.
- Q. It's quite difficult perhaps for a member of the public to see whether it's all about being in the ALP or whether it's all about being a councillor.
- A. And you're right, and it's actually quite difficult to separate, and tomorrow afternoon I'm going to meet a large number of them at the football.
- A. And, you know, the public are going to sit there and say, "Well, here we go again, Councillor [D] ... "Having afternoon tea with Michael Atkinson, they must be conspiring, they couldn't possibly be talking about the weather."<sup>97</sup>

### The Member for Croydon

215. The Member for Croydon has held the seat of Croydon since 1989. During the relevant period, the Member for Croydon was Attorney General, Minister for Justice, Minister for Veteran's Affairs and Minister for Multicultural Affairs. The evidence in my investigation revealed that the Member for Croydon takes an active interest in local government within his electorate, which falls partly within the City of Charles Sturt area. He has apparently taken such interest beyond the period under consideration in my investigation.

216. The Member for Croydon's comments in Hansard shows his active role in the Hindmarsh Council back in 1995:

Where I used to live in the old Town of Hindmarsh we had a small council with active elected members and an ALP sub-branch that had been supporting its candidates for local government since 1891. We in the Spence sub-branch had done such a good job that most of our opponents were from the ALP, too.

At one recent [Hindmarsh Council] election we canvassed the supplementary roll assiduously and had them vote in advance. Candidates door knocked every dwelling. We direct mailed the House of Assembly roll and the supplementary roll. We drove people to the Town Hall to vote in advance. Our candidates were on talkback radio two nights a week and, on election eve and election morning, we put door knock cards on the front doors, reminding the inhabitants that that day was their last chance to vote. What was the turnout? There was a 40 per cent turnout after that unprecedented effort.<sup>98</sup>

217. In his evidence, the Member for Croydon said that between one half and two thirds of the complaints that come to his electorate office are in relation to local government.

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<sup>97</sup> Cr D (T1) p 93, 42; Cr D (T1) p94, 1.

<sup>98</sup> House of Assembly, Wednesday 15 November 1995, p543.

218. The Member for Croydon was considered by many who gave evidence as a key figure within the community. A former council officer, Witness 2, told my investigation:

in the first few days that I was at Charles Sturt a number of people said to me 'Look, you need to understand how this place works'. So they talked about Atkinson and his role. He is the ALP people, he is the Labor people, and they give you the story: he is connected to this person, this person is connected to that. It is what everybody understands is the way it works and it has been like that for a long, long time.<sup>99</sup>

219. Some of the ALP councillors described the Member for Croydon as a 'mentor'. Several attributed their joining the ALP or their entering local government to the Member for Croydon. Councillor M told my investigation:

- A. I know he was interested from the start, that I know of it. You know, from 2003. I can't answer before that. And he obviously takes interest in his electorate - council electorate. That's the nature of politics.
- Q. So is it fair to say that he takes an active interest in council issues?
- A. I wouldn't say he takes an active interest in the day-to-day business. But he'd certainly take an active interest in who is in council, you know, who is elected to council.<sup>100</sup>

220. Councillor M said that there were meetings in the Member for Croydon's office before the 2003 elections to discuss nominations for the council. My investigation noted that the minutes from the Croydon ALP sub-branch meeting dated 19 February 2003 recorded that an ALP councillor 'mentioned the impending Local Government elections, and stated that there was still a need to get more Labor candidates involved.'

221. When asked if there was an assumption that they would try to recruit ALP candidates as councillors, Councillor A told my investigation:

- A. Yeah, I'd have to say yes.
- Q. And do you have to get Michael Atkinson's approval?
- A. I don't think that really comes into it. I think - I think if the person was an ALP member - I don't know. It would be up to the other councillors to support the person more than anything else.
- Q. Do you think they'd fly it by Michael Atkinson?
- A. I have no doubt that they would.<sup>101</sup>

222. My investigation noted from email evidence that in preparation for the 2010 council elections, Councillor C and Councillor M suggested to a potential council candidate from the ALP that he should consult with the Member for Croydon before nominating for the council. When my investigation asked Councillor C why, the councillor replied:

- A. Well, it's what I did when I ran for council. I, you know, decided I wanted to run and went and had a chat to Mick to get his advice on it, and so I suggested that for [named person] too...<sup>102</sup>

223. The potential candidate also mentioned in his email that he had 'requested to meet with Jay W and Paul C to discuss [his] nomination'.<sup>103</sup> (I assume that Jay W is the Member for Cheltenham and Paul C is the Member for Colton.)

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<sup>99</sup> Witness 2, p36, 27.

<sup>100</sup> Cr M, p85, 13.

<sup>101</sup> Cr A (T1) p108, 36.

<sup>102</sup> Cr C (T2) p35, 26.

224. Two councillors gave evidence that the Member for Croydon's counsel was sought about their wish to seek the mayoralty in the 2010 elections. Councillor C, for example, said:

I would go to him to get his nod for mayor and, as in my case, he might tell you 'No, it's not a good idea, you'd lose'. So yeah, I'd go to him, but there's -- I guess as the recent elections just showed, an ALP member could get elected mayor without his support in the same way the current mayor got elected [in 2010] without his support. So there's no hard and fast rule about these things.<sup>104</sup>

225. The Member for Croydon essentially agreed with this in his evidence; and in relation to the other councillor who wished to seek the mayoralty (Councillor P), said that he 'just ignored [the councillor's] ambitions'.<sup>105</sup>
226. The Member for Croydon's role amongst the ALP councillors was also described to my investigation by one councillor as one of a 'broker' in the council:

There is a broker inside politics there and that was Michael Atkinson.<sup>106</sup>

227. The Member for Croydon rejected this suggestion in his evidence:
- A. I don't know what 'broker' means in this context because usually I would have had no familiarity with the Charles Sturt Council agenda from one year to the next. In fact, I have never attended a Charles Sturt Council meeting. I certainly can't recall ever attending a Charles Sturt Council meeting. Certainly I've been a mentor in that I've counselled them to be good representatives and to adopt a grass roots or close to the people approach and to conscientiously do their best for every constituent who approaches them but a 'broker', no.<sup>107</sup>
228. My investigation revealed that it was not uncommon for Councillor B to email the Member for Croydon about council matters. In my view, these emails suggested either a familiarity with the Member for Croydon or at least a desire for such.
229. For example, using councillor email address and signature, Councillor B forwarded an email sent from the CEO to the council members, to the Member for Croydon at the member's Croydon electorate office email address and his Attorney-General email address.<sup>108</sup> The CEO's email announced the departure of a council officer and praised this officer for his integrity, stating that his contribution to the council was 'impossible to measure'. In forwarding the email to the Member for Croydon, Councillor B wrote what was, in my view, a sarcastic remark about the officer's departure. When my investigation asked Councillor B the reasons for doing this, the councillor was 'not sure',<sup>109</sup> and later said, 'I think him and the MP's office at Croydon at times didn't see eye to eye.'<sup>110</sup>

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<sup>103</sup> Email from potential candidate to Cr C dated 30 June 2009, 2:22 PM (Exhibit Cr M #1).

<sup>104</sup> Cr C (T2) p32, 31.

<sup>105</sup> M for C, p11, 17.

<sup>106</sup> Cr D (T2) p15, 37.

<sup>107</sup> M for C, p10, 1.

<sup>108</sup> Email from Cr B to the Member for Croydon, 29 September 2007 (Cr B, Exhibit #1).

<sup>109</sup> Cr B, p14, 43.

<sup>110</sup> Cr B,p105,10.

230. Councillor B would also include the Member for Croydon in an email loop with the other ALP councillors, as well as other state and federal ALP MPs in the area about council matters. During the relevant period, these emails included updates on voting in the council elections, and updates on the progress of the revocation and land swap. When my investigation questioned Councillor B why these emails would be sent to the Member for Croydon and other MPs, the councillor responded that they were for the recipients' 'information'.<sup>111</sup> My investigation asked the Member for Croydon about Councillor B's email updating him on the outcome of the 2006 elections,<sup>112</sup> and the member replied:

Councillor [B] emails rather more information than anyone is able to absorb.<sup>113</sup>

231. It appeared to my investigation that Councillor B's emails to the Member for Croydon and other councillors and state and federal MPs were usually unsolicited.

### Meeting at Parliament House for ALP councillors after the 2006 elections

232. It was suggested to my investigation by two councillors who were not members of the ALP, Councillors L and O, that the ALP councillors would generally vote as 'a block', particularly when it came to voting for presiding memberships of council committees.
233. Towards the conclusion of my investigation's interviews, my investigation received evidence from Councillor A and Councillor M that after the 2006 elections in November 2006, the Member for Croydon held a celebratory barbecue at Parliament House for the ALP councillors and their families. Based on information submitted by Councillor B in response to my provisional report, I understand that the date of the meeting was Thursday 16 November 2006. Councillor A alleged that the majority of the ALP councillors attended the barbecue; and after, they gathered in what appeared to be the Kingston room of Old Parliament House to discuss who would be presiding members of the council's committees, members of the council's DAP, and the council's four deputy mayors.
234. Because of the timing of this allegation, my investigation did not test this evidence with all of the ALP councillors whom I was told attended the barbecue. Those whom my investigation did question, however, generally appeared to have difficulty in recalling who attended the event and what was discussed at the gathering.
235. Councillor A appeared to recall events quite clearly; and I am inclined to accept the truth of the councillor's version of events. To a lesser extent, Councillor M also appeared to recall the occasion. However, in responding to my provisional report, Councillor M did not recall specific details of the event, and disagreed with my provisional assessment that they recalled the occasion clearly.<sup>114</sup>

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<sup>111</sup> Cr B, p19, 24.

<sup>112</sup> Email from Cr B to Cr G, Cr K, Cr E, Cr P and Cr C and four other councillors from the previous 2003-2006 council whom I understand were members of the ALP, 9 November 2006. Cr B copied in the Member for Croydon at this Croydon electorate address and his Attorney General email address (M for C, Exhibit #4).

<sup>113</sup> M for C, p11, 25.

<sup>114</sup> Letter from legal representative for Cr M, 18 August 2011, p2.

236. Councillor A was a new member of the council, as was Councillor F. Although Councillor F had not formally joined the ALP at that stage, I understand that Councillor F was familiar with the Member for Croydon and sought his views about entering local government and joining the ALP.

237. Councillor F could not recall who was at the barbecue, nor what discussions took place – even though Councillor A said that they sat together in the room and jointly discussed their confusion about the purpose of the meeting.<sup>115</sup> Councillor D told my investigation that Councillor F ‘... had no idea what were the protocols, conventions’;<sup>116</sup> and that Councillor F had said in a telephone call with the councillor that there had been a barbecue at which committee chairmanships were discussed. Councillor D said:

In fact, [Councillor F] would not have known ... you know, at the end of the meeting no-one would have briefed [Councillor F] and said ‘... if anyone asks you, we didn't really have a meeting, this didn't occur, we shouldn't be having such meeting’ and it was possibly because of the complacency of the members by that time.<sup>117</sup>

238. Councillor B denied being at the barbecue at all, and reiterated that position in response to my provisional report. However, other councillors asserted otherwise. Councillor A said that Councillor B, along with Councillor M, were the ‘main leaders’ of discussions at the meeting.<sup>118</sup> Councillor M and Councillor C also suggested that Councillor B was at the barbecue.<sup>119</sup> When my investigation suggested to Councillor B that it appeared that the ALP councillors had met to decide about committee presiding memberships outside a formal council meeting, Councillor B commented: ‘I wouldn't be in that’.<sup>120</sup> In the event, I decided not to further investigate whether Councillor B was present, as in my view nothing turns on it.
239. Councillor G recalled being at the barbecue, but not going into a room to discuss committee positions with other councillors.
240. Councillor A told my investigation of a new councillor’s perspective about the discussions:

I had no idea. At the point of walking into that room, I had no idea what was going on. I was the new kid on the block, same as [Councillor F] was, and we were under the pretext of being invited to a congratulatory barbecue with Mick Atkinson. You know, it was - to me it was a social event to congratulate us all and to say, you know, it's great that we're all involved. And then we all got invited into this room, and at that point, [Councillor F] and I, who sat next to each other, for no particular reason, and started talking about what was going on, and realised that what was going on was that we were being earmarked to be on particular committees and it wasn't what we expected.<sup>121</sup>

<sup>115</sup> Cr A (T2) p46, 5.

<sup>116</sup> Cr D (T3) p21, 30.

<sup>117</sup> Cr D (T3) p31, 46.

<sup>118</sup> Cr A (T1), p107, 45.

<sup>119</sup> Cr M p33,35; Cr C(T1)p38,3.

<sup>120</sup> Cr B, 101, 1.

<sup>121</sup> Cr A (T1) p115, 11.

241. Councillor C told my investigation that council positions were discussed at the gathering, but they did not ‘caucus’:

we did get together; yes, we did have a chat about what wanted to do what, but I didn't leave thinking that we had pre-selected a group of people for something in a binding manner.<sup>122</sup>

242. Councillor M agreed that it was correct to assume that the gathering at the barbecue was to decide who was going to hold particular positions on the council. Councillor M said it was a ‘fairly ingrained kind of habit’ and ‘it's ... part of politics’.<sup>123</sup>

243. In his evidence, the Member for Croydon confirmed that several of the ALP councillors came to the barbecue at his invitation, stating that he held it because he ‘just wanted them to get to know one another’.<sup>124</sup> He stated that he did the cooking and washing up while the councillors ‘talked among themselves’.<sup>125</sup>

244. The Member for Croydon said he did not know if they had talked about the council’s presiding memberships, but said ‘it's quite possible they talked among themselves’.<sup>126</sup> He did not recall the councillors moving into the Kingston room or another room.<sup>127</sup>

245. Those ALP councillors who said discussions about council positions took place, varied in their evidence about the Member for Croydon’s involvement. Two said the Member for Croydon came in to the room at the end of the meeting. One said:

Q. When did he come in?  
A. At the end he said something like, ‘oh, I hope you've had a nice chat.’<sup>128</sup>

246. However, Councillor M told my investigation that they thought that the Member for Croydon was in sitting at the table<sup>129</sup> in the meeting and was ‘part of the discussion’.<sup>130</sup>

247. Councillor M agreed in evidence that the discussions were to effectively decide who would have which leadership positions on the new council:

Q. And the discussions that took place, we've been informed, were to effectively obtain a decision of council, ie, who was going to be presiding members of the committees, who was going to be on the committees, who was going to be deputy mayor; would you agree with that?  
A. Yeah, I would agree with that, yeah.<sup>131</sup>

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<sup>122</sup> Cr C (T1) p40, 24.

<sup>123</sup> Cr M, p52, 2.

<sup>124</sup> M for C, p20, 1.

<sup>125</sup> M for C, p20, 2.

<sup>126</sup> M for C, p20, 6.

<sup>127</sup> M for C, p20, 13.

<sup>128</sup> Cr C (T1) p51, 41.

<sup>129</sup> Cr M, p43, 33.

<sup>130</sup> Cr M, p39, 19.

<sup>131</sup> Cr M, p42, 21.

248. Councillor A described how what transpired in the meeting was achieved in the later formal vote in the chamber (on 27 November 2006):

- Q. You would have had the numbers for all the people who went to Parliament House, so whatever was put up, you'd have the numbers --
- A. Yeah.
- Q. So everyone got what they wanted, all the presiding officer-ships?
- A. Yes.
- Q. And the membership on the DAP?
- A. Yeah.
- Q. What about the deputy mayor? How was the deputy mayor worked out?
- A. Basically a similar conversation. It was - it was - there was a discussion about who should be deputy mayor. It wasn't so much put your hand up. It was you'll be for this year and you'll be for this year and you'll be for that year and you'll be for that year.
- Q. Who organised that?
- A. I'm - I'm not entirely sure. I wasn't actually involved in that conversation so much because it was completely out of my league. I felt that [Councillor M and Councillor P] were the main sort of pushers in that nomination process, but I wasn't really involved in that conversation, so I'm not entirely sure.
- Q. But four were picked?
- A. Yeah.
- Q. And who were they?
- A. [Councillor P, Councillor E, Councillor K, Councillor B]
- Q. And were they the ones that got voted in --
- A. Yeah.
- Q. in the chamber?
- A. Yeah.<sup>132</sup>

249. In response to my provisional report, Councillor P could not recall partaking in any meeting, or having any discussions about nominations.<sup>133</sup>

250. Councillor M also said:

- Q. And all the positions were filled with the people who had been suggested at that meeting; is that correct?
- A. I would say yes.
- Q. But you were confident that everyone who was at that meeting at Parliament House would stick to their vote and stick to the understanding as to who wanted to be what and vote accordingly.
- A. I would believe that, yes.<sup>134</sup>

251. In the opinion of Councillor O, the formal vote in the chamber 'went like clockwork':

- A. They had it all very well organised, the ALP-aligned members there, and the first meeting it was all [sic] went like clock work. They clearly had a meeting somewhere else away from the chamber and it was all sorted out, and persons like me, ... you know, [sic] couldn't really get on the sort of ones that the committee should probably like to have got on and nominated. You just don't stand a chance because the way the numbers are stacked up to give exclusion.<sup>135</sup>

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<sup>132</sup> Cr A (T1) p117, 22.

<sup>133</sup> Letter from Cr P, 17 August 2011, p1.

<sup>134</sup> Cr M, p57, 12.

<sup>135</sup> Cr O, p7, 47.

252. In response to my provisional report, Councillor P advised of being an apology for the relevant meeting, being overseas on holiday at the time. Councillor P noted also being nominated for a position by a councillor who was not a member of the ALP.<sup>136</sup>
253. Councillor L told my investigation of the frustration in seeking but never succeeding in obtaining leadership positions on the council:
- A. I don't know. In my view, it looked a bit political, if you like, because the ones that were elected, they were basically of a group. They mention here it's suggested 11 out of whatever, out of 16, were of that group, and probably that's my truthful thinking about it, they were voted in because of that.
  - Q. Which group are you referring to?
  - A. I'm referring to the Labor Party group, because I know most of the members, ... lots of the members, even my co-councillor, they either work or are associated, whatever, with the Labor Party.<sup>137</sup>
254. One ALP councillor told my investigation that it was 'commonplace' for the ALP group of councillors to decide presiding memberships before the formal vote.<sup>138</sup>

### Croydon electorate office assistance – councillors' street corner meetings

255. Evidence was given to my investigation that during the relevant period, the Member for Croydon and his electorate office would arrange regular street corner meetings to meet the community, for him, a local federal member and some of the ALP councillors.
256. The Member for Croydon told my investigation that he would invite Councillor K, Councillor A, Councillor P and Councillor G.<sup>139</sup> He said that 'it's part of providing a good and well-rounded service to my constituents.'<sup>140</sup> Councillor G noted in response to my provisional report that the meetings 'served to enhance communications between residents and representatives in the different tiers of government for the benefit of the residents'.<sup>141</sup>
257. The Member for Croydon described his reasons to my investigation for including councillors in his street corner meetings:

My experience when I began to do street corner meetings with the federal members, was that most of the matters that were raised were local government matters and it was simply untenable for us to have street corner meetings and not to field local government grievances. Within a short time I started inviting the local councillors along, if the street corner meeting was in their ward. Some were keen to do this because they were conscientious, and I guess they wanted their name out there, they wanted people to know who they were so they could be accountable. Others were not so keen.<sup>142</sup>

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<sup>136</sup> Letter from Cr P, 17 August 2011, p1.

<sup>137</sup> Cr L, p13, 22.

<sup>138</sup> Cr D (T3) p31, 44.

<sup>139</sup> M for C, p16.

<sup>140</sup> M for C, p14, 26.

<sup>141</sup> Letter from legal representative for Cr G, 29 August 2011, para 46.

<sup>142</sup> M for C, p15, 31.

258. The Member for Croydon told my investigation that his office would produce individualised notices advertising the meetings for distribution to constituents for three councillors, whose wards were in or next to his electorate:<sup>143</sup>

So, there would be a flyer prepared for me and there would be a flyer prepared for the local councillor ...<sup>144</sup>

259. He said that he had offered the same opportunity to a councillor in a ward in his electorate who was not an ALP member, Councillor I; however, he had received no response and 'presumed [Councillor I] wasn't interested.'<sup>145</sup>

#### *Councillor P*

260. Councillor P eventually admitted to my investigation that in fact, the street corner meetings notices for the councillor's ward were produced by the Member for Croydon's electorate office.<sup>146</sup>
261. One notice obtained by my investigation was produced by the Croydon electorate office on 24 February 2009, advertising meetings in four different locations in the councillor's ward for 14 March 2009. The notice purported to be from Councillor P on the councillor's letterhead, and said:

I'm grateful to the people who re-elected me to the Charles Sturt Council at the November 2006 election. I won't let you down.

I've organised four open-air meetings in Allenby Gardens, Welland and West Hindmarsh on Saturday 14 March, 2009 so that you can tell me what you expect from your local Council.

State Attorney-General and local M.P. Michael Atkinson will attend the meeting and so will Mark Butler, Federal Member for Port Adelaide.

262. In January 2009, the Member for Croydon arranged a street corner meeting at Flinders Park, and invited Councillor P and the federal member to attend. The Member for Croydon's comments in an email dated 29 January 2009 to Councillor P and the federal member confirm his practice:

I write to invite you to participate in these meetings in the way you have for the past four years.

As has been the case in the past, we would produce a street-corner meeting notice for you. Flinders Park is the largest suburb in the electorate. It has 12 letterboxing areas. I propose that I arrange for the distribution of your notice in eight of those areas and that you be responsible for distributing your notice in four of the areas. I will of course arrange for the distribution of my own notice in all 12 areas.<sup>147</sup>

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<sup>143</sup> M for C, p16.

<sup>144</sup> M for C, p16, 3.

<sup>145</sup> M for C, p16, 29.

<sup>146</sup> Cr P (T1) p84.

<sup>147</sup> Email from the Member for Croydon to Cr P, 29 January 2009.

263. In response to this invitation, Councillor P expressed concern about time constraints and distributing the notices for four of the areas (email dated 5 February 2009). Alluding to Councillor P's wish to be mayor, the Member for Croydon answered by email dated 6 February 2009:

If you say that you are worthy of being Mayor of Charles Sturt or Member of State Parliament - and you do make these claims - how is it that in 14 days you cannot letterbox four areas in your own ward near your home nor find supporters who are willing to do this for you?

How are you going to campaign over an area 50 times larger in October 2010?<sup>148</sup>

*Councillor A*

264. Councillor A told my investigation of invitations by the Member for Croydon for street corner meetings. The councillor said a letter to (the councillor's) constituents would be drafted by the Member for Croydon and then letterboxed. Sometimes Councillor A did not check the letter:

- Q. Now, these street-corner meetings how are they arranged?  
A. Generally Mick Atkinson's office will actually set them up. They are an important part of Mick's community gathering, community communication. Mick Atkinson's office generally sets up the date, I would be invited and a letter will be put together from Mick including my name as an attendee, then that will get letterboxed.
- Q. Does he send out a separate flyer about you?  
A. Generally not. I do know that on one occasion he did. He actually asked me to do, to have a separate letter and he actually put that letter together and letterboxed it.
- ...  
A. on behalf of me.  
Q. As a representative of the Charles Sturt Council?  
A. Correct.  
Q. And that came out of his office?  
A. Yes.
- A. There were two letters that he helped me print for my initial campaign to run for election, and I'm confident that in between then and now he's printed our letters for street-corner meetings, some of which have been from me and some from him.
- Q. Do you get to check these letters before they go out in the mail?  
A. Sometimes. Sometimes just the text is sent to me, but generally no. Sometimes I have.<sup>149</sup>

265. I note that at interview, and in his response to my provisional report, the Member for Croydon denied that he assisted Councillor A in the councillor's electoral campaign.<sup>150</sup>

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<sup>148</sup> Email from the Member for Croydon to Cr P, 6 February 2009.

<sup>149</sup> Cr A (T1) p70, 12.

<sup>150</sup> Letter from legal representative for the Member for Croydon, 18 August 2011, para 73-75.

### *Councillor G*

266. Councillor G also told my investigation that the Croydon electorate office used to produce notices for the councillor's constituents and assist letterboxing in relation to street corner meetings.<sup>151</sup> As with the other two councillors, the Member for Croydon advised me that the electorate office retained copies of the councillor's letterhead for producing letters for constituents.
267. In return, Councillor G would apparently volunteer labour for the electorate office.
268. Councillor G told my investigation of the benefit of the Member for Croydon's office arranging the street corner meetings:
- Q. Would Michael Atkinson's office sometimes arrange those street corner meetings?
  - A. Well, generally, look, if he hadn't done them, I would have done them myself. But the fact is if someone wants to do all the groundwork and organise them, great, all for it. I'm all for taking the path of least resistance in that regard. Communications with the public, it takes a lot of time, dedication and effort. So if someone's willing to do that you just piggyback off them.<sup>152</sup>

### **Croydon electorate office assistance – councillors' land swap letters**

269. My investigation was also told that the Member for Croydon and his electorate office assisted in drafting, producing and distributing letters for Councillor K, Councillor P, Councillor A and Councillor G's respective constituents in support of the land swap. This occurred towards and after the conclusion of the revocation process.
270. In my view, the production of these letters was advantageous to the Member for Croydon. The Member for Croydon himself acknowledged to my investigation the assistance that would be gained in the letters being sent out to the community, given the contentiousness of the issue and the pending state government elections. He told my investigation that at a gathering of the councillors at Councillor M's house (on 29 November 2009):

I said to the councillors "Well look, if you bring some paper and some envelopes around to my office, and we can settle a draft, [we'll] send out to your constituents the reason you took this decision and that will have the benefit for me and for Mr Weatherill as members facing election in three months' time, having the people who actually made the decision explain why they made the decision and then people could take it or leave it."<sup>153</sup>

271. I consider the conduct of the councillors in relation to this matter later in this report.

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<sup>151</sup> Cr G, Exhibit #2.

<sup>152</sup> Cr G, p29, 6.

<sup>153</sup> M for C, p31, 29.

## Comment

272. In my opinion, the evidence above shows an association between some of the ALP councillors and the Member for Croydon that reflected the potential to place the proper discharge of the councillors' functions and duties as elected members at risk. I agree with the Victorian Ombudsman in his comments that:

Where councillors allow ... influence to be exercised over them, they place themselves at risk of not being able to exercise their functions in accordance with their statutory obligations.<sup>154</sup>

273. Further, where councillors make decisions based on factional or political alliances,<sup>155</sup> they may not be acting in accordance with their duties and responsibilities to act in the best interests of the community under the Local Government Act.
274. I note the barbecue gathering at Parliament House, and the apparent discussions about who would hold the new council's leadership positions. Regardless of what role the Member for Croydon played in these discussions, in my opinion, they demonstrated a propensity by some of the ALP councillors to meet and confer with each other about council matters that required a decision at a formally constituted meeting of the council under the Local Government Act.<sup>156</sup>
275. In response to my provisional report, Councillor G expressed the view that my observations above are 'baseless and without foundation in (their) speculative form', and that my 'conclusion is based on speculation, assumption and innuendo'.<sup>157</sup> Also in response to my provisional report, Councillor M expressed the view that my investigation focussed unnecessarily on the matters which I have outlined in this part of my report. Councillor M described them as 'extraneous' to the administrative act.<sup>158</sup>
276. I disagree with these submissions. I consider that the evidence outlined in this section demonstrates relevant context, history and background to the administrative act. Further, in my view these matters are central to the terms of the reference given to me by the Legislative Council.

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<sup>154</sup> Ombudsman Victoria, Whistleblowers Protection Act 2001 – Investigation into the Alleged Improper Conduct of Councillors at Brimbank City Council, May 2009, p9, para 8.

<sup>155</sup> Ibid, para 10.

<sup>156</sup> Local Government Act, section 90(8).

<sup>157</sup> Letter from legal representative for Cr G, 29 August 2011, para 23.

<sup>158</sup> Letter from legal representative for Cr M, 18 August 2011, p1.

## PART 3

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# DECISION-MAKING IN RELATION TO THE ADMINISTRATIVE ACT

### 3.1 CONFLICT OF INTEREST, BIAS AND THE ADMINISTRATIVE ACT

277. In considering whether the council erred in making its decision to submit the revocation proposal to the Minister and the surrounding circumstances, it is necessary to consider whether individual councillors complied with their obligations to declare a conflict of interest and abstain from voting where required at law, and to approach the decision without bias. This is reflected in the ‘Further description of the administrative act’ (see Appendix B) which provides *inter alia* that the following issues form part of the context, history and background to the administrative act:
- (a) the manner of discharge by councillors of the council of their responsibilities in respect of the administrative act under the *Local Government Act 1999 (SA)* (**LG Act**) and council Members Code of Conduct policy, including:
- any possible impact of a councillor’s membership of a political party
  - any potential or actual conflict of interest due to councillors being
    - members of a political party
    - employees working in the offices of members of Parliament
    - employees of a State Government entity
  - the duty to hold council meetings in public
  - bringing an open mind to decision-making
  - acting without bias
- ...
278. If elected members did not meet their obligations in relation to conflicts of interest, and if such failure had a decisive influence on the making of the revocation decision by the council, a finding that the council erred in the administrative act would follow.<sup>159</sup> Where apprehended bias is shown on the part of some elected members, in some circumstances, a finding that the council as a whole did not bring an impartial mind to the relevant decisions may also follow.<sup>160</sup>
279. I comment that there are other decisions of the council or surrounding circumstances during the revocation and land swap process which may be pertinent in considering elected members’ conflict of interest issues: these are the council’s decisions on 9 June 2009 and the (valid) revocation decision itself of 14 December 2009. However, my investigation has principally focused on the 9 November 2009 decision of the council to submit the revocation proposal to the Minister. In my opinion, this was the threshold decision which crystallised the council’s intention to proceed with the revocation and land swap, and it is central to the administrative act.

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<sup>159</sup> The District Court has the power to annul the decision: Local Government Act, section 74(5).

<sup>160</sup> *McGovern v Kuringgai Council* (2008) NSWCA 209 (1 September 2008).

## 3.2 CONFLICT OF INTEREST

### Background

#### *What is a conflict of interest?*

- 280. The term ‘conflict of interest’ can refer to situations in which a conflict arises between a public officer’s duty to serve the public and the public officer’s private interests.
- 281. Under the Local Government Act, elected members take an oath of office which requires them to undertake to discharge their duties conscientiously (section 60). Elected members also have a duty to act honestly and with reasonable care and diligence (section 62) and to represent the interests of residents and ratepayers (section 59).
- 282. As public officers, elected members have a duty to act in the community’s or the ‘public interest’. They should avoid situations where their private interests conflict with this duty. A case in the Supreme Court of Victoria stated:

The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals...<sup>161</sup>

- 283. A private interest can involve pecuniary interests (financial interests or other material benefits) or non-pecuniary interests. A conflict of interest can involve the interests of the elected member or of their immediate family, business partners, employers or.
- 284. Avoiding and managing conflicts of interest is crucial to maintaining public confidence in the integrity of a council and local government. In a joint publication in 2004, the NSW Independent Commission Against Corruption and the Queensland Crime and Misconduct Commission commented:

The community expects that public officials will perform their duties in a fair and impartial way, putting the public interest first at all times.

...  
Conflicts of interest are not wrong in themselves – public officials are also private individuals and there will be occasions when their private interests come into conflict with their duty to put the public interest first at all times – but such conflicts must be disclosed and effectively managed.

...  
A transparent system that is observed by everyone in an organisation as a matter of course will also demonstrate to members of the public and others who deal with the organisation that its proper role is performed in a way that is fair and unaffected by improper considerations.

Failure to identify, declare and manage a conflict of interest is where serious corruption often begins and this is why managing conflicts of interest is such an important corruption prevention strategy.<sup>162</sup>

<sup>161</sup> *Director of Public Prosecutions v Smith* [1991] 1 VR 63 at 75.

<sup>162</sup> NSW ICAC and Queensland Crime and Misconduct Commission, *Managing Conflicts of Interest in the Public Sector - Guidelines*, November 2004, p.7.

285. Everyone has interests which can influence them and which may result in conflicts of interest. Local government can attract people who are active in their local communities. This means that as elected members, they may often be asked to make decisions that may impact upon them, their family, their friends or their neighbours. It is important for elected members to recognise and manage conflicts of interest so that they fulfil their public officer duties impartially.
286. There are three types of conflicts of interest - actual, potential and perceived. There is also the notion of a 'conflict of duty', which I describe below.
287. A person has an *actual* conflict of interest if they have a specific duty relating to their role as an elected member (ie to vote on a particular matter) and they have a personal or private interest which could reasonably be expected to conflict with their ability to act in the public interest in relation to that specific duty.
288. A *potential* conflict of interest exists when the person has an external interest or duty that does not presently conflict with their duties as an elected member but, in view of the types of decisions that an elected member is involved in, could reasonably be expected to give rise to a conflict of interest at some time in the future.
289. A *perceived* conflict of interest is one which a fair minded and informed member of the public might perceive as existing. A perceived conflict of interest may not relate to what is in reality a potential or an actual conflict of interest. It may only ever be a 'perception' of a conflict of interest. However, as my investigation has highlighted, the management of perceived conflicts of interest is important for the integrity of a council; and it may be impossible to determine whether or not a public officer has in reality acted in their private interest. Perceived conflicts of interest may be a contributor to allegations of bias.
290. A *conflict of duty* may arise where there is a conflict between an elected member's duty to act in the public interest and their duty to act for the benefit of another. For example, elected members may have a fiduciary relationship with another body which conflicts with their duty as a elected member. A fiduciary duty is an equitable duty to act in good faith for the benefit of another. They could also have a common law duty of fidelity to their employer, namely to act in the employer's best interests. A conflict of duty could also be a perceived or potential conflict of interest.

#### ***Conflict of interest under the Local Government Act***

291. Council members have an ethical obligation to avoid conflicts of interest. However, where conflicts do arise, and they will, there must be effective strategies in place to manage them. The Local Government Act seeks to give effect to these obligations. However, not all of the concepts outlined above are reflected in the legislation; and I comment on this matter later in my report.
292. The Local Government Act sets out obligations of elected members to declare certain interests and to abstain from voting on matters in relation to 'interests' that arise under the Act.
293. Under section 73(1) of the Local Government Act, a member of the council has an interest in a matter being considered by the council if:
  - (a) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, receive or have a reasonable expectation of receiving a direct or indirect pecuniary benefit or suffer or have a reasonable expectation of suffering a direct or indirect pecuniary detriment; or

- (b) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, obtain or have a reasonable expectation of obtaining a non-pecuniary benefit or suffer or have a reasonable expectation of suffering a non-pecuniary detriment,
- (not being a benefit or detriment that would be enjoyed or suffered in common with all or a substantial proportion of the ratepayers, electors or residents of the area or a ward or some other substantial class of persons).
294. Section 73(2) of the Local Government Act defines persons or entities that are 'closely associated' for the purposes of section 73(1) as follows:
- (2) A person is closely associated with a member of council –
- (a) if that person is a body corporate of which the member is a director or a member of the governing body; or
  - (b) if that person is a proprietary company in which the member is a shareholder; or
  - (c) if that person is a beneficiary under a trust or an object of a discretionary trust of which the member is a trustee; or
  - (d) if that person is a partner of the member; or
  - (e) if that person is the employer or an employee of the member; or
  - (f) if that person is a person from whom the member has received or might reasonably be expected to receive a fee, commission or other reward for providing professional or other services; or
  - (g) if that person is a relative of the member.
295. A conflict of duty is covered by the Local Government Act to only a limited extent, in relation to an elected member who is a member, officer or employee of an agency or instrumentality of the Crown. Section 73(3) and (4) provide:
- (3) A member of a council who is a member, officer or employee of an agency or instrumentality of the Crown, will be regarded as having an interest in a matter before the council if the matter directly concerns that agency or instrumentality but otherwise will not be regarded as having an interest in a matter by virtue of being a member, officer or employee of the agency or instrumentality.
  - (4) In this section–
- agency or instrumentality of the Crown* includes–
- (a) an administrative unit of the Public Service;
  - (b) a body corporate comprised of, or including or having a governing body comprised of or including, a Minister or Ministers of the Crown or a person or persons appointed by the Governor or a Minister or other agency or instrumentality of the Crown.
296. This sets a lower threshold than section 73(1). There is no issue of benefit or detriment; and there is one test to determine if the council member has an interest -- being whether the matter 'directly concerns' the agency or instrumentality of which the council member is a member, officer or employee.

297. Under section 74(1) of the Local Government Act, a council member who has an interest in a matter before the council must disclose the interest to the council, and must provide full and accurate details of the relevant interest (section 74(2)). Additional obligations under section 74(3) and (4) are as follows:

- (3) A disclosure made under subsection (1) must be recorded in the minutes of the council (including details of the relevant interest).
- (4) A member of a council who has an interest in a matter before the council must not–
  - (a) propose or second a motion relating to the matter; or
  - (b) take part in discussion by the council relating to that matter; or
  - (c) while such discussion is taking place, be in, or in the close vicinity of, the room in which or other place at which that matter is being discussed; or
  - (d) vote in relation to that matter.

298. Section 74 suggests that the affected council member decides if they have a conflict of interest in a particular matter.

299. Pursuant to section 74(5), if a conflict of interest exists and a council member fails to comply with section 74, the decision or resolution will not necessarily be invalid. However, 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, then the council, the Minister or a person affected by the resolution or decision may apply to the District Court which may annul the resolution or decision and make orders as it sees fit.

300. Furthermore, there are penalties provided for a council member’s failure to comply with section 74:

#### **267—Outcome of proceedings**

- (1) On the hearing of a complaint, the District Court may, if it is satisfied that the grounds for complaint exist and that there is proper cause for taking action against the person to whom the complaint relates, by an order or orders do one or more of the following:
  - (a) reprimand the person;
  - (b) require the person to attend a specified course of training or instruction, or to take other steps;
  - (c) impose a fine not exceeding \$5 000 on the person;
  - (d) suspend the person from any office under this Act for a period not exceeding two months;
  - (e) disqualify the person from any office under this Act;
  - (f) disqualify the person from becoming a member of a council, a council committee or a subsidiary of a council for a period not exceeding five years.
- (2) If a person is disqualified under subsection (1)(e), the office immediately becomes vacant.
- (3) A fine imposed under subsection (1) is payable to general revenue in accordance with an order of the District Court.

(4) If—

- (a) a person has been found guilty of an offence; and
- (b) the circumstances of the offence form, in whole or in part, the subject matter of the complaint,

the person is not liable to a fine under this section in respect of conduct giving rise to the offence.

301. The provisions of the Criminal Law Consolidation Act relating to abuse of public office may also be applicable in an elected member's failure to disclose. These involve a penalty of up to 7 years imprisonment (section 251).
302. The Local Government Act provides exemptions from some or all of the obligations imposed on an affected council member in a conflict of interest situation. These are set out in section 74(4a) and (4b), as follows:

(4a) The following qualifications apply:

- (a) subsections (1) and (4) do not apply—
  - (i) to questions relating to allowances or benefits that a council is empowered to pay to, or confer on, members, their spouses, domestic partners or members of their families; or
  - (ii) to matters of a class exempted by regulation from the provisions of those subsections; or
  - (iii) to matters in relation to which the Minister has granted an exemption from the provisions of those subsections;
- (b) a member of a council who has disclosed an interest under subsection (1) may, by permission of the council, attend during proceedings of the council on the relevant matter in order to ask or answer questions, provided that the meeting is open to the public, the member withdraws from the room after asking or answering the questions, and the member does not in any other way take part in any debate or vote on the matter;
- (d) a member does not contravene this section if the interest was unknown to the member at the relevant time.

(4b) In addition, subsection (4) does not apply in a case where the interest of the member arises because of 1 or both of the following circumstances:

- (a) the member or a person closely associated with the member is a member of, or director or member of the governing body of, a non-profit association;
- (b) the member or a person closely associated with the member is a member of a body (whether incorporated or unincorporated) comprised of or including, or having a governing body comprised of or including, a person or persons appointed or nominated by the council.

303. An exemption under section 74(4b) (but not one under section 74(4a)) enables the council member to continue to fully perform their normal role, i.e. being involved in discussions on the matter and voting in relation to the matter, on the basis that they disclose their interest.

304. The tests in section 73 are limited to circumstances where there is an actual conflict of interest. The Local Government Act does not contemplate perceived conflicts of interest. Despite this, the LGASA Conflict of Interest Guidelines provide advice to elected members in recognising a perceived conflict of interest. The guidelines state:

It is not relevant whether the affected person thinks that he or she would actually be influenced - the important question is whether the impartial observer could form the opinion that in the given set of circumstances, the affected person could be influenced by the nature of his or her possible or perceived interest.<sup>163</sup>

305. The LGASA recommends that if this test is satisfied, then the affected council member should declare a conflict of interest and withdraw from voting on the matter.
306. Potential conflicts of interest are also not explicitly referred to in the Local Government Act, although they are effectively contemplated by the Register of Interests. Under Schedule 3 of the Act, a council member's return (whether primary or ordinary) must contain *inter alia* income sources, various assets, gifts above \$750, and the name of 'any political party, any body or association formed for political purposes or any trade or professional organisation of which the member is a member'.<sup>164</sup>

#### ***Conflict of interest and the code of conduct***

307. The principles listed in the council's code of conduct do not explicitly refer to conflict of interest, although they do provide that council members will 'not seek or accept any gift or benefit in connection with [their] public duties that may place [them] under any obligation or expectation of benefit to the giver or could reasonably be perceived as such by others'. Further, conflicts of interest are provided as an example of a level 3 complaint ('of a serious nature') in the code of conduct policy.

### **Whether council members had conflicts of interest**

#### ***Whether Councillor K had an interest – employment in the DPLG***

308. During the relevant period, six councillors were members, officers or employees of 'an agency or instrumentality of the Crown' within the meaning of section 73(3) and (4) of the Local Government Act. They were members, officers or employees of the following state government departments:
- DPLG - Councillor K
  - Department for Transport Energy and Infrastructure - Councillor G
  - Attorney General's Department - Councillor C
  - Department of Primary Industries and Resources - Councillor D
  - Department of Treasury and Finance - Councillor J, Councillor P (as electorate officers for a state MP).

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<sup>163</sup> Local Government Association of South Australia, Conflict of Interest Provisions – Guidelines and Examples, March 2007, updated October 2010, p15. The suggestion to withdraw from voting on the basis of a perceived conflict of interest was also addressed in the original March 2007 version of the document.

<sup>164</sup> Schedule 3 – Register of Interest, Clause 2(3)(b).

309. Shortly after a resident's newsletter raised the issue of some councillors' potential conflicts of interest in the St Clair land revocation matter, Councillor C requested the council to seek legal advice about conflict of interest, prior to the council's further consideration of the matter at its 9 November 2009 meeting. A council officer sought this advice, and received it by email on 6 November 2009 (**the first advice**).<sup>165</sup> On the same day, the officer forwarded it to Councillor C, and to the other councillors who were employed by the state government on the basis that it had relevance to them also.
310. The first advice stated that based on the facts provided, the matter before the council on 9 November 2009 would directly impact upon the LMC, given its involvement in the redevelopment of the Cheltenham Park racecourse. It noted however, that Councillor C 'was employed by the Office of the Attorney General'. The advice noted that this was a 'separate corporate entity' from the LMC, and that as the St Clair land revocation matter did not directly concern that office, Councillor C did not have an interest in the matter.
311. The first advice also stated that in regard to other council members who were employed by a government department or other instrumentality of the Crown, each such department or instrumentality was a 'separate corporate entity' in its own right. Accordingly unless the council member was a member, officer or employee of the LMC, he or she would not have an interest in the matter for the purposes of section 73 of the Local Government Act and was, therefore, entitled to fully participate in any council consideration and decision-making in relation to the matter.
312. The council sought further advice from a different lawyer, and I am informed by the CEO this was received by a council officer at about 4.34pm on 9 November 2009 (**the second advice**).<sup>166</sup> It appears to me that the council officer did not become aware of the second advice until after the council meeting held later that night, and consequently it was not provided to the relevant councillors prior to the council meeting.<sup>167</sup> This was unfortunate, but I accept for the purposes of my investigation that the relevant councillors were unaware of it.
313. The second advice said that in receiving the revocation proposal from the council for approval (as required under section 194 of the Local Government Act), the Minister for State/Local Government Relations had 'to take action through her Department (the Department of Planning and Local Government) on the submission.'<sup>168</sup> The advice stated:

We note that a role of the Office for State/Local Government Relations (being an office within the Department of Planning and Local Government), is to provide advice to the Minister on 'the administration and enforcement of the *Local Government Act 1999*'.

We therefore consider that the report directly concerns the Department of Planning and Local Government.<sup>169</sup>

314. The second advice concluded that:

the elected member who is employed by the Department of Planning and Local Government will likely have an interest in this matter.<sup>170</sup>

<sup>165</sup> Email to the council's General Manager Corporate Services, 6 November 2009.

<sup>166</sup> Letter from a law firm containing the second advice to the council's General Manager Corporate Services, 9 November 2009.

<sup>167</sup> Response from the CEO, 18 August 2011, attached table p9.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

<sup>170</sup> Ibid.

315. Apparently in reliance on the first advice, Councillor K voted at the council meeting on 9 November 2009. As noted above, I accept that the councillor was unaware of the second advice at the time of this meeting. Further, the councillor's legal representative advised me in response to my provisional report that the councillor 'was only made aware of this advice through [my] report'.<sup>171</sup>
316. The council sought further legal advice (**the third advice**) which was received on 19 November 2009.<sup>172</sup> The third advice considered that Councillor K did not have a conflict of interest in the revocation issues:

it is still not a matter which, in my view, directly concerns the DPLG - rather, it is simply a statutory approval process that the Council must adhere to in seeking to revoke the classification of community land in its area. By contrast, if the Council had a contract to sell the land, once revoked, to a Government Department (e.g.) the LMC and [Councillor K] was an employee of the LMC, all related decisions made by the Council would likely directly concern the LMC sufficient to invoke the application of Section 73(3) of the Local Government Act.<sup>173</sup>

317. The third advice further stated that:

I am unable to identify any actual prescribed conflict of interest for [Councillor K] in relation to the community land revocation process simply because [Councillor K] is an employee of the DPLG.<sup>174</sup>

318. Councillor K knew about the third advice, and commented to my investigation that a work colleague had questioned whether the councillor had a conflict or not and whether legal advice had been obtained. The councillor told my investigation:

When all this started to blow up and he came in and asked me if I'd had advice on whether I had a conflict or not, and I talked him through the whole thing and said, "This is my belief and this is how I have been behaving because this is my belief. I do not believe I have a conflict." But after he left I thought about it. I thought here are a whole series of questions I can now ask, which I hadn't felt the need to before, because it hadn't occurred to me that I would have a perception of a conflict even, so I raised a series of questions with [the CEO] who got me advice from ... which confirmed my view.<sup>175</sup>

I note that the third advice was not received until ten days after the 9 November 2009 meeting, when the critical vote resolving to forward the revocation proposal to the Minister was made.

319. I prefer the approach adopted in the second advice. Section 73(5) states that a council member will have an interest if the matter 'directly concerns' the agency or instrumentality of the Crown in which they are employed. It defines the term 'agency or instrumentality of the Crown' as including an administrative unit of the Public Service, but does not define what an 'administrative unit' is. I consider it reasonable to look for guidance from section 3 of the *Public Sector Management Act 1995*, as it was titled and in force at the relevant time, which defined 'administrative unit' as follows:

**administrative unit** means an administrative structure in which persons are or are to be employed, established under this Act as an administrative unit;

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<sup>171</sup> Letter from legal representatives for Cr K, 18 August 2011, para 12.

<sup>172</sup> Email dated 19 November 2009 containing the second advice from a law firm (forwarded by the CEO to Cr K).

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> Cr K, p135, 2.

Section 7(1) of that Act provided that the Public Service consists of administrative units established under the Act; section 7(2) empowered the Governor to establish administrative units by proclamation; and section 9 required each administrative unit to have a chief executive.

320. On the basis of an examination of the relevant proclamations, I conclude that the ‘administrative unit’ in which Councillor K was employed on 9 November 2009 was the DPLG, and this administrative unit encompassed the responsibilities of the Office of State/Local Government Relations. I do not consider this office is a discrete administrative unit as contemplated by section 73(3) and (4).
321. The element that must be satisfied to determine if Councillor K had an interest is whether the matter ‘directly’ concerned the DPLG (section 73(3)). The Macquarie Dictionary defines ‘directly’ as follows:
  1. in a direct line, way, or manner; straight.
  2. without delay; immediately.
  3. presently; soon.
  4. absolutely; exactly; precisely.
322. Under section 194(3) of the Local Government Act, the council was required to submit the revocation proposal and a revocation report to the Minister for approval. The Minister was required to consult with the council prior to the revocation.<sup>176</sup> These requirements necessitate that the DPLG advise the Minister on the issue, including as to whether the Minister should approve the revocation proposal. In my view, this involvement meant that the matter ‘directly’ concerned the DPLG, and the role that Councillor K played in relation to that involvement is not relevant to the application of section 73(3).
323. In my view, had all the circumstances been known, Councillor K should have disclosed an interest and followed the procedure in section 74 of the Local Government Act.
324. In response to my provisional report, it was put to me that section 74(4a)(d) is relevant to Councillor K’s situation. This provides that a member does not contravene the section if ‘the interest’ was ‘unknown’ to the member at the relevant time.
325. It appears to me that this provision derives from an amendment to the *Local Government Act 1934*, namely the *Local Government Act Amendment Act (No. 3), 1984* as part of section 54 which dealt with conflict of interest (No. 58 of 1984). This amendment provided:
 

54(1) A member of a council who has an interest in a matter before the council or a council committee of which he is a member shall disclose the fact that he has such an interest to the council or committee.

Penalty: Ten thousand dollars or imprisonment for one year.

(2) ...

(3) Subject to subsection (4), no member of a council who has an interest in a matter before the council or a council committee of which he is a member shall—

(a) take part in discussion by the council or committee relating to that matter;

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<sup>176</sup> Local Government Act, section 194(4).

(b) while such discussion is taking place, be in, or in the close vicinity of, the room in which or other place at which that matter is being discussed;

or

(c) vote in relation to that matter.

Penalty: Ten thousand dollars or imprisonment for one year.

(4) Subsection (3) does not apply in relation to a matter in which the member has an interest by virtue only of the fact—

(a) that he is a member of, or director or member of the governing body of, a non-profit association;

or

(b) that he is a member of a body (whether corporate or unincorporate) comprised of or including, or having a governing body comprised of or including, a person or persons appointed by the council.

(5) It shall be a defence to a charge of an offence against subsection (1) or (3) for the defendant to prove that he was, at the time of the alleged offence, unaware of his interest in the matter. [my emphasis].<sup>177</sup>

326. In their book Council Meetings in South Australia, Goode and Williams comment in relation to section 54(5):

It is likely that the member would have to prove that lack of knowledge on the balance of probabilities. However, the defence does not require proof that the belief was reasonable in all the circumstances. It is enough that the member did not know, not that a reasonable person would not know. The defence is honest or genuine mistake or ignorance and not denial of negligence.<sup>178</sup>

327. My investigation's research did not yield any commentary, case law or substantial second reading speeches in relation to section 74(4a)(d) of the Local Government Act. However, I consider it is reasonably arguable that Goode and Williams' observations about the previous section 54(5) apply to the current section 74(4a)(d).
328. In this way, I accept that Councillor K genuinely believed there was no interest, and I also accept that Councillor K was acting on the basis of legal advice which indicated that there was no conflict of interest. I consider that the interest was 'unknown' to Councillor K within the meaning of section 74(4a)(d). I note also that the DPLG supported a number of ministerial portfolios; that Councillor K was engaged in work which supported the Minister for Urban Planning and Development, not the Minister for State/Local Government Relations; and that the councillor's employment was properly disclosed in the council's Register of Interests during the relevant period.
329. In these circumstances I do not consider that Councillor K contravened section 74 by failing to disclose an interest.
330. Further, given that Councillor K did not contravene the section, and the relevant decision was carried by a clear majority (13 elected members) of which Councillor K was one, I am of the view the councillor's actions did not have a decisive influence on

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<sup>177</sup> I note that section 54(5) was amended in 1988; however, the matter of a council member being 'unaware' of their interest in the matter remained in the provision.

<sup>178</sup> Goode, Matthew, Williams, David, Council meetings in South Australia, The Federation Press, 1992, para 14.30.

council's decision. Accordingly, I am of the view that there was no administrative error on the part of the council.

331. There is no evidence to suggest that the decision of 9 November 2009 'directly' concerned the Department of Transport Energy and Infrastructure, the Attorney General's Department, the Department of Primary Industries and Resources or the Department of Treasury and Finance. Accordingly, I am of the view that councillors who were employed within those agencies did not have an 'interest' under section 73(3) of the Local Government Act which required disclosure.

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### OPINION

Councillor K had an interest in a matter before the council in Item 6.121 on 9 November 2009, which directly concerned the councillor's employing agency (the Department of Planning and Local Government) within the meaning of section 73(3) of the Local Government Act. However, this interest was unknown to Councillor K and the councillor acted reasonably on the basis of legal advice which indicated that there was no conflict of interest. Consequently Councillor K did not contravene section 74 of the Local Government Act.

Councillor C, Councillor D, Councillor G, Councillor J and Councillor P, as members, officers or employees of the Attorney General's Department, the Department of Primary Industries and Resources, the Department of Transport, Energy and Infrastructure and the Department of Treasury and Finance respectively, did not have an interest in the matter under section 73(3).

There was no administrative error made by the council arising from these councillors' actions.

### *Whether 12 councillors had an interest – membership of the ALP*

332. The possibility of a conflict of interest due to twelve councillors' membership of the ALP was frequently raised by community members during the course of community debate about the revocation and land swap. One submission from a member of the community during the consultation period said:

There is also the perception that this transaction is being dictated by political factions within council and has not been progressed with the best interests of residents or ratepayers.<sup>179</sup>

333. Another submission stated:

To some, it can appear that Charles Sturt Council is only concerned with lining its pockets and appeasing political allegiances.<sup>180</sup>

334. Some ALP councillors themselves suggested to my investigation that they found themselves in situations where their differing roles have led to confusion. When one was asked if they mix their ALP and council activities, the answer was:

A. Well, it's hard to say when you mix because the people you meet in [sic] ALP are the same people you meet in the council. So if I go to a social function and I meet [Councillor C] and [Councillor G] and [Councillor M] and [Councillor B], I'm there in a social capacity. I was invited there either because of my membership of the ALP or because of my membership to the council. So you can't separate - you can wear separate hats, but you don't say, "No, don't talk to me about [sic]."<sup>181</sup>

<sup>179</sup> Submission to the St Clair Land Swap consultation. Included in Appendix A to Consultation Report - St Clair Reserve Community Land Revocation.

<sup>180</sup> Submission to the St Clair Land Swap consultation. Included in Appendix A to Consultation Report - St Clair Reserve Community Land Revocation.

<sup>181</sup> Cr D (T1) p40, 39.

335. Another said:

And when you have got all these members of council who are deeply involved in the Labor Party, who all work for the ministers, who have all got interests, it is very difficult for them to have a view that's not government's view. How can you expect the council to have a view that's different to the government? How can you honestly expect that council to say "No, we are not going to do the land swap. No, we are not going to put houses on St Clair reserve in defiance of South Australian government policy"?<sup>182</sup>

336. Whether the ALP councillors had conflicts of interest in relation to the 9 November decision of the council must be determined according to the requirements of the Local Government Act, which only deals with actual conflicts. A perceived conflict of interest does not necessarily amount to an actual conflict of interest under the Act.
337. Under section 73(1), an 'interest' for which a council member may have a conflict can be one of three types:
- a direct pecuniary benefit or detriment
  - an indirect pecuniary benefit or detriment
  - a non-pecuniary benefit or detriment
338. Previously, in a report<sup>183</sup> on a complaint I received about the revocation, I wrote that membership of a political party was not in itself an 'interest' which required disclosure under the Local Government Act. I remain of that view.
339. I note on the 2010-2011 ALP membership (SA Branch) application form, there is a pledge of membership. In response to my provisional report, the Member for Croydon put to me that the pledge arises from historical splits in the party; is designed to bind Members of Parliament; and has no application to ALP members who happen to have been elected to local government. I accept that this may have been the intention, but on its face the pledge applies to any person who seeks to join the ALP in South Australia. It is in the following terms:

**PLEDGE**

I hereby apply to join the Australian Labor Party (SA Branch). I agree to be bound by the Objectives, Federal and State Platforms and the rules of the Australian Labor Party. I also agree to be bound by decisions of the State Executive taken in accordance with these rules. I declare that this information is true and accurate and that I am enrolled at the address above with the Australian Electoral Commission.<sup>184</sup>

340. I assume that the 12 ALP councillors would have signed a pledge of similar wording; and I have proceeded on this basis.
341. In addition, the ALP (SA Branch) rules state:

20.3.2 Charges may be laid against a member of the Party, or a member may be the subject of an investigation by State Executive, on the grounds of:

- (a) disloyalty to the Party;
- (b) infringement of the National or State Rules, or the National or State Platform;<sup>185</sup>

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<sup>182</sup> Cr H, p60, 34.

<sup>183</sup> Complaint received 8 September 2009. Report dated 24 November 2009. See Complaint 1 - Part 2.3 of my report.

<sup>184</sup> [www.sa.alp.org.au](http://www.sa.alp.org.au)

<sup>185</sup> ALP Rules. See [www.sa.alp.org.au](http://www.sa.alp.org.au)

342. The rules set out the process for investigating such a charge. Rule 20.3.9 says:

20.3.9 Where a charge has been found proved by State Executive and the finding has been endorsed by Council, State Executive shall impose any one or more of the following penalties:

- (a) a reprimand;
- (b) a fine;
- (c) a removal of the member from any office held in the Party and/or any position held on a committee of the Party;
- (d) suspension of any or all rights as a member of the Party for a specified period of time;
- (e) expulsion from the Party.

343. I invited the state secretary of the ALP to provide any comment in relation to matters affecting the ALP, but he declined to make any further comment beyond that provided by the Member for Croydon.<sup>186</sup> The Member for Croydon put to me in response to my provisional report that at least since the 1940's there has never been any charge laid against any ALP member in South Australia arising from his or her participation in local government, either as an elected member or otherwise. Further, he commented that no harm has ever been done or could be done under the party rules to any ALP member who happened to be a councillor in local government on account of his or her voting in local government.

344. However, on the face of the wording of the pledge, I am unable to escape the conclusion that the 12 ALP councillors had pledged not to be disloyal to the ALP and not to infringe the state platform. Doing so could potentially result in charges being laid against them.

345. The South Australian Labor Platform for 2009 (**the platform**) records in Chapter 7 - A Green South Australia - Urban Environments at paragraph 59 that:

To ensure a continued high quality of life in Adelaide and the Adelaide Hills, urban development densification must be supported by appropriate new land use and transport planning policies, increased provision of high quality public open and green spaces to offset the reduction in private open space, support for transit oriented community hubs and networks, and sustainable water and energy supply infrastructure and transport systems.

346. Following in paragraph 66 under the heading Labor's Commitments, is:

Labor will support sustainable and innovative development, and work to ensure that development will be public transit oriented, and utilise existing infrastructure and services.

347. The platform sets out Labor's commitments as including the following:

[11] We will support sustainable and innovative development consistent with community values, work to ensure that development will be transit oriented and seek to utilise existing infrastructure and services.

[20] Labor will ensure that transport corridors are well planned and protected, and that economic, employment and environmental opportunities presented by new transport infrastructure are realised.

[21] We will promote a positive image to visitors to South Australia by ensuring that

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<sup>186</sup> Telephone conversation with Deputy Ombudsman, 26 September 2011.

transport gateways are well presented and integrated with transport nodes.<sup>187</sup>

348. In Chapter 8 - Building South Australia's Future - Urban Development and Planning, the platform says at paragraph 7:

The Draft Plan for Greater Adelaide has identified 13 areas for transit orientated development (TOD). Higher density housing is proposed within these areas, which are located within 800 metres of a transit corridor or near major public transport interchanges.<sup>188</sup>

349. In his response to my provisional report, the Member for Croydon commented on the preceding commitments in the platform as follows:

Charles Sturt councillors who were A.L.P. members would have no familiarity with these obscure parts of the Platform, with the possible exception of Councillor K, owing to [Councillor K's] employment. Some of the Council staff might have read these provisions. Even if councillors had read it, they would not regard it as binding or persuasive or carrying any weight in their duties on Council. The Platform is rarely if ever mentioned even in the Parliamentary Labor Party. In my first term as an M.P., I was listening to a Caucus debate. A Labor backbencher was reproaching Deputy Premier Frank Blevins for a Government decision. Out of left field the backbencher challenged Frank:

“What you are doing is against the Party Platform!”

Frank: “Oh, going to play dirty are we ?”

If this is so in the State Parliamentary Party, it is so much truer in local government where the Party Platform has the same status among councillors who happen to be A.L.P. members as *The Bhagavad Gita* has among members of the Adelaide Crows squad.<sup>189</sup>

350. The Draft Plan for Greater Adelaide (titled Planning the Adelaide We All Want - Progressing the 30-year Plan for Greater Adelaide) outlined the development of TODs next to mass transit lines. One of the targets was to:

Ensure transit corridors contain a network of cycle ways, walkways and greenways to provide cooling and to create liveable and attractive locations for a diverse population.<sup>190</sup>

351. I note that other targets included delivery of ‘13 high-order transit-oriented developments’<sup>191</sup> and to ‘prepare Precinct Requirements for transit-oriented developments’.<sup>192</sup> Further, ‘Cheltenham/Woodville’ was listed as a ‘priority development’, along with six other developments in the Draft Plan for Greater Adelaide.<sup>193</sup>

352. I note that section 8(c), (d) and (e) of the Local Government Act require that a council must, in the performance of its roles and functions:

- (c) participate with other councils, and with State and national governments, in setting public policy and achieving regional, State and national objectives;
- (d) give due weight, in all its plans, policies and activities, to regional, State and national objectives and strategies concerning the economic, social, physical and environmental development and management of the community;
- (e) seek to co-ordinate with State and national government in the planning and delivery of services in which those governments have an interest;

I consider that these provisions required the council to give due weight to the state government objectives set out in the Draft Plan for Greater Adelaide, but that they do

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<sup>187</sup> South Australian Labor Platform for 2009, A Strong South Australia.

<sup>188</sup> South Australian Labor Platform for 2009, A Strong South Australia, p135  
[http://www.sa.alp.org.au/images/stories/Policies/sa\\_labor\\_platform\\_2009.pdf](http://www.sa.alp.org.au/images/stories/Policies/sa_labor_platform_2009.pdf)

<sup>189</sup> Response from the Member for Croydon, 17 August 2011, p4

<sup>190</sup> Planning the Adelaide We All Want - Progressing the 30-Year Plan for Greater Adelaide, 6 July 2009, p76.

<sup>191</sup> Planning the Adelaide We All Want - Progressing the 30-Year Plan for Greater Adelaide, 6 July 2009, p80.

<sup>192</sup> Planning the Adelaide We All Want - Progressing the 30-Year Plan for Greater Adelaide, 6 July 2009, p80.

<sup>193</sup> Planning the Adelaide We All Want - Progressing the 30-Year Plan for Greater Adelaide, 6 July 2009, p80. The final 30 Year Plan for Greater Adelaide was released on 17 February 2010; and designated Woodville Railway Station as a future TOD site.

- not impose an obligation to give due weight to the commitments set out in the ALP platform.
353. As I have previously said, one of the purposes of the revocation was to facilitate a land swap between the St Clair land and the Sheridan land to enable an opportunity for a TOD to be developed adjacent to the Woodville Railway Station.<sup>194</sup>
354. The creation of a TOD was a key factor in the revocation and land swap; and at the same time, it was also a clear commitment of the SA branch of the ALP in its 2009 platform. It was also a clear component of the state government's Draft Plan for Greater Adelaide, which the council was legislatively obliged to 'give due weight to' and 'seek to coordinate with'.
355. It might be thought that if an ALP councillor voted against the referral of the revocation proposal to the Minister on 9 November 2009 (or the 14 December 2009 meeting), they would in effect be voting against the platform. On the face of rule 20.3.2 above, this might have resulted in an investigation or a charge being laid against them on the grounds of infringement of the platform.
356. However, based on the historical information provided to my investigation, I conclude that whilst of the face of the documents, action could have been taken against the ALP councillors if they had voted inconsistently with the party platform, it is highly unlikely that any such action would in fact have been taken. Further, the councillors were under a duty to meet their obligations under section 8 of the Local Government Act, not simply to give effect to the ALP platform. Thus I do not consider that the ALP councillors could be said to have had a 'reasonable expectation' of suffering a non pecuniary detriment by virtue of their membership of the ALP.
357. There is a further reason why the councillors' membership of the ALP in my view does not amount to an 'interest' under section 73(1) of the Local Government Act. This is because the relevant paragraph (b) in section 73(1) requires a council member to suffer or to have a reasonable expectation of suffering a detriment *if the matter were decided in a particular manner*. In my view, these words require a link between the *council's decision* on the matter and the detriment, not between the *individual council member's vote* and the detriment.
358. The individual ALP councillors might have had a reasonable expectation of suffering a detriment if they effectively voted against the platform on 9 November 2009 (or 14 December 2009). However, if they did, this expectation was not dependent on the outcome of the council's decision in relation to the matter, as required by section 73(1)(b).
359. I consider later whether an apprehension of bias arose by virtue of these councillors' membership of the ALP.

## 2

### OPINION

The 12 ALP councillors did not have an interest in a matter before the council on 9 November 2009 (or 14 December 2009) within the meaning of section 73(1) of the Local Government Act, due to their membership of the ALP.

<sup>194</sup> City of Charles Sturt, Council Minutes, Cheltenham Racecourse and St Clair Reserve and Sheridan Land Exchange, 9 June 2009, Item 13.6, p29.

*Whether Councillors J and P had an interest – engagement in the Enfield electorate office*

360. Councillor J and Councillor P were employed in the Enfield electorate office during the period of the revocation and land swap. Councillor J had worked there on a full time basis since May 2007<sup>195</sup> and Councillor P on a permanent casual basis since 2005.<sup>196</sup> I understand that Councillor P would also get occasional casual work in other ALP electorate offices.
361. I note that the Enfield electorate area was covered in part by the council area during the relevant period.
362. I have noted above that Councillor J and Councillor P did not have an interest in the matter before the council on 9 November 2009 (or 14 December 2009) under section 73(3) of the Local Government Act, by virtue of their engagement within the Department of Treasury and Finance.
363. Further, in my view, they also did not have an interest in the matter under section 73(1) of the Local Government Act. This is because section 73(3) provides:
- (3) A member of a council who is a member, officer or employee of an agency or instrumentality of the Crown, will be regarded as having an interest in a matter before the council if the matter directly concerns that agency or instrumentality **but otherwise will not be regarded as having an interest in a matter by virtue of being a member, officer or employee of the agency or instrumentality.** [my emphasis].
364. I also consider that on this basis neither Councillor K, Councillor C, Councillor G nor Councillor D had an interest under section 73(1)(b).
365. Section 73(3) is clear that the only occasion on which a member, officer or employee of an agency or instrumentality of the Crown will be regarded as having an interest in a matter before the council, is when and if the matter ‘directly concerns’ that agency or instrumentality.
366. It is understandable that situations will arise in which elected members may have duties to their employers or to other bodies, which conflict with their duties as council members. Council members often are elected precisely because of their close links to their communities; and in my view, this is a laudable feature of representative local government.
367. However, these links may give rise to potential conflicts. The particular duties owed will depend on the nature of the particular organisation or body, but could include being put in a situation of ‘divided loyalty’.
368. In my view, a council member’s performance of their functions and duties as an elected member may be compromised by their employment in an MP’s electorate office in the following ways:
1. a conflict can exist between their public duty as a council member elected by the community to represent the interests of residents and ratepayers (section 59(1)(b) of the Local Government Act), and their public duty to act in the interests of their state MP.

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<sup>195</sup> Cr J, p6, 21.

<sup>196</sup> Cr P (T1) p9, 31.

2. a conflict can exist between their public duty as a council member to act in the interests of the community, and their private interest in maintaining their employment with the state MP as an electorate officer.<sup>197</sup>
369. Some witnesses suggested to my investigation that councillors may not always perform their duties as elected members in the best interests of the community, because of their private interest in maintaining their employment.
370. One ALP councillor speculated about electorate officer employees:

You see, for these people they are directly involved, their bread and butter. And [Councillor ...'s] got a young family. You know, [Councillor ...'s] children are grown up. But if you rely on having to pay a mortgage and these people tell you what to do, and if you displease them they sack you, I mean, that's quite significant on your decision-making powers.<sup>198</sup>

371. I comment that my investigation received no evidence to suggest that Councillor J or Councillor P themselves had these concerns, or that they felt obliged to vote in line with any position or view of their MP.<sup>199</sup>
372. However, I consider that in relation to the 9 November 2009 (and 14 December 2009) decisions concerning the revocation, Councillors J and P had a conflict of duty between their public duty as a council member, and their public duty to act in the interests of their state MP.
373. This situation is not captured in the Local Government Act; and I address it later in Part 8 of this report.

### 3

#### OPINION

Councillor J and Councillor P did not have an interest in a matter before the council on 9 November 2009 (or 14 December 2009) within the meaning of section 73(1) of the Local Government Act, due to their employment in the Enfield electorate office.

Further, neither Councillor K, Councillor C, Councillor G nor Councillor D had an interest under section 73(1).

<sup>197</sup> See also, Ombudsman Victoria, Whistleblowers Protection Act 2001 - Investigation into the Alleged Improper Conduct of Councillors at Brimbank City Council, May 2009, p33, para 128.

<sup>198</sup> p64, 12.

<sup>199</sup> Nominally the Department of Treasury and Finance is an electorate officer's employer. However, it is the MP who selects and engages the electorate officer (they are not obliged to follow the public service merit selection process) and who is effectively their 'employer' on a day to day basis.

### 3.3 BIAS AND OPEN MIND

#### Background

374. In addition to the Local Government Act governing elected members regarding actual conflicts of interest, the common law rules of natural justice or procedural fairness require that council members make decisions free from any bias. They must bring open minds to all matters and approach their decision-making fairly and impartially. This is a separate, additional requirement to the conflict of interest provisions in the Local Government Act (although a bias may be based on an interest or arise out of pre-judgment).

375. In addition to actual bias, the common law recognises ‘apprehended bias.’ The test for determining whether a decision is infected with apprehended bias is an objective one, being:

whether a fair-minded, lay observer might reasonably apprehend that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the question which must be decided.<sup>200</sup>

376. Only a limited class of persons is entitled to enforce the requirements of procedural fairness in administrative decision-making. The requirements can be enforced only when a decision affects the rights, interests or ‘legitimate expectations’ of an individual.<sup>201</sup>

377. In *Hot Holdings Pty Ltd v Creasy*, McHugh J said (at para 68):

The rules of natural justice require that any decision of a Minister that affects a person's rights, interests or legitimate expectations must be unbiased and free from any reasonable apprehension of bias. Where an administrative decision is made in private, the test for apprehended bias is whether a hypothetical fair-minded lay person, properly informed as to the nature of the proceedings or process, might reasonably apprehend that the decision-maker might not have brought an impartial mind to making the decision. In deciding the issue, the court determines the issue objectively.<sup>202</sup>

378. The High Court has determined that the ‘question is one of possibility (real and not remote), not probability’,<sup>203</sup> and that there are two steps to be taken to establish apprehended bias:

First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an “interest” in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.<sup>204</sup>

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<sup>200</sup> *Johnson v Johnson* [2000] HCA 48 at 11.

<sup>201</sup> *Kioa v West* (1985) 159 CLR 550.

<sup>202</sup> *Hot Holdings Pty Ltd v Creasy* [2002] 210 CLR 438 at 68.

<sup>203</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at para 7.

<sup>204</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at para 8.

379. Further, although the courts have recognised that different standards apply to judicial officers on the one hand and ministerial and administrative decision-makers on the other,<sup>205</sup> ‘these differences must not obscure the fundamental principle.’<sup>206</sup>
380. The Victorian Supreme Court considered the concept of apprehended bias in the context of a council decision in *Winky Pop Pty Ltd & Anor v Hobsons Bay City Council*. Kaye J said that a resolution has been passed in breach of natural justice if:
- a fair minded and informed member of the public might entertain a reasonable apprehension that the councillor might not have brought an impartial and unprejudiced mind to the resolution of the issues considered by the council.<sup>207</sup>
381. His Honour provided further guidance on the issue of bias:
- (1) In determining whether there was pre-judgment on behalf of a councillor, it must be borne in mind that councils are democratically elected, and that councillors necessarily carry out political and legislative roles. Accordingly, a councillor is not necessarily disqualified from participating in a decision because the councillor, previously, has held and expressed views on the matter in question.
  - (2) The appropriate test, taking into account the political and legislative nature of the role of a councillor, is whether the councillor, on the matter in question, is open to persuasion, notwithstanding his or her previously held and expressed views on a subject. In other words, to establish that a councillor is disqualified from participating on a decision on the basis of pre-judgement, it must be shown that the councillor’s views were so demonstrably fixed that they were not open to being dislodged by reason or argument.
  - (3) It is not necessary to prove actual pre-judgment on behalf of a councillor. It is sufficient if it is made to appear that a fair minded and informed member of the public might entertain a reasonable apprehension that the councillor was not open to persuasion on the matter in question, because of the councillor’s previously held and expressed views on the matter, or because of the councillor’s previous involvement in the issue in question.<sup>208</sup>
382. Whilst only a limited class of people may enforce the requirements of procedural fairness, in my view there is a legitimate expectation that councillors will consider all matters fairly and impartially, and with an open mind.<sup>209</sup> I accept that the concept of maintaining an open mind does not require that a decision-maker should have an ‘empty’ mind, and that it is not reasonable or practicable to expect that a person will have no pre-existing personal views or preferences. I accept also that an elected member of a council frequently will have strong views about community issues, often expressed prior to election, and that this is an important manifestation of the representational role of elected members.

<sup>205</sup> *Hot Holdings Pty Ltd v Creasy* [2002] 210 CLR 438 at 50 and 69.

<sup>206</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at para 5.

<sup>207</sup> *Winky Pop Pty Ltd & Anor v Hobsons Bay City Council* [2007] VSC 468 at 66.

<sup>208</sup> *Winky Pop Pty Ltd & Anor v Hobsons Bay City Council* [2007] VSC 468 at 44.

<sup>209</sup> For example, the council’s Code of Conduct for Elected Members requires councillors ‘to be informed, impartial and have due regard for both individuals and the wider community, and short and long term considerations in reaching decisions...’.

383. In summary, members of a council are entitled to hold and express views, but what is important is that they should be able to reconsider them in light of all the evidence and arguments presented when making decisions which directly affect the interests of a certain individuals.
384. To ensure that council members bring an open mind to their decision-making, they must:
- be prepared to listen to all arguments
  - be prepared to take into account all relevant matters and facts known, or that ought to have reasonably been known
  - consider all of the various options
  - genuinely hear the objections and any alternative views
  - not take irrelevant matters into account
  - make their decisions solely on merit.
385. However, even if a council member is able to bring an open mind to a decision, a perception of bias may cast doubt on the impartiality of the decision. An appearance or perception of bias may arise from:
- the elected member having some direct or indirect interest (pecuniary or non-pecuniary) in the outcome of the decision
  - the elected member having an association with a person or persons who stand to gain a benefit or suffer a detriment in some way which could be seen to influence the decision
  - the conduct of the elected member (including communication or comments in relation to the matter), or
  - the elected member having extraneous information (where prejudicial information or circumstances could give rise to a perception of bias).

### Whether the ALP councillors brought an open mind to their decision-making

386. It was alleged that some council members failed to bring an open mind in relation to the revocation decision-making, due to their membership of the ALP and the influence of the ALP state government through their employment in state government departments and in the Enfield electorate office.
387. Council members have a right to maintain their own political convictions. Political allegiance becomes an issue however, if council members fail to consider the merits of a matter before them and vote ‘blindly’ according to the position of their political party. I note that in the United Kingdom (where there are politically endorsed candidates for local government), a court has stated:
- A local authority councillor is entitled to give weight to the views of party colleagues, but should not abdicate responsibility by voting blindly in support of party policy. . .<sup>210</sup>
388. In this respect, local government is different from state or federal government. Councils are created as incorporated bodies under the Local Government Act<sup>211</sup>. That means that, like a company or an incorporated association, a council can only act through its formal meetings. The Local Government Act also requires that meetings should be open to the public, and that decisions must not be made outside those meetings.<sup>212</sup>

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<sup>210</sup> *R. v Waltham Forest LDC* [1988] QB 419.

<sup>211</sup> Local Government Act, section 35(1).

<sup>212</sup> Local Government Act, section 90(1) and (8).

389. No similar constraints apply to a Cabinet, or to a parliamentary party, because they are not incorporated bodies or established by statute. It follows that members of Cabinet or a Parliamentary party are quite entitled to discuss how they want to vote, and to reach a concluded position, outside a formal meeting. The situation is different for councillors because of the operation of the Local Government Act.
390. While I recognise the concerns of some members of the community about the ALP councillors in their decision-making, the common law test that I must apply is an objective one: that is, whether a fair-minded, lay observer armed with the facts – and whose rights, interests, or legitimate expectations might be affected by the decision – might reasonably apprehend that they did not bring an impartial and unprejudiced mind to their decision-making. There are a number of aspects of the behaviour of the ALP councillors which may assist in answering this question, and I consider these below.

#### *ALP councillor discussions outside the council*

391. I have previously discussed the apparent conduct of some of the ALP councillors at the barbecue at Parliament House in November 2006. I consider that it demonstrated the councillors' propensity to meet and confer with each other about a council decision before a formal vote in the council chamber.
392. The evidence received during my investigation showed that there was much communication amongst the ALP councillors about the revocation. However, this communication appeared to be more concerned about how to respond to the protests from some sections of the community, rather than how they would vote.
393. Just prior to the council's (purported) revocation decision on 23 November 2009, for example, Councillor F tried to encourage other councillors to engage a public relations person to help them deliver to the community the positive aspects of the revocation and land swap.
394. Councillor F sent an email on 16 November 2009 to the majority of the ALP councillors (and one who was not an ALP councillor) stating:

I have concerns that the policies of the [council] are not being made known to the ratepayers or the general public regarding the St Clair land swap. As a result there is a lot of angst in the community and with council members. Therefore, I propose to hold a forum with experienced public relation consultants to workshop a possible way forward.<sup>213</sup>

395. Councillor C responded by email of the same date that while there was merit in Councillor F's proposal:

I'm just a bit worried that that 12 of us getting together for a forum with PR reps may not be a good look prior to a final decision on the land swap being made.<sup>214</sup>

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<sup>213</sup> Cr F Exhibit #2.

<sup>214</sup> Cr F Exhibit #3; Cr C Exhibit #8.

396. My investigation also received evidence that many of the ALP councillors met at Councillor M's house on 29 November 2009 with the Member for Croydon, and discussed how they were going to deal with the reaction of some of the community in relation to the revocation and land swap.
397. I note these events occurred after the threshold decision of the 9 November 2009 and the purported revocation decision on 23 November 2009. I found no conclusive evidence in my investigation which showed that the ALP councillors discussed how they would collectively vote in relation to the revocation; or that they would follow or were aware of the state ALP policy or platform on TODs and the need to support the land swap.

#### *Member for Croydon*

398. I have previously noted evidence obtained in my investigation about the association and communications between some of the ALP councillors and the Member for Croydon. I have also expressed my concern that some of the councillors' association and communications with the Member for Croydon could potentially call into question the councillors' independence in the discharge of their duties as elected members of the council.
399. I have considered the Member for Croydon's involvement in the revocation and land swap, and whether the ALP councillors (with the exception of Councillor H) allowed themselves to be influenced by his views about the land swap such that they did not bring an open mind to their decision-making, and whether their relationship with him could amount to apprehended bias.
400. My investigation found that from 11 November 2009, the Member for Croydon made significant public comment in supporting the land swap in the media (including Facebook). My investigation did not find any evidence of such comment prior to 11 November 2009.<sup>215</sup>
401. The Member for Croydon told my investigation that on 9 November 2009, it had been agreed amongst his ministerial colleagues that he would become the government spokesperson on the St Clair issue:

I would be appointed ... spokesman on St Clair ... that I would put the decision in the context of the government's light rail proposal which was a positive for my electorate, for Hindmarsh, Bowden, Brompton, Ridleyton, Croydon, West Croydon and Kilkenny.<sup>216</sup>

402. I note this timing was after the closure of the council's consultation period in the revocation process, and at a time when the community's protest against the land swap appears to have peaked. It was also at the time the council had resolved to submit the revocation proposal to the Minister for her consideration.

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<sup>215</sup> ABC radio 891.

<sup>216</sup> M for C, p26, 36.

403. Over the 12 days from 11 until 23 November 2009, my investigation found that the Member for Croydon made at least seven public statements supporting the land swap.<sup>217</sup> The Member for Croydon was also active in the media about the land swap between 23 November 2009 and the (valid) revocation vote on 14 December 2009. My investigation found there were at least seven media comments made by the Member for Croydon about the land swap during this time.<sup>218</sup>
404. When questioned by my investigation about his communications with councillors leading up to the revocation, the Member for Croydon only recalled that he had telephoned Councillor C and Councillor G the day following a SCAG<sup>219</sup> meeting he had attended in Sydney. I have since learned that the SCAG dates were 5 and 6 November 2009. The Member for Croydon said that he called these councillors because Cabinet would be wanting to know 'what Charles Sturt Council is going to do on the St Clair question.' The Member for Croydon said that he asked the councillors of the numbers in support of the revocation, and became aware that the proposal 'was going to be carried by a large majority'.<sup>220</sup>
405. My investigation found that the majority of the ALP councillors were reticent to talk about their association with the Member for Croydon. However, I found no persuasive evidence from either my investigation's interviews or the council's and councillors' records and email traffic, which showed communications of any substance between the Member for Croydon and the councillors suggesting how councillors would or should vote prior to the decision of 9 November 2009 (or 14 December 2009).
406. Councillor A said that even though the Member for Croydon's support for the land swap was known during the revocation period, the councillor made their own decision in voting. Councillor A commented that whenever the Member for Croydon had suggested that the councillor support a council agenda item, the councillor would usually agree ... and 'there's not been an occasion where I've felt that what he's saying is wrong'.<sup>221</sup>
407. Councillor A also alleged to my investigation that the ALP group of councillors was told by Councillor B to vote for the revocation to support the Member for Croydon:

And [Councillor B] basically said that 'We need to support Mick Atkinson on this' and went on to talk about the community issues that were - you know, the backlash and then the potential benefits and the tramline and the things like that.<sup>222</sup>

<sup>217</sup> ABC radio 891, 11 November 2009; 5AA, 11 November 2009; Stateline, 13 November 2009; 5AA ,14 November 2009; Sunday Mail, 15 November 2009; 5AA, 16 November 2009; 5AA, 20 November 2009.

<sup>218</sup> Independent Weekly, 27 November 2009; The Advertiser, 4 December 2009; ABC radio 891, 4 December 2009; 5AA ,7 December 2009; Weekly Times, 9 December 2009; ABC radio 891, 10 December 2009; 5AA, 11 December 2009; 5AA ,14 December 2009.

<sup>219</sup> Standing Committee of Attorneys General.

<sup>220</sup> M for C, p29, 36.

<sup>221</sup> Cr A (T1) p98, 6.

<sup>222</sup> Cr A (T2) p49, 11.

408. Councillor B denied this to my investigation, saying:

No. I don't recall that at all. I don't think I would have - I would have argued merits and that's it. That's how I've always went along the line. The merits of the project. No, I don't recall that at all. To me - and especially the last bit, which kills it, I would never have done that. I don't even get involved like that. No. No, I dispute that. That's not correct, that I would have said that. I don't even recall the meeting. Before the vote, is that - no, absolutely not. I don't think that.<sup>223</sup>

409. My investigation was not able to corroborate the allegation.

410. The Member for Croydon told my investigation:

[the councillors' minds] certainly [were] not adulterated by any expression of opinion by me because until early November I didn't have an opinion. Not having an opinion I wasn't in a position to share it with anyone else.<sup>224</sup>

411. I accept this evidence.

412. In summary, I found no evidence that the Member for Croydon exerted improper influence on any councillor, and I conclude that no councillor was wrongly influenced by the views of the Member for Croydon in their decision-making regarding the decision of council on 9 November 2009 (or 14 December 2009).

#### *Voting pattern of the ALP councillors*

413. A factor which may indicate that the ALP councillors had predetermined positions on the revocation and land swap is the actual voting pattern of the councillors.

414. In my view, the voting pattern is not conclusive of a suggestion that councillors did not bring an open mind. In particular, I note that not all ALP councillors voted in support of the revocation on 9 November 2009 and 14 December 2009. Further, councillors who were not members of the ALP voted in support of the revocation. The voting pattern of the ALP councillors was as follows:

- The motion on 28 April 2008 to endorse in principle the concept of a land swap and to commence investigation into the revocation process was approved nine to two. Three ALP councillors disclosed interests due to their membership on the DAP and left the meeting. Five ALP councillors voted in the affirmative and two in the negative (this included Councillor H).
- There was a motion (from Councillor H) to rescind the 28 April 2008 decision at the meeting of 12 May 2008. It was defeated 13 to one. Nine ALP councillors voted in the negative (Councillor H in the affirmative).
- The voting at the 11 August 2008 meeting to effectively continue proceeding with the revocation and land swap with the LMC was approved 12 votes to one (Councillor H). Nine ALP councillors voted in the affirmative.

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<sup>223</sup> Cr B, p65, 7.

<sup>224</sup> M for C, p33, 4.

- The meeting on 9 June 2009 to resolve to accept the draft contracts for the land swap, and to consider the prudential report and the Deloitte review was approved 11 to one. Eight ALP councillors voted in the affirmative, and one in the negative.
- The motion on 12 October 2009 to hold a public meeting was defeated eight votes to five. Seven ALP councillors voted in the negative and three in the affirmative (including Councillor H).
- The motion on 9 November 2009 to note the consultation report and proceed with the revocation and forward the proposal to the Minister was carried 13 votes to three. Ten ALP councillors voted in the affirmative and two in the negative (including Councillor H).
- The motion on 14 December 2008 to revoke the community status of the St Clair land following the approval by the Minister for the Southern Suburbs as the delegate of the Minister for State/Local Government Relations was carried 12 votes to three. Ten ALP councillors voted in the affirmative and one in the negative (Councillor H).

#### *ALP membership*

415. As discussed above, in my view the ALP councillors' membership pledge suggests that they were bound to follow the state ALP platform, which included supporting TODs and the state government's Draft Plan for Greater Adelaide (Planning the Adelaide We All Want - Progressing the 30-Year Plan for Greater Adelaide). This appeared to require that they support a TOD at 'Cheltenham / Woodville'.<sup>225</sup> I note that the exact location of that TOD was not defined in the Draft Plan for Greater Adelaide to be at the Woodville Railway Station, not how the development of that TOD would be achieved.
416. I have considered whether this gives rise to an apprehension of bias. I am not of the view that there is a sufficient and persuasive connection (that is, real rather than remote) between the taking of the pledge and the decision of 9 November 2009 (or 14 December 2009) to warrant a finding of apprehension of bias. At its highest, I consider that the ALP councillors' 'interest' was merely to support a TOD in the Cheltenham / Woodville area. Further, they were not in any way bound to revoke the community status of the St Clair land in order to establish a TOD.

#### *ALP councillors' motivations in voting on the revocation*

417. The evidence suggests that the ALP councillors voted in relation to the revocation and land swap for a variety of reasons. I have considered these reasons with a view to determining whether they might indicate apprehended bias in relation to the revocation decision.

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<sup>225</sup> Planning the Adelaide We All Want - Progressing the 30-Year Plan for Greater Adelaide, 6 July 2009, p80.

418. First, Councillor J expressed the view that the council members were dependent on the administration's research into the revocation:

The merits, yeah, that's understandable. I believe - given the design of it and how it's meant to - how it is supposed to look in, you know, several years time once it's all said and done, the staff believed that the land swap was necessary. They are the experts in it. They are the ones that did, you know, a lot of the legwork behind it. You can only take their word on good faith that it was necessary.<sup>226</sup>

419. Second, Councillor D was frank with my investigation and admitted that in supporting revocation, the councillor was also mindful of supporting another ALP councillor's wish to become mayor.<sup>227</sup> At the same time, my investigation found that it was evident that Councillor D had considered the merits of the revocation. My investigation found evidence of email communications between Councillor D and the council administration just prior to the 9 November 2009 vote, which showed that the councillor was concerned about a possible conflict of interest and voting on the matter on the basis of the merits of the revocation proposal.

420. Third, Councillor A told my investigation about voting in favour of the revocation because of the way the community was behaving:

One of the parts of my decision process was the really negative group of the community. They weren't supporting the park as such. They were supporting nothing. They were supporting: let's not do anything and let's get loud about it, let's - you know, upset the applecart. They weren't actually - at that point they weren't being community supportive. They were being negative.<sup>228</sup>

421. However, in other parts of this councillor's evidence, it was clear that on balance, the councillor had considered the merits of the revocation and land swap proposal:

So, to me, the land swap was a good idea. I could see that it's going to bring huge benefits of housing and redevelopment of that whole area, which is a fairly bad area as far as factories go and all those things around that area. So that, to me, is a huge benefit. So, you know, I was going to vote for it anyway. But let's face it, to me those things were all good. I can't see any bad things.<sup>229</sup>

I think all along I'd actually supported the concept plan of the housing and re-greening that space and - for my personal perspective I have less interest in what the Labor Party wanted or didn't want and what the State Government did or didn't want.<sup>230</sup>

422. Fourth, my investigation revealed that some of the councillors did not have a clear factual understanding of aspects of the revocation and land swap, and particularly of the role of the state government and the LMC.

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<sup>226</sup> Cr J, p61, 9.

<sup>227</sup> Cr D (T2) p37, 45.

<sup>228</sup> Cr A (T2) p50, 28.

<sup>229</sup> Cr A (T2) p50, 45.

<sup>230</sup> Cr A (T2) p62, 34.

423. When asked about the role of the LMC, Councillor A answered:

- A. I think, my understanding was that they were to facilitate, to oversee the land swap.
- Q. By doing what?
- A. I thought they were the legal review group and also would ratify the decision of the land swap. I'm a little unclear on their role actually.
- Q. So what parties were going to engage in the swap, from your recollection?
- A. The council, the LMC, State Government. But I'm not entirely sure.
- Q. So how did you see the process happening? So who owned what land, the joint venture - or?
- A. I understood the joint venture owned the factory land.
- Q. Say the Sheridan land?
- A. Yeah, Sheridan, Actil and whatever else there was there. I have to say I haven't looked into the ownership of the land, that's not something that's concerned me, really, I'm unclear on that.<sup>231</sup>

424. When asked the same question by my investigation, Councillor J said:

- A. That's a very good question. I always was of the opinion they were there as another party to it, but it was generally between developer and council.
- Q. So --
- A. I never really saw the Land Management Corporation, you know, in a really large role. That was never my understanding. It was always more - obviously because I'm looking at it from a councillor point of view, I'm far more - you know, I try to make myself as much aware of what council was thinking, what council wanted to do about it, not so much Land Management Corporation.
- Q. So Land Management Corporation, in terms of the swap, how did you see that was going to work?
- A. I really - I really didn't - don't know how that was - how that specifically was going to work.
- Q. Do you know --
- A. Their role would have been - look, their role would have been described in the minutes, but I just can't --
- Q. Do you know who owns the land that's going to be swapped with council?
- A. Well, you've got the Actil site. So that, I can only assume, would still be owned privately. St Clair, I believe, is owned by us, the council. And the rest of the site, as in Cheltenham, would be state government, I can only imagine, which I'd guess would be where Land Management Corporation comes into it, because they also run, like, large - they also own large chunks of land, I think....<sup>232</sup>

425. I note that the evidence of one councillor who was not a member of the ALP similarly revealed a lack of understanding of the LMC's role:

- Q. What's your understanding of the role of the Land Management Corporation in the swap?
- A. I don't know much about the LMC, all I know is that they want -- well whether they wanted to or not, and I shouldn't say that because I'm not sure -- but they agreed to the land swap. Once again I don't know who originated the idea. Some people say LMC. Protesters say that I think, but whether that's true or not I -
- Q. So what do you think they're going to do. What's their actual role in it?
- A. In this?
- Q. Yes.
- A. I'm not too sure. All's I know is it is under their guidance, it is under the LMC, the land. That's about all I know.
- Q. So you don't know of any contracts or any arrangements they might have had with the developers?
- A. No.<sup>233</sup>

<sup>231</sup> Cr A (T2) p60, 44.

<sup>232</sup> Cr J, p72, 24.

<sup>233</sup> Cr I, p33, 21.

426. It is concerning that some of the councillors appeared not to fully understand the facts of the land ownership in the revocation and land process. In my view, these councillors' lack of knowledge does not help to demonstrate that diligent decision-making occurred under the Local Government Act.
427. In saying this, the fact that these councillors had an incomplete understanding of some of the facts, cannot of itself lead to a conclusion that on balance, they did not approach the decision-making process with apprehended bias or without an open mind.
428. Fifth, one councillor, Councillor G, told my investigation that they saw merit in the revocation and land swap, but voted against it initially because it appeared to be the wish of the councillor's community. Councillor G later changed to vote in support of the revocation. Two ALP councillors told my investigation about this:

it was clear that Councillor G wanted it; [Councillor G] was only voting against it to appease ... residents. Then, when [the councillor] realised that [they weren't] going to be there, it didn't matter towards the end.<sup>234</sup>

sometimes what happens is you want to do a performance with the crowd that's there. So you want to show the crowd you're actually with them, but you're not actually with them. So what you might say before you walk in the room is, "Look, by the way, I'm going to show publicly ... who's come to the chamber tonight, that I support [his/her] community involvement and I'm going to speak for it and I'm going to vote for it, but I don't want you to vote for it. I want you to vote against it". So that's what happened.<sup>235</sup>

- Q. We've been told that Councillor G said to you that [the councillor] was in favour of the land swap, but ... was going to vote against it because of [the] constituents, and [the councillor] wanted you all to vote for the land swap. Did [the councillor] say that to you?
- A. I would say, yes.
- Q. [Councillor G] did?
- A. Yes.
- Q. So [Councillor G] wanted you all to vote for the land swap, the ALP councillors?
- A. I'm not saying I agree with it, right.
- Q. So [Councillor G] wanted all the ALP councillors to vote for the swap?
- A. Yes.
- Q. So [Councillor G] could vote against it?
- A. Yes, that's my understanding were [sic] [Councillor G's] views.
- Q. What else did [Councillor G] say to you about that?
- A. That's roughly what [Councillor G] said at the time.
- Q. Where did [Councillor G] say that?
- A. I don't know, that might have been in the chamber, that might have been afterwards when we were having, you know, refreshments after the meeting, but I just don't recall where, but, you're right [Councillor G] did say that and it's not something that I would do myself, right. I had a problem with it, but, anyway.<sup>236</sup>

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<sup>234</sup> Cr D (T3) p49, 34.

<sup>235</sup> Cr D (T2) p49, 21.

<sup>236</sup> Cr M, p155, 33.

429. When my investigation asked Councillor G about the reasons for the vote change in relation to the revocation, the councillor said:

- A. I hadn't disputed the merit of the project itself. Now, the problem I have is that when you go and do the representation duties, you've got to put another hat on and represent residents. Now, up to this point here we received a considerable lot of criticism from a lot of people in relation to this decision. But I formed a view -- and with whatever time frame may have been between then and the meeting -- I formed a view that the people who were against this project not [sic] represent the majority of the ratepayers out there in the City of Charles Sturt.<sup>237</sup>

430. Councillor G's letter to constituents after the vote said:

It is true that I initially voted against the land swap because I thought the protesters represented majority opinion in the ward I represent. However, even at that time, I received abusive phone calls from those opposed to the land swap. Some calls sought to target members of my family. I was followed home while driving from Arndale on one occasion. In my 10 years on council, nothing like this has ever been done to me before. I don't give in to bullying and my message to anyone who did this is that in targeting me and my family you had the opposite effect from that you intended.<sup>238</sup>

- 431. I do not consider the evidence outlined above would support a conclusion that Councillor G approached voting on the revocation with apprehended bias or without an open mind.
- 432. In summary, and on balance, I am of the view that the above evidence does not support a conclusion that the ALP councillors' vote (individually or collectively) on 9 November 2009 was tainted with apprehended bias.

## 4

### OPINION

On balance, the evidence does not support a conclusion that the ALP council members approached their decision-making on 9 November 2009 with apprehended bias.

<sup>237</sup> Cr G, p51, 17.

<sup>238</sup> Letter from Cr G to community member, 'Don't let the protesters kill public-transport investments in the west and your real-estate values', 21 December 2009.

## PART 4

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## CODE OF CONDUCT

## 4. CODE OF CONDUCT

433. In the course of my investigation, I considered the circumstances surrounding the administrative act and the revocation and land swap process and some of the ALP councillors' conduct in the exercise of their responsibilities under the Local Government Act. This is highlighted in the document 'Further description of the administrative act' (see Appendix B). During the investigation, evidence came to my attention suggesting that some councillors may have breached the council's code of conduct. Whilst such breaches did not, in themselves, appear to directly impact the council's decision-making in relation to the revocation, they are nevertheless breaches of a code which has a statutory basis.
434. I have noted previously that it was put to me by the council and some councillors, both during the course of my investigation and in response to my provisional report, that for various reasons I lack jurisdiction to consider these matters. I have also noted previously that I do not agree with their submissions. In my view, I am empowered to investigate 'the circumstances surrounding the (administrative) act'<sup>239</sup> and in my view the matters dealt with in this part fall clearly within those circumstances.
435. Section 18(5) of the Ombudsman Act provides:

The Ombudsman must report any evidence of breach of duty or misconduct on the part of a member, officer or employee of an agency to which this Act applies to the principal officer of the agency.

436. In this part, I do not make findings as to whether the evidence which I must report actually amounts to a breach of duty or misconduct. I simply describe the evidence, and the reasons why I consider that it may amount to a breach of duty or misconduct.

### What is the code of conduct?

437. As recently stated by the Attorney General in the consultation paper 'An Integrated Model – A Review of the Public Integrity Institutions in South Australia and an Integrated Model for the Future':

Public confidence in government institutions is a fundamental element of responsible government. It is indispensable to the rule of law. The public is entitled to expect that where powers are entrusted to public officials they will be used honestly, transparently and responsibly.<sup>240</sup>

438. There is a suite of legislative provisions which I have previously outlined in Part 2.1 which set standards for elected members' conduct in councils, some of which provide penalties for failures of compliance. A council's code of conduct is an additional set of standards applying to elected members.

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<sup>239</sup> See the definition of 'act' in the Ombudsman Act, section 3.

<sup>240</sup> Government of South Australia, An Integrated Model - A Review of the Public Integrity Institutions in South Australia and an Integrated Model for the Future, 25 November 2010, p2.

439. The Local Government Act requires that a council must prepare and adopt a code of conduct to be observed by council members (section 63(1)). While the code of conduct is required to be ‘consistent with any principle or requirement prescribed by the regulations’ and to ‘include any mandatory provision prescribed by the regulations’,<sup>241</sup> there is no statutory obligation for council members to comply with the terms of a code of conduct, and no statutory process to be followed in the event of an alleged breach.
440. A code of conduct is a statement by the council members about how they intend to behave. I note the views of the LGASA where it describes a code of conduct as:

a public declaration of the principles of good conduct and standards of behaviour that the Council’s stakeholders can reasonably expect of the Members of the Council. It is a statement of the desired standards of behaviors that the Council has agreed an individual should demonstrate when carrying out his or her role as a Council Member.

Local Government is a sphere of Government and as such the standards it sets should be at the top end of community expectations. The position of Council Member in Local Government is one of trust and custodianship of public assets bestowed on the Council by the electors. ...<sup>242</sup>

### **City of Charles Sturt’s code of conduct**

441. During the relevant period the City of Charles Sturt’s code of conduct mirrored the code as it currently stands. The code is attached as Appendix A to the council’s code of conduct policy.<sup>243</sup> Appropriately, the code is a publicly accessible document. The council’s policy document says the code of conduct is:
- a public declaration of the principles of good conduct and standards of behaviour that the Mayor and Councillors of the City of Charles Sturt have decided the community could reasonably expect them to demonstrate in the performance of their responsibilities as elected community representatives. The standards expressed below are in addition to any statutory requirements of the Local Government Act, 1999 or other relevant Act or Regulation.<sup>244</sup>

442. The policy sets out the circumstances in which behaviour is contrary to the provisions of the code of conduct, as well as grievance procedures for complaints about council members who may allegedly be in breach of the code of conduct.

### **The principles in the code of conduct**

443. The code of conduct sets out the following principles:

#### **Statement of Principles**

When undertaking my responsibilities as a member of Council I will:

- act conscientiously, with honesty and integrity, and generally conduct myself in a way that enhances the public image of the Council
- make myself aware and be mindful of the provisions of the Local Government Act 1999 and Regulations, other relevant legislation, and the By-laws and policies of Council
- respect the opinions and privacy of individuals and groups in the community

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<sup>241</sup> Local Government Act, section 63(3a).

<sup>242</sup> LGASA, Guidelines for Developing a Code of Conduct for Council Members, updated and revised January 2010.

<sup>243</sup> City of Charles Sturt, Code of Conduct Policy, last reviewed December 2008, p9.

<sup>244</sup> City of Charles Sturt, Code of Conduct Policy, last reviewed December 2008, p9.

- use information obtained as a Council member responsibly and not for purposes other than Council business
- respect and maintain confidentiality
- seek to establish and maintain a constructive and courteous working relationship with fellow Council members that respects and values diversity of opinion and the right of all points of view to be expressed in the decision-making process
- be informed, impartial and have due regard for both individuals and the wider community, and short and long term considerations in reaching decisions and accept the responsibility associated with decisions
- treat staff with courtesy, respect their professional expertise and opinions and recognise our different and complementary roles in achieving Council's objectives
- observe the correct lines of responsibility in dealings with staff
- be responsible when dealing with the media and making it clear that views expressed are personal and not necessarily the policy or position of the Council except where acting as Council spokesperson in accordance with the Council Spokesperson Policy
- not seek or accept any gift or benefit in connection with my public duties that may place me under any obligation or expectation of benefit to the giver or could reasonably be perceived as such by others.<sup>245</sup>

### **Behaviour contrary to the code of conduct**

444. The council's policy says that support and assistance in compliance with the code of conduct is to be provided by the leadership committee of the council (the mayor and four deputies).
445. The policy specifies the process to be followed in dealing with alleged breaches of the code of conduct. Any person can bring a complaint of an elected member's breach of the code of conduct. An investigation is managed by the Responsible Council Member (**RCM**). The RCM is the mayor, unless the case concerns the mayor's behaviour, in which case it is the deputy mayor. If the complaint concerns the behaviour of both the mayor and the deputy mayor, it is referred to the council's leadership committee for investigation. The RCM is then to consult with all the other members of the leadership committee 'as soon as practical after a complaint regarding the code of conduct has been received and before any formal action is taken'.<sup>246</sup>
446. The policy sets out three categories of complaints, depending on the severity of the alleged conduct.

#### ***Level 1 complaint***

447. Level 1 complaints generally relate to the behaviour of a council member within the context of a council or council committee meeting. Examples given in the policy include:
- disrespect to the chair or other members
  - failure to observe meeting procedures
  - inappropriate comments regarding staff, members of the public or other council members.

<sup>245</sup> City of Charles Sturt, Code of Conduct Policy, last reviewed December 2008, p9.

<sup>246</sup> City of Charles Sturt, Code of Conduct Policy, last reviewed December 2008, p3.

448. The consequences of a justified level 1 complaint include:

- ask that the offending remarks be withdrawn
- seek an apology
- provide the council member with additional training
- counselling from the mayor or committee chair
- a formal letter from the mayor or committee chair
- censure motion<sup>247</sup>
- suspension from the meeting.<sup>248</sup>

#### *Level 2 complaint*

449. Level 2 complaints allege improper behaviour, including possible breaches of the Local Government Act and regulations. They also include behaviour that is contrary to council's policies, codes and statements.

450. Examples given in the policy include:

- attempting to inappropriately influence a decision of a council officer
- improper use of council resources
- leaking of politically (but not commercially) confidential information
- action contrary to council policy
- public behaviour detrimental to the council's image.

451. The consequences of a level 2 complaint may include:

- an apology
- counselling
- training
- a censure motion by the council
- formal letter
- removal of non mandatory privileges/appointments.

#### *Level 3 complaint*

452. Level 3 complaints allege illegal behaviour. The policy says that complainants can refer level 3 complaints directly to the Minister/Office for State/Local Government Relations; the SA Police; other relevant investigation authorities; or the RCM. Where the complaint is referred to the RCM they are to refer it to one of these independent authorities for investigation as soon as they are satisfied the matter is likely to be a level 3 complaint.

453. Examples of level 3 complaints given in the policy include:

- bribery
- conflict of interest
- theft
- misuse of public office
- misuse of confidential information.

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<sup>247</sup> See also regulation 29, *Local Government (Procedures at Meetings) Regulations 2000*.

<sup>248</sup> City of Charles Sturt, Code of Conduct Policy, last reviewed December 2008, p4.

## Recording of complaints

454. The code of conduct policy provides that all levels of complaint and outcomes are to be presented to the council's Audit Committee in a quarterly report, and included in council's Annual Report.

## Whether councillors may have breached the code of conduct during the revocation process

455. During the revocation process, my investigation found there was evidence to suggest that there were councillors whose conduct may have offended the principles in the code of conduct.

### *1. Whether Councillors K, P, A and G may have breached the code of conduct – the Member for Croydon and the councillors' letters supporting the land swap*

456. The Member for Croydon told my investigation that in his judgment, people in the local area were unaware of the councillors' reasons for favouring the land swap. He said that he offered his assistance in drafting letters for the councillors to send to their constituents, at a gathering at Councillor M's house on 29 November 2009:

And I said to the councillors 'Well look, if you bring some paper and some envelopes around to my office, and we can settle a draft, we'll send out to your constituents the reason you took this decision and that will have the benefit for me and for Mr Weatherill as members facing election in three months' time, having the people who actually made the decision explain why they made the decision and then people could take it or leave it.' My understanding is some of them got mixed feedback ... . But, it was a question of elected officials taking responsibility and being accountable and in sending out the letters and letterboxing them. I'm sure the councillors concerned knew that they could be subject to a really quite vicious backlash and that it might have a negative influence when they next presented themselves to the electors. ...<sup>249</sup>

I note that the gathering at Councillor M's house was for ALP councillors.

457. Councillor K told my investigation that some of the ALP councillors had talked about how they would deal with the adverse reaction of the land swap protestors; and it was agreed that they would have a letter 'ready to go asap'<sup>250</sup> after the 23 November 2009 vote, explaining their positions to their constituents because 'we were all purging over the stuff we'd all been put under'.<sup>251</sup> However, one email obtained by my investigation showed that this agreement was reached amongst some of the councillors around 17 November 2009.<sup>252</sup>
458. My investigation learned that the Member for Croydon and his electorate office directly assisted four councillors, Councillor K, Councillor P, Councillor A and Councillor G, in:

- drafting, finalising, printing and enveloping letters for constituents in support of the land swap, which purported to be from each of these councillors
- attaching each councillor's photograph, contact details and signature to these letters, which had been provided by the councillors to the electorate office

<sup>249</sup> M for C, p31, 29.

<sup>250</sup> Email from Cr K to Crs B and A, 17 November 2009.

<sup>251</sup> Cr K (T1) p60, 43.

<sup>252</sup> Email from Cr K to Crs B and A, 17 November 2009.

- mail merging the councillors' constituents' names and addresses to these letters and envelopes, presumably from the electorate roll
  - arranging volunteers to letterbox these letters; and in some cases, boxing and delivering these letters to volunteers' houses for letterboxing.<sup>253</sup>
459. In the case of Councillor G, this assistance was apparently provided by an officer in the Cheltenham electorate office as well. In responding to my provisional report, the legal representative for the Member for Croydon queried why I did not also make inquiries of the Member for Cheltenham and his electorate office as to the extent of this assistance.<sup>254</sup> I saw no need to do so, having regard to the stage which my investigation had reached, and because the terms of reference provided to me by the Legislative Council explicitly referred to the Member for Croydon.
460. Councillor C, who did not send out a letter, told my investigation that they were advised by the Member for Croydon to put out a letter, but the councillor chose not to because the councillor '... didn't want to raise the profile of the issue in my ward any more than it had been already'.<sup>255</sup>

### Councillor K

461. Councillor K eventually conceded to my investigation that the Member for Croydon had originally drafted a six page constituent letter, which the councillor refined to a two page letter. My investigation revealed that the councillor received the draft from the Member for Croydon via email on 17 November 2009.<sup>256</sup>
462. The electorate office addressed, enveloped, boxed and delivered the constituent letters to the councillor's home. Councillor K paid for the paper, envelopes and postage in relation to this letter, and most of the letters were distributed by the councillor and the councillor's family and friends.<sup>257</sup> Councillor K learned at a later date that the electorate office had inserted the councillor's private mobile phone number on the letter, and that the electorate office had made some changes in the draft provided by the councillor to the office. Councillor K was 'disappointed' about this.<sup>258</sup>

I got mine out first, but I didn't know until I read it at - when I got it in my own letterbox, what was in it.<sup>259</sup>

463. Councillor K told my investigation that while there were communications in the past with the electorate office about council issues when they were aired at street corner meetings, the councillor had no further communications with the office in relation to the revocation and land swap.<sup>260</sup> When my investigation asked why Councillor K accepted the Member for Croydon's offer of assistance in relation to the letter, Councillor K responded:

I don't know. I think Atkinson likes to be in control of his sub-branch in every - of his electorate in every single way, including knowing everything that anyone's writing and sending to anyone. He can't control us... but I've heard from other councillors say [sic]

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<sup>253</sup> It appears that the constituent letters were dated as follows: Cr K – 30 November 2009; Cr P – 15 January 2010; Cr A – 8 January 2010; Cr G – 18 December 2009 and 21 December 2009.

<sup>254</sup> Letter from legal representative for the Member for Croydon, 18 August 2011, para 36.

<sup>255</sup> Cr C (T2), p70, 33.

<sup>256</sup> Email from Member for Croydon to Cr K, 17 November 2009.

<sup>257</sup> Letter from legal representative for Cr K, 18 August 2011, para 18.

<sup>258</sup> Cr K (T1) p87, 39.

<sup>259</sup> Cr K (T1) p92, 13.

<sup>260</sup> Cr K (T1) p77.

that they are surprised that he doesn't get more involved in council business, that he promotes people to - that he helps people, promotes people to get on council and then just leaves them to flounder or whatever ... I certainly don't believe he controls the council.<sup>261</sup>

### Councillor P

464. Councillor P eventually acknowledged to my investigation that the Croydon electorate office had assisted in crafting the councillor's constituent letter. However, Councillor P commented about being 'deceived'<sup>262</sup> by the letter which was finalised and sent out to the councillor's constituents by the electorate office, because there was no prior warning of the contents of the final draft. This was the case, even though Councillor P apparently assisted in distributing the letter. Councillor P told my investigation that the electorate office had ignored corrections that the councillor had made to the initial draft:

it was a different letter altogether practically. It still conveyed the message, most of it, but it's not what I wanted, you know.<sup>263</sup>

465. In addition, the electorate office had apparently wrongly placed another councillor's contact address on Councillor P's letterhead,<sup>264</sup> and failed to properly position Councillor P's signature at the end of the letter. Councillor P believed this was 'not professional'.<sup>265</sup>

466. It appears that the Member for Croydon played an active role in compiling the original draft of Councillor P's letter. In an email sent to Councillor P from a worker in the electorate office on 11 December 2009, the worker wrote:

I spoke to Mick a little while ago. He wants me to hold off on sending the letter to you until he has made some final adjustments to it.

467. Furthermore, the contents of the letter reflected the Member for Croydon's interests in the construction of the light rail, whereas this was not an issue which had been addressed in the council's consultation literature which was sent out to the community.

468. When asked who delivered the letters, Councillor P responded:

Be my guest, you know? ... I did some ... but they're in an envelope, I'm not going to open them. I just go and ... bang, bang, bang, you know, and I normally do, you know, in a certain area which is close to me.<sup>266</sup>

469. Councillor P told my investigation that the Member for Croydon had not been paid for producing the letters, although:

The understanding was always from the outset that we produce - you know, we pay - we pay, you know, reams of papers and pay for the envelopes ourselves, you know, and that has always been the way. Even when I do street corner meetings I'm expected to replace the paperwork.<sup>267</sup>

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<sup>261</sup> Cr K (T1) p77, 28.

<sup>262</sup> Cr P (T2) p123, 8.

<sup>263</sup> Cr P (T2) p127, 46.

<sup>264</sup> The contact address placed on the letterhead was that of Cr A.

<sup>265</sup> Cr P (T2) p126, 47.

<sup>266</sup> Cr P (T2) p118, 23.

<sup>267</sup> Cr P (T2) p123, 16.

470. The councillor told my investigation that no invoicing occurs for the paper and printing, and there is a ‘gentleman’s agreement’.<sup>268</sup>

471. In response to my provisional report, Councillor P commented :

I maintain from my comments that my intentions were honourable and further if there was deception then it was not by me. My intent with regard to this letter was to advise my constituents and to explain why I voted in the way that I did. Notwithstanding my honourable intentions, in hindsight I accept that it may have been an error of judgement to authorise the letter in the first place.<sup>269</sup>

### Councillor A

472. Councillor A admitted trying to be ‘deceitful’ when giving evidence in my investigation; and was concerned ‘that there will be backlash that I would rather avoid’:<sup>270</sup>

A. I apologise, because I have been trying to separate myself from Michael Atkinson’s office. ... but he has supported me and has helped me with a few letters and it’s something that I would rather avoid.<sup>271</sup>

473. Eventually, Councillor A conceded that a worker in the Member for Croydon’s electorate office had drafted the letter for the councillor’s constituents. Councillor A said that the worker:

gave me some advice about items I should think about for St Clair, things like the tram and things like the increased land values that would have an impact on Hindmarsh ward considering the Cheltenham and the tramline progress.<sup>272</sup>

I would ask him to ask Mick Atkinson something.<sup>273</sup>

I’m afraid that [the electorate officer worker] has helped me put together a few letters, and as I said before I was unsure which letters I’d reviewed and which ones I hadn’t. Obviously this is a letter that he’s sent to me for review.<sup>274</sup>

474. Councillor A told my investigation that the electorate office initially made contact about sending a constituent letter out. Councillor A said that the office retained copies of the councillor’s council letterhead and photograph:

A. He did have it for letters that he was printing for me, yes.<sup>275</sup>

475. Councillor A said there was no surprise in getting a call from the electorate office offering assistance, as the office had assisted previously with ‘a couple of other letters’ and they had also been involved in arranging the councillor’s street corner meetings.

A. I wasn’t at all surprised. I guess I did expect that there would be some contact.

Q. Why do you think you would have expected that?

A. Because it was an issue that Mick Atkinson had an interest in and an issue that the State Government had an issue in so he would have - as much as supporting us, he would actually be seeking our support as well, you know.

Q. And did he seek your support on the tramline and issues?<sup>276</sup>

A. Well, the letter itself is support of what he wanted. Yep.

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<sup>268</sup> Cr P (T2) p123, 30.

<sup>269</sup> Letter from Cr P, 17 August 2011 p1, dot point 4.

<sup>270</sup> Cr A (T1) p90, 9; Cr A (T1) p90, 33.

<sup>271</sup> Cr A (T1) p89, 22.

<sup>272</sup> Cr A (T1) p76, 5.

<sup>273</sup> Cr A (T1) p76, 20.

<sup>274</sup> Cr A (T1) p87, 17.

<sup>275</sup> Cr A (T1) p72, 4.

476. Councillor A claimed that the paper and the envelopes were provided to the electorate office, but that the electorate office had printed the letter and together they had letterboxed it.<sup>277</sup>

### Councillor G

477. Councillor G told my investigation that the Member for Croydon telephoned after the revocation decision on 23 November 2009 and 'urged'<sup>278</sup> that the councillor send out a constituent letter:

and then indicated that other councillors were sending it out and he'd be happy to have one of his officers in his electorate office forward ... on their draft letters to me. I received them.<sup>279</sup>

478. The electorate office sent the constituent letters of Councillors K, P and A to Councillor G. Councillor G told my investigation that with the Member for Croydon's help they collaborated to write a constituent letter. Councillor G said that the Member for Croydon had given 'no overt reason' for getting a letter out but the councillor 'suspect[ed] it was to test the reaction of the communities [sic] and the decision'.<sup>280</sup>
479. In the initial cut of the constituent letter, Councillor G emailed a worker at the Croydon electorate office and asked that the draft be 'proof read or edited by someone with knowledge around the issue'.<sup>281</sup> Councillor G also re-drafted and edited the letter before it was distributed.
480. From Councillor G's evidence, it appears that both the Cheltenham electorate office and the Croydon electorate office printed and distributed the councillor's letter. Councillor G said that paper and envelopes were provided to the electorate offices.
481. My investigation queried Councillor G about the constituent letter being 'designed to perhaps test for what reaction there was out there in the community in relation to the decision',<sup>282</sup> and asked whether this meant 'testing the response from a Labor Party perspective' in light of the pending state elections. Councillor G replied:

- A. No, testing the response from the decision perspective and see what the community's response for it is. Not from the Labor Party's perspective but from a decision perspective, what the reaction is for that decision.
- Q. So what did it matter, it was already over?
- A. I don't understand the question?<sup>283</sup>
- Q. Well, the revocation decision had already gone through.
- A. Yes, yeah.
- Q. So you're saying you thought they wanted to test the response?
- A. Mm.
- Q. That's Jay Weatherill and Michael Atkinson test the response?
- A. Yeah. And I was happy to go with that.
- Q. Did it have anything to do with state elections coming up?
- A. I don't know. I think you'd have to speak to them about that. But look, as far as I understand, being safe Labor seats, I don't think either of them were really in danger of losing their seats. And even if you look at the anti-Labor feeling there

<sup>276</sup> Cr A (T2) p28, 38.

<sup>277</sup> Cr A (T1) p96, 28.

<sup>278</sup> Cr G, p63, 44.

<sup>279</sup> Cr G, p64, 23.

<sup>280</sup> Cr G, p64, 44.

<sup>281</sup> Cr G, p69, 25.

<sup>282</sup> Cr G, p67, 12.

<sup>283</sup> Cr G, p81, 40.

was supposedly at the time, that neither of them came close to losing their seats. So I don't suspect losing the seats was an overriding mentality that was going through their heads. I'm sure it probably wasn't.<sup>284</sup>

482. I note the Member for Croydon's comments previously that sending out constituent letters explaining councillors' voting in relation to the revocation and land swap would benefit him as an MP 'facing election in three months time'.<sup>285</sup>
483. It is not unlawful for an elected member to receive external support in exercising their council member role, provided that it is appropriately declared and does not conflict with the independent exercise of their council duties and responsibilities. Further, I accept the submission put to me in response to my provisional report that a public officer does not fail to act conscientiously simply because another person prepares a document for them, and that this in fact, extremely common practice.
484. However, councillors have an obligation under the code to enhance the image of the council. I consider that the production of the letters in the circumstances which I have outlined would not have been perceived by most ratepayers as enhancing the image of the council. In this context, I note in particular the allegations being publicly expressed through the media at the time by some members of the community about the Member for Croydon's possible involvement in the ALP councillors' decision in relation to the revocation and land swap.
485. In response to my provisional report it was argued that in fact the letters enhanced the image of the council by explaining its decision on an issue of controversy and importance.<sup>286</sup> Whilst it is of course desirable that councillors should explain council decisions, the circumstances surrounding the preparation of the letters in my view would be perceived as confirming the concerns that were being publicly expressed about the Member of Croydon's possible influence on the councillors. On balance, I do not accept the submission.
486. I also gave consideration to the question of whether these actions could amount to evidence of a breach of the code obligation as follows:

When undertaking my responsibilities as a member of council I will ... not seek or accept any gift or benefit in connection with my public duties that may place me under any obligation or expectation of benefit to the giver or could reasonably be perceived as such by others.

487. On this question, I was persuaded by a submission made in response to my provisional report that this provision of the code is not concerned with the receipt of assistance from others in the carrying out of the councillor's public duties, but with reward (or perceived expectation of reward) for carrying out those duties in a way favourable to the giver.<sup>287</sup> The provision is thus concerned to prevent a situation where a councillor may in fact be, or may be perceived as being, indebted to the giver of the gift or benefit, to act in a certain way in the discharge of their public duties.
488. I do not consider that the assistance was provided to the councillors in an attempt to influence the way in which they discharged their public duties.

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<sup>284</sup> Cr G, p82, 1.

<sup>285</sup> M for C, p31, 29.

<sup>286</sup> Letter from legal representative for Cr G, 29 August 2011, para 33; Letter from legal representative for Cr K, 18 August 2011, para 22; Letter from legal representative for the Member for Croydon, 18 August 2011, para 28.

<sup>287</sup> Letter from legal representative for Member for Croydon, 18 August 2011, para 29-35; Letter from legal representative for Cr K, 18 August 2011, para 20.

489. In light of the above, in my opinion, in allowing the Member for Croydon and his electorate office to assist in producing and distributing letters supporting the revocation and land swap, Councillor K, Councillor P, Councillor A and Councillor G may have contravened the code by failing to enhance the image of the council.

## 5

**OPINION**

In allowing the Member for Croydon and the Croydon electorate office to assist in drafting, producing and distributing their constituent letters supporting the land swap, Councillor K, Councillor P, Councillor A and Councillor G may have acted in a manner that was contrary to the code of conduct.

In accordance with section 18(5) of the Ombudsman Act, I report this evidence to the principal officer of the council.

**2. *Whether Councillor M may have breached the code of conduct – writing a letter to the press***

490. On 15 November 2009, Councillor M wrote a letter to the Weekly Times Messenger about the conduct of the public during the council meeting on 9 November 2009 when the council determined to forward the revocation proposal to the Minister.
491. The contents of the letter are as follows:

Dear Sir,

Regarding the disgraceful behavior of the mob that invaded the City of Charles Sturt Council meeting on November 9, this mob intimidated and threatened decent members of the public gallery to sign their petition. This mob also intimidated and threatened Councillors in an attempt to disrupt the meeting, to stop Councillors from voting on the St. Clair reserve motion. They stood over and threatened a female Councillor when she was about to vote on the motion, they boxed in and spat on another female Councillor when she left the Council Chamber, [sic] she was rescued by two decent members of the public.

One of the mob tried to grab a policeman's gun when he was being removed from the Chamber. This behavior is an affront to Democracy, it was reminisce [sic] of the old Painters & Dockers behaviour in the 1960's/1970's etc, it is time the Media exposed these thugs for what they are and not encourage their dishonest anarchy. Beware, if it is not the Brocuse [sic] Museum, the Cheltenham Racecourse, or the St. Clair reserve this mob will manufacture some other issue leading up to the State, Federal and Local Government elections, is this the death throes of the old ALP Centre Left?

Congratulations to my fellow Councillors who put the interests of the Community ahead of their own safety by voting for the motion in spite of the intimidation and threats. When Henley Ward Residents raise concerns with this very dishonest campaign, I provide them with an information package giving the true history of the St. Clair reserve, events etc (Please contact me if you require same). Finally, as someone who, survived bomb and bullet in Ireland in the early 1970's I do not bow to mob rule.

Regards,

Cr [M]  
[private address]

492. My investigation discussed this letter with Councillor M. Councillor M did not resile from the contents of the letter, and said:

That's what I felt and that's what I was really ropeable about that behaviour. I don't think councillors as volunteers should be subject to that type of behaviour.<sup>288</sup>

493. When my investigation asked Councillor M if the contents of the letter might be in breach of the council's code of conduct, Councillor M replied:

- A. You know I certainly don't think so. I think that was an effort to try and put the truth out and let people know what was really happening, because other people don't know what goes on.
- Q. It's an inflammatory letter, though, isn't it?
- A. Definitely, it was meant that way (indistinct).
- Q. Do you think a public officer should behave that way?
- A. I don't know whether - well, we are public officers, but we're also in the political realm as well, right, rather than say a staff member (indistinct) but I wouldn't say that, that was what we were facing, that was the truth as I saw it, it happened, you always stick to the truth, as you people warn me today.<sup>289</sup>

494. Sixteen elected members gave evidence to my investigation about the apparent unruly conduct of some community members during the council meetings dealing with the revocation and land swap. On the basis of their evidence, I have no doubt that some elected members were concerned about this conduct.

495. It is evident that Councillor M wrote to the press in a councillor capacity, as the letter includes the title 'Cr' in the signature. I consider therefore that Councillor M could reasonably be taken to have been expressing the views of a councillor acting in the course of the official functions and duties of a councillor – rather than expressing views in a personal capacity.

496. In the letter, the councillor describes the protestors as 'thugs' who did not hold genuine concerns about the land swap. Councillor M relegates the protestors to a faction of the ALP which dominated in the past, suggesting that they had manufactured the St Clair issue for the pending state, federal and local government elections.

497. In my opinion, Councillor M's comments were not only fanciful but intemperate. It is also concerning that Councillor M's intent was for the letter to be 'inflammatory'. Councillor M commented to my investigation that 'I thought somebody would sue me, but they haven't so far'.<sup>290</sup> This suggests that Councillor M was aware of the intemperate nature of the letter and that the description of the protesters was exaggerated.

498. In responding to my provisional report, Councillor M asserted that the letter does not relate to the circumstances relating to the land swap, and that it is therefore outside my jurisdiction. I do not agree with that view, and I consider that the publication of the letter is within those circumstances.<sup>291</sup>

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<sup>288</sup> Cr M, p172, 2.

<sup>289</sup> Cr M, p176, 17.

<sup>290</sup> Cr M, p175, 29.

<sup>291</sup> Letter from legal representative for Cr M, 18 August 2011, p4.

499. Councillor M also responded that a councillor has every right to express a view and participate in political discourse, and that any reasonable member of the public would not have considered the comments ‘improper’.<sup>292</sup> I acknowledge that Councillor M is of course able to participate in political discourse; but where this occurs in the capacity of an elected member, there is an obligation to do so in accordance with the council’s code of conduct.
500. In responding to my provisional report, Councillor M acknowledged that it could have been made clearer that the views expressed were personal views, and not those of the council. The councillor submitted that all correspondence from the councillor now includes the disclaimer that the views expressed are personal ones, and that there was no intent to mislead the public in this regard.<sup>293</sup>
501. In my opinion, Councillor M may have acted in a manner which contravened the code of conduct as follows:
- by signing the letter as a councillor, enmeshed the council in a way which failed to enhance the public image of the council
  - showed a lack of the responsibility required of a councillor when dealing with the media
  - failed to make it clear in the letter that the views expressed were personal, and not those of the council. (I understand that the councillor was not acting as a council spokesperson in accordance with the Council Spokesperson Policy).

## 6

**OPINION**

In writing, as a councillor, an intemperate letter about the St Clair protestors to the press, Councillor M may have acted in a manner that was contrary to the code of conduct.

In accordance with section 18(5) of the Ombudsman Act, I report this evidence to the principal officer of the council.

***3. Whether Councillor M may have breached the code of conduct – writing to a St Clair protestor’s employer alerting the employer to the fact that his employee was using her work email address for communications unrelated to her work***

502. On 7 November 2009, a member of the community emailed Councillor K voicing his concerns about the land swap, and he mentioned the state government’s interest in the proposed TOD and other matters. In his email, he copied in a member of the St Clair protest group (**the employee**) who worked at the Australian Rail Track Corporation (ARTC). In an email dated 8 November 2009, the employee responded to the member of the community and Councillor K, with copies to other councillors, members of the media and some members of the state government against the revocation and the land swap. In an email dated 3 November 2009, the employee expressed disappointment to all council members and the CEO about being denied the opportunity for a public meeting. Both emails were sent from her work email address. She did not specifically refer to the TOD or any rail proposals in relation to the St Clair matter.

<sup>292</sup> Ibid

<sup>293</sup> Ibid

503. On 11 November 2009, Councillor M emailed the chief executive of the ARTC with these three emails attached. Up to that time, Councillor M had voted in favour of the revocation and land swap.

504. In the email to the chief executive, Councillor M asked:

1. What is the Australian Rail Track Corporations [sic] (ARTC) official policy/position re the matter discussed in the E-mails?
2. Has the ARTC a conflict of interest should [sic] it be in a position to bid for a contract in regard to the proposed rail transport corridor in the Western suburbs of Adelaide?
3. What probity issues would ARTC face in regard to this matter?

505. The chief executive replied to Councillor M that the ARTC had ‘no interest’ in the matter.

506. When my investigation asked of the reasons for contacting the chief executive, Councillor M told my investigation that the employee was ‘waging this campaign using [the ARTC’s] email address’ and the councillor wanted to know what the ARTC’s ‘position’ was ‘and if they had a conflict of interest’.<sup>294</sup> My investigation asked Councillor M why it was necessary to send the employee’s emails to the chief executive. Councillor M replied expressing concerns about ‘probity’, the ARTC’s possible involvement in the rail corridor, and:

if they were involved in the rail corridor or whatever in the future, then we’d have to make a decision, if we were in that position in conjunction with the LMC, we would need to know, you know, what they’re thinking.<sup>295</sup>

507. My investigation suggested that it appeared that Councillor M was trying to ‘dob’ the employee in to her employer for using her work email address for non-work matters. Councillor M denied this and asserted that it was for reasons of ‘probity’ that the councillor emailed the chief executive.

508. Even though this was a council matter, Councillor M told my investigation that this issue had not been raised with the council; and the employer had been approached on Councillor M’s own initiative, because Councillor M wanted to ‘... flesh out and see what the position was.’<sup>296</sup>

- Q. Did you ask council if there was any problems with these - with ARTC in relation to any matters coming up that council was going to deal with?  
A. I didn’t, no, but I wanted to know what their company position was.<sup>297</sup>

509. My investigation asked Councillor M whether it should have been up to the council to decide whether to approach the ARTC:

- Q. Don’t you think it’s up to council to ask those questions?  
A. Not when it’s directed to me as an individual member and I’m on that list of emails,<sup>298</sup> right. I think it’s quite appropriate.

510. In my opinion, it was inappropriate for Councillor M to have contacted the chief executive of the ARTC, as any probity concerns were a broader council matter.

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<sup>294</sup> Cr M, p178, 38.

<sup>295</sup> Cr M, p179, 15.

<sup>296</sup> Cr M, p180, 12.

<sup>297</sup> Cr M, p181, 18.

<sup>298</sup> Cr M, p181, 40.

511. My investigation questioned the employee about this. She said she thought it was 'a clear attempt to get me disciplined in some way, either [sic] by losing my job for having used my email address'.<sup>299</sup>
512. Regardless of the employee's views, I consider that the evidence of Councillor M was disingenuous. On balance, I do not consider the principal reason for Councillor M contacting the chief executive was to raise issues of probity with the ARTC. Further, there was no reason for Councillor M to attach the employee's emails, as she did not express any views about TODs or rail corridors in them.
513. I conclude that on balance, Councillor M's principal reason for sending the employee's emails to the chief executive was to demonstrate that the employee was using her work email address for non-work related matters. I consider that Councillor M's email with the attachments was sent to the chief executive to discredit the employee.
514. I note the evidence of Councillor G, to whom Councillor M subsequently sent a copy of the chief executive's reply, as follows:
- A. Oh yeah, [Councillor M] rang me up and just said that [they're] going to follow this up considering [the employee's] using the employer's email, the ARTC email. And [Councillor M] says [they're] going to follow it up and [they] said - ... 'I tell you what, I'll send you through the email after'. So it's really as simple as that.
  - Q. That was [Councillor M's] idea, was it?
  - A. Yeah.
  - Q. What did you think of that?
  - A. Petty.
  - Q. Or do you remember thinking anything about it?
  - A. Petty, comes to mind. That was what I thought at the time. I just rolled my eyes and I just thought -- this is just going to -- I thought to myself 'This is just going to antagonise things even further than already are antagonised'.<sup>300</sup>
515. In Councillor M's email to the chief executive, Councillor M used a personal email address and did not indicate any elected member status in the email's sign off. However, in the employee's two emails which were attached, Councillor M is named as a recipient with the elected member title, along with other councillors. In my opinion, therefore, it could reasonably be interpreted that in Councillor M's email to the chief executive, Councillor M was acting in the course of the official functions and duties of a council member and expressing views in this capacity rather than in a personal capacity.
516. In responding to my provisional report, Councillor M asserted that these actions do not relate to the circumstances relating to the land swap, and that this matter is therefore outside my jurisdiction.<sup>301</sup> I do not agree with that view, and I consider that the actions fall within those circumstances.
517. Councillor M also responded that, for the same reasons as I have criticised the letter to the Weekly Times Messenger for not making clear that the views expressed were personal ones, I should recognise the possibility that the sending of an email from a work email address, with no such disclaimer, could be interpreted by the recipient as expressing the views of the employer.<sup>302</sup> I accept this comment, but it does not change my views about the circumstances of this matter.

<sup>299</sup> Witness 3 (T2) p61, 37.

<sup>300</sup> Cr G, p101, 31.

<sup>301</sup> Letter from legal representative for Cr M, 18 August 2011, p4.

<sup>302</sup> Ibid.

518. Also in responding to my provisional report, Councillor M expressed regret for any distress this matter may have caused the St Clair protester, and a wish to express this regret directly to the person in question.<sup>303</sup>
519. In my opinion, Councillor M may have acted in a manner which was inconsistent with the code of conduct. By communicating with the chief executive in the manner I have described, Councillor M may have:
- failed to act with integrity
  - involved the council in a way which failed to enhance the public image of the council
  - failed to use information (in particular, the employee's two emails) obtained as a council member in a responsible manner, and for purposes other than council business.

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### OPINION

In communicating, as a councillor, with a St Clair protestor's employer in order to cause detriment to the protestor, Councillor M may have acted in a manner that was contrary to the code of conduct.

In accordance with section 18(5) of the Ombudsman Act, I report this evidence to the principal officer of the council.

#### *4. Whether Councillor M may have breached the code of conduct – asking another to obtain information about the employee*

520. On 22 December 2009, Councillor M received an email from a person about the results of research which that person (**the researcher**) had conducted in relation to the employee. It appeared that the researcher had gathered the research from publicly available information in relation to certain events concerning the employee and her ARTC work in the Adelaide Hills. At the conclusion of the email, the researcher commented that he happened to know the Human Resources Manager of the ARTC and he would 'try and find out some more information'.
521. The following day, Councillor M forwarded on the email to nine ALP councillors 'for their information'.
522. My investigation questioned Councillor M about the researcher's email. Councillor M responded that the researcher 'knew something' about what had been happening in the Adelaide Hills concerning the employee and he was asked to do some research because Councillor M was:

Interested to find out what was going on, because don't forget at this time we were getting the protests in the City of Charles Sturt.<sup>304</sup>

<sup>303</sup> Ibid.

<sup>304</sup> Cr M, p182, 28.

523. My investigation asked Councillor M the reasons for this. Councillor M replied:

- A. I just wanted to know what the background was.
- Q. But why?
- A. Because it was political flak of what was happening and I wanted to know her background with the hills because I heard there was a lot of dissension up there. I was looking for information.<sup>305</sup>

524. Councillor G, who received a copy of Councillor M's email, told my investigation that this was 'muckraking':

- Again, it's one of these things that really just antagonises, doesn't it, you know. Just muckraking....
- Q. You don't know what's behind this at all?
  - A. It's just muckraking by the looks of it; just seeing if [Councillor M] can score cheap points off whoever.<sup>306</sup>

525. My investigation questioned Councillor C, who also received the email. Councillor C expressed surprise at receiving the email and said '... it's not something that I would be interested in, you know.'<sup>307</sup>

526. My investigation questioned Councillor M about whether the ALP wanted to know the information about the employee. Councillor M denied any ALP involvement as such, and said:

No, I wanted to know.<sup>308</sup>

527. I accept Councillor M's evidence in this regard.

528. In the researcher's email to Councillor M, Councillor M's private email address was used (although I comment that Councillor M appeared to nearly always use this address for council activities). However, Councillor M forwarded on this email to fellow ALP councillors and signed off in an elected member capacity.

529. In my opinion, it could reasonably be interpreted that by engaging the researcher to conduct the research on the employee, and by forwarding on the information to councillor colleagues, Councillor M was acting in the course of the official functions and duties of an elected member – rather than in a personal capacity.

530. In light of my comments above, I consider that Councillor M asked the researcher not just to get information about the employee, but to get information which would discredit the employee in the hope of damaging her profile in the St Clair protests.

531. In responding to my provisional report, Councillor M asserted that the request to the researcher did not relate to the circumstances relating to the St Clair revocation, and that it is therefore outside my jurisdiction.<sup>309</sup> I do not agree with that view, and I consider that the request is within those circumstances.

<sup>305</sup> Cr M, p182, 43.

<sup>306</sup> Cr G, p103, 2.

<sup>307</sup> Cr C, p74, 1.

<sup>308</sup> Cr M, p183, 15.

<sup>309</sup> Letter from legal representative for Cr M, 18 August 2011, p5.

532. In my opinion, Councillor M may have acted in a manner which was inconsistent with the code of conduct in that the councillor may have:
- failed to act with integrity
  - failed to act in a way which enhanced the public image of the council.
533. Councillor M responded that the seeking of information about the person concerned does not constitute a failure to act with integrity, and that there is no evidence to support my comment that the information was sought to discredit the employee.<sup>310</sup> I have noted Councillor M's comments but maintain my view about this matter.

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### OPINION

In seeking, as a councillor, a person to research a St Clair protestor with the intention of gathering information which was detrimental to the protestor, Councillor M may have acted in a manner that was contrary to the code of conduct.

In accordance with section 18(5) of the Ombudsman Act, I report this evidence to the principal officer of the council.

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<sup>310</sup> Ibid.

**5. Whether Councillor B may have breached the code of conduct – providing a community member's email to the Member for Croydon**

534. In an email dated 4 December 2009 at 12.33am, a member of the community wrote to the 17 elected members of the council. The community member referred to an article in The Advertiser about the Member for Croydon and defended the Hon David Winderlich's comments in the Legislative Council (which led to the referral). The community member also complained about the council agreeing to swap the St Clair land with 'a chemical wasteland'. She wrote that she had also sent her views about the article in The Advertiser to 'a handful of people which will get to 2,000 ... in the next few hours, and then more'. The community member copied in two people whom I understand worked for a current affairs television programme.

535. On the same day, (4 December 2009) at 11.44am, Councillor B replied by email to the community member, as well as to 14 other elected members of the council. Councillor B referred the community member to the council for information about the revocation and land swap, and made negative comments about the Hon David Winderlich seeking the protection of parliamentary privilege in relation to his allegations (which were about the Member for Croydon, and certain ALP councillors). Councillor B asked the community member to:

please explain why then doesn't he repeat all those allegations in the public arena where the protection of Parliament does not apply. It is not hard to work out why. Will you publicly repeat all that was said by Hon. D. Winderlich considering you are defending the remarks?

536. Again on that same day (4 December 2009), at 2.49pm, the community member replied by email to Councillor B and included the same 14 elected members. The community member made certain comments about the state government and there being no 'independent corruption commission' (**the offending email**).

537. Councillor B replied to the community member by email on 5 December 2009 at 12.13am. This time Councillor B replied only to the community member and not the other 14 elected members. Councillor B continued to ask for an explanation from the community member.

538. Over the following days, email communication between Councillor B and the community member continued in this vein. No other people were copied in to their emails.

539. On 8 December 2009, at what appears to be the end of the email communications between Councillor B and the community member, Councillor B responded:

Oh well it appears I will not get a clear answer to the "actual" questions I put to you previously. I was just trying to understand why and where you were coming from. Why are you involved in the defence of Hon. David Winderlich and why it was necessary for him to hide behind Parliamentary privilege. It all sounds a bit odd.

I am [sic] responded to you out of courtesy [sic] because you sent the original e-mail which needed clarification.

Anyway - Have a peaceful Christmas and New Year.

540. On 18 December 2009, the Member for Croydon's solicitors issued a 'concerns notice' under Part 3, Division 1 of the *Defamation Act 2005* (SA) to the community member alleging that she had defamed the Member for Croydon in her email of 4 December 2009. It appears that this email is the document I have named as 'the offending email'.
541. The community member subsequently lodged a 'level 3' complaint with the council about this, claiming that a councillor had provided the Member for Croydon with a copy of (the offending) email in breach of the Local Government Act and the code of conduct.
542. In his investigation in response, the CEO was hamstrung, as the community member was concerned about providing the council with a copy of the offending email. It appears that the CEO looked to the council's records management system to retrieve what he thought were the relevant email communications.
543. In a letter dated 17 February 2010, the CEO informed the community member that he would not continue to pursue her complaint. His reasons were because she had put her concerns into the public domain by copying in to her emails members of a television current affairs programme, and she had declared her intent to broadcast her concerns to 2,000 recipients. The CEO also noted that one of the emails 'about this matter' had been copied in to the Member for Croydon's electorate office.<sup>311</sup> The CEO wrote:

I firstly acknowledge that your letter to me dated 1 January 2010, responded to by the Acting CEO at the time, was marked private and confidential. Unfortunately, it appears in your subsequent discussion with the media that it no longer appears to be the case. Nevertheless, I have reviewed your complaint and sought legal advice on the emails you indicate are the subject of your complaint. I also note that you did not provide me with a copy of the emails you believe to be the subject of your complaint, even though I requested these as critical for me to carry out any investigation. This has made it very difficult to deal with your complaint. I have had to extract these emails via the dates and the nature of the conversation you described. Therefore, if you believe any of my assessment below is inaccurate, based on the emails you have relating to this matter, then I ask that you provide them to me so I can more thoroughly investigate your complaint.

I make the following assessment of those emails.

Given the absence of any (justified) suggestion of confidentiality in the email correspondence and, further, a declared intent to generate what may be described as a 'public discussion' upon the basis of identified recipients and a statement of broader publication, it is my view that there can be no suggestion of a breach of confidentiality or other form of impropriety if an elected member recipient were to provide a copy of such an email to a third party, whether or not that third party was one of the disclosed or undisclosed other recipients of the email. I make reference to the fact that you indicate in the emails that you are broadcasting the email and public discussion on this topic to upwards of 2,000 unidentified recipients. You also have copied the Producer and the principal Journalist of the current affairs program 'Today Tonight' in the emails. You have also copied the Messenger Newspaper and Reporter into subsequent exchanges. I oddly note also that one of the emails from you about this matter has been copied in to the Member for Croydon Electoral Office.

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<sup>311</sup> Letter from CEO to community member, 17 February 2010.

It is apparent in such circumstances that the sender of the email is the person by whose actions the email has been placed (and hence its contents) in the public domain. It would not behove the sender to subsequently assert that an elected member who had further disseminated the email had offended any express or implied confidentiality or other principles of appropriate conduct in public office.

I go on to note also that the Member for Croydon in a Sunday Mail article recently indicated that he received a copy of the emails from a previous Councillor of the City of Charles Sturt which complicated the investigation even further as I have no way of investigating who that may be and what, if any relationship that person may have had with an existing Councillor. For these reasons I will not be investigating your complaint further unless you can provide me any further information that changes the position I have taken on the material I have access to at this time.

- 544. The community member provided my investigation with copies of the email communications with Councillor B which she had in her possession, which I have described above. They included the offending email. There is no evidence before me to suggest that they are not accurate.
- 545. It appears that the CEO assessed the wrong emails; and to some degree, the community member responded to this in answer to the CEO's invitation. However, she still did not apparently provide him with a copy of the offending email.
- 546. The email communications indicate that the community member copied the two members of the current affairs programme in to her initial email of 4 December 2009 (at 12.33am), but not in her subsequent emails, including the offending email. Further, none of the emails, including the offending email, show that the Member for Croydon was entered as an addressee.
- 547. The email communications provided also did not show that Councillor B copied in the members of the current affairs programme or the Member for Croydon.
- 548. In giving evidence to my investigation, Councillor B suggested that the community member sent the offending email to 'all the councillors', 'all the media and Channel 7 Today Tonight' and the Member for Croydon. Councillor B told my investigation about responding as a 'reply to all' to the offending email; and in this way the Member for Croydon would have received the (offending) email:

I believe there was one email about... and it was sent not only to all the councillors but it was sent to all the media and Channel 7, Today Tonight, I remember that up the top. And it also included, I believe, [the Member for Croydon]. I think I responded as in 'Reply to all' so it would have went out back to all, I think.<sup>312</sup>

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<sup>312</sup> Cr B, p87, 6.

549. Councillor B claimed not to have ‘intentionally’ provided the email to the Member for Croydon. But the councillor was ‘not a 100% sure’<sup>313</sup> how the process went. Later in evidence after reiterating that the Member for Croydon was in the ‘reply to all’ email which the councillor had apparently sent out after receiving the offending email, Councillor B was equivocal. Councillor B commented that ‘... I might have, without seeing that, sent it to him direct for information’:
- Q. So you didn’t ever discuss it with Michael Atkinson or email?
- A. I think he was in the reply.
- Q. Pardon?
- A. I think he was in the ‘Reply all’, from memory. Or I might have, without seeing that, sent it to him direct, for information.<sup>314</sup>
550. In my provisional report, I stated that I was inclined to the view that Councillor B provided the offending email directly to the Member for Croydon, rather than by means of a ‘reply to all’ communication. (Councillor B had not denied providing the email to the Member for Croydon - the councillor claimed a belief of not intentionally providing it.)
551. I stated that the evidence suggested that Councillor B made a conscious decision to provide the offending email to the Member for Croydon. Evidence obtained by my investigation showing email traffic from Councillor B to other ALP councillors and the Member for Croydon suggested that Councillor B would often share (unsolicited) views with these people.<sup>315</sup> Further, I noted previously in another email from Councillor B to the Member for Croydon<sup>316</sup> that Councillor B showed an eagerness to communicate thoughts about council activities with the Member for Croydon.
552. I also considered that two of Councillor B’s emails to the community member may well have reflected Councillor B’s knowledge of the consequences in relaying the offending email to the Member for Croydon, because at one point Councillor B appeared to become more measured in responding to the community member. Firstly, I noted that Councillor B responded only to the community member in answering the offending email on 4 December 2009, and not the 14 other elected members. Secondly, I noted the comment at the conclusion of Councillor B’s email of 8 December 2009 to the community member:

I am [sic] responded to you out of courtesy [sic] because you sent the original e-mail which needed clarification.

553. I considered that Councillor B appeared to be trying to place some distance from the community member’s (possibly defamatory) communication and to be justifying responding to her.

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<sup>313</sup> Cr B, p88, 8.

<sup>314</sup> Cr B, p88, 41.

<sup>315</sup> For example: Email from Cr B to Cr M, Cr D, Cr N, Cr C, Cr J, Cr K, Cr G, cc’d to Hon Michael Wright MP, the Member for Croydon, Julie Duncan (Presiding Member DAP), Cr O, Cr P, Cr A, Cr I, Hon Patrick Conlon MP, Hon Carmen Zollo MP, 22 July 2007; Email from Cr B to Hon Michael Wright MP, Cr D, Cr G, Member for Croydon (AGD), Cr P, Julie Duncan, Cr E, Member for Croydon, Cr M, Cr C, Hon Jay Weatherill MP, Hon Mark Butler MP, Cr K, 8 January 2010 (12.24pm); Email from Cr B to Hon Michael Wright MP, Cr D, Cr G, Member for Croydon (AGD), Cr P, Julie Duncan, Cr E, Member for Croydon, Cr M, Cr C, Hon Jay Weatherill MP, Hon Mark Butler MP, Cr K, 8 January 2010 (12:37pm) (Cr B, Exhibit #3).

<sup>316</sup> Email from Cr B to the Member for Croydon, 29 September 2007 (Cr B, Exhibit #1).

554. I also noted in my provisional report that Councillor B had been given ample opportunity by my investigation to reflect on the offending email, as it was specifically listed as an issue in my investigation in paragraph (e) of the 'Further description of the administrative act' document which my office had sent to elected members and other witnesses after the mediated settlement of the legal proceedings. Councillor B had had the opportunity to recollect the email communications with the community member, prior to being interviewed by my investigation. I was not persuaded that the apparent vagueness of Councillor B's evidence was attributable to the councillor's difficulty in remembering but rather was a device to avoid giving direct and truthful answers.
555. In response to my provisional report, Councillor B's legal representative pointed out that the offending email itself had not been put into evidence at interview by my investigation, and that this had compromised the councillor's ability to provide a detailed response to my concerns and be provided with procedural fairness.<sup>317</sup> While it is so that the offending email was not physically provided to the councillor, my investigation understood from the councillor's descriptions during evidence that the councillor knew which email the offending email was, as the councillor had identified its contents (although I note that the councillor, like the CEO did not accurately describe the recipients of the email). Furthermore, my investigation considered that Councillor B would have been aware of the email from paragraph (e) of the document 'Further description of the administrative act' (Appendix B) which had been sent to Councillor B two months previously, to enable the councillor to prepare for the interview with my investigation. Neither the councillor nor the councillor's legal representative responded to my comment about this in my provisional report.
556. Councillor B's legal representative also noted in response that a spokesman for the Member for Croydon was reported<sup>318</sup> as stating that he (the Member for Croydon) received the offending email from a former councillor. The legal representative submitted that I should accept:

[Councillor B's] explanation that the offending email was not sent by him to the Member for Croydon but was sent by a former councillor.<sup>319</sup>

557. This appears at odds with Councillor B's comments in evidence, where the councillor acknowledged possibly providing the Member for Croydon with the offending email (either as a 'reply to all' or 'direct'). I also comment that my investigation informed Councillor B during evidence that the Member for Croydon may have been reported in the press saying that he had received the email from a former councillor. Councillor B did not know anything about this:

- Q. [The Member for Croydon] Michael Atkinson, I think, was reported in the press saying that he received it from a former councillor. Did you know anything about that?  
A. No.<sup>320</sup>

<sup>317</sup> Letter from legal representative for Cr B, 18 August 2011, p3.

<sup>318</sup> *Sunday Mail*, 14 February 2010, p32.

<sup>319</sup> Letter from legal representative of Cr B, 18 August, p3.

<sup>320</sup> Cr B, p88,28.

558. After the release of my provisional report, the Member for Croydon's legal representative informed me that the Member for Croydon recalled that Councillor B was one of the people who had been in contact with him about the offending email:

it is [the Member for Croydon's] recollection that [Councillor B] was one of the persons who had been in contact with Mr Atkinson about a defamatory email. If [Councillor B] did provide [the Member for Croydon] with a copy of an email dated 4th December 2009, then that email may still be in the possession of the Attorney-General's Department if it remains on their system or is otherwise accessible.

It is [the Member for Croydon's] recollection that several people told him that [the community member] was circulating an email concerning [the Member for Croydon], which she claimed to have sent to hundreds of people and the media. [The Member for Croydon's] dim recollection is that the person who first told him was a former councillor, but he is not certain of that.<sup>321</sup>

559. However, and in apparent contrast to this, Councillor B in evidence reported not having contact with the Member for Croydon about the matter:

- Q. So you didn't intentionally provide any email?  
A. No.  
Q. That you got from [the community member] to -  
A. I don't believe so, no. It was a 'reply all'. How come - and then, when it came to light later, I think - I'm not sure now - but there was something about, without seeing who - how the process went, I'm not 100% sure.  
Q. I've got to say, I don't know the exact detail.  
A. No, no, I'm just saying I replied to an email from her that referred to .... I replied back and I think [Councillor K] said this is ... And then the next thing I hear, I think it was through the Messenger - no, radio or something - that the local member was concerned. And whether I sent it to him, I don't believe I recall sending it to him personally but, if I did, well it was in his interests because it was referred to him. If I did. I don't know.  
Q. But you received that in your councillor capacity?  
A. I received that on my council equipment. So she would have sent it to me. She does that sometimes ...  
Q. The email, did [the Member for Croydon] talk about it with you?  
A. No, no, no, not that, nothing to do with that, except - I thought I talked it over with [Councillor K] because she's the one that told me about this, ... and I said 'Oh okay, that's not very nice' or something, words to that effect. And that's probably where it left and then -  
Q. So you didn't ever discuss it with [the Member for Croydon] or email?  
A. I think he was in the reply.  
Q. Pardon?  
A. I think he was in the 'Reply all', from memory. Or I might have, without seeing that, sent it to him direct, for information.  
Q. But subsequently you didn't discuss anything with him after he issued the notice of concern?  
A. No, no, I found out about that later when I read it and heard it on the press. He didn't say what action he was taking or any action was going to be taken. I think I heard from - maybe [Councillor K] heard before I did, that there was some legal action and it went in the press, in the public arena. He never ever said 'Oh thanks [Councillor B], I'm going to sue her now' or 'I'm going to take her to court'.  
Q. So you didn't have any discussions about it with him?  
A. No, no. No, not on any of his intended actions, no.  
Q. No, not about his intended actions but in relation to the issue?  
A. No, I don't believe I recall anything specific on that or even unspecific, if there is such a word.<sup>322</sup>

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<sup>321</sup> Letter from legal representative of Member for Croydon, 16 September 2011.

<sup>322</sup> Cr B, p88, 17.

560. In response to my provisional report, Councillor B disputed my views and informed my investigation that relevant emails would be provided to my office. However, these were not forthcoming. My investigation subsequently requested the CEO to provide a copy of an email forwarding the offending email to the Member for Croydon. The CEO replied that the only email relating to my request on the council's records management system was Councillor B's email dated 4 December 2009 at 11:44am. I note, however, that the emails provided by the CEO appear to be 'derivative', and not in their 'original' state as an email chain. They show that they were forwarded 'separately' to the CEO by another councillor - at 9.28pm and 9.29pm on 8 February 2010. In saying this, I do not seek to imply that the CEO did not conduct an appropriate search of the council's records system. Rather, that the outcome of the CEO's search, in my opinion, cannot be relied upon.
561. Further, my investigation subsequently issued a summons for documents from the Attorney- General's office in an endeavour to locate any communications with Councillor B (and the community member) between the period of 4 and 18 December 2009. This also did not reveal any communications with Councillor B.<sup>323</sup>
562. Through his barrister, my deputy requested the Member for Croydon to seek relevant documents from his solicitor who issued the concerns notice to the community member.
563. Waiving legal professional privilege, the barrister then provided my deputy with a scanned copy of an email chain from the Member for Croydon's solicitor's file.
564. This email chain showed the original email from the community member to the 17 councillors dated 4 December 2009 at 12.33pm; Councillor B's reply to the community member and the 14 councillors dated 4 December 2009 at 11.44am; the community member's reply to Councillor B and the 14 elected members dated 4 December 2009 at 2.49pm (the offending email); and finally, an email from Councillor B to the Member for Croydon dated 9 December at 3.58pm stating 'refer below' (**the final email**).
565. The final email, as with all of the emails in the chain, was sent from Councillor B's councillor email address. Further, the final email shows that it was signed off by Councillor B in the councillor's councillor capacity. Councillor B's other titles relating to the numerous senior positions the councillor held within the council were also listed below the councillor's contact details in the final email.
566. The final email was marked as being of 'High' importance, with the comment 'refer below'.
567. My investigation did not seek comment from Councillor B in response to my receipt of the email chain containing the offending email and the final email, as I was persuaded by their veracity.
568. In light of this and despite the arguments from Councillor B's legal representative, I do not resile from the substance of my provisional view that on balance, Councillor B provided the Member for Croydon with a copy of the offending email.

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<sup>323</sup> The legal representative of the Member for Croydon informed my investigation that the Member for Croydon had previously requested his former office to conduct searches for email correspondence, but received no response (letter from legal representative of Member for Croydon, 16 September 2011).

569. Further, I note the recollections of the Member for Croydon as set out by his legal representative above. These add further support to my view in so far as I accept that Councillor B contacted the Member for Croydon about the matter. I do not accept Councillor B's evidence to my investigation that the councillor apparently had no contact with Member for Croydon in relation to the issue.
570. In my view, Councillor B appeared to provide the Member for Croydon with a copy of the offending email for personal reasons and not for reasons which had any relation to the councillor's role as an elected member or to council business.
571. In my opinion and in these circumstances, Councillor B may have acted in a manner which was inconsistent with the standards expected of councillor conduct under the code of conduct, in that the councillor failed to use information obtained as a council member responsibly, and used information for purposes other than council business.
572. I comment that I have reached my view about the Councillor B's conduct even though I consider the community member's language in the offending email was immoderate; that she had previously publicised her views about the land swap to people outside the council in a previous email; and she did not appear to indicate that her communication in the offending email was confidential.

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### OPINION

In providing a community member's email to the Member for Croydon which was received in their councillor capacity, Councillor B may have acted in a manner that was contrary to the code of conduct.

In accordance with section 18(5) of the Ombudsman Act, I report this evidence to the principal officer of the council.

**6. Whether Councillor G may have breached the code of conduct – forwarding a community member's email to the Member for Croydon**

573. On 20 December 2009, a constituent sent an email to Councillor G in response to the councillor's letter in support of the land swap. This email was addressed to Councillor G's council email address, and the councillor provided it to my investigation. I have previously referred to Councillor G's letter in Opinion 5 above.
574. The constituent's email addressed a number of issues relating to the land swap, including comment on the new light rail, the TOD, and the role of the Environment Protection Authority in dealing with rehabilitation of the site. I note that these issues are matters which fall within the responsibility of the state government. In his email, the constituent's comments included:

Your letter does not indicate any membership of a political party - are you a member of any political party or branches, including the Labour Party?

I have not looked at any of the "frenzied television coverage" but I do see a council that has poorly engaged the local community, I see a council that readily accepts SA Labour Party decisions, I see a Labour Party that does not listen to locals, I see the possibility of other possible issues, some may refer to as hidden agendas. Is it possible that St Clair was required because the developers wanted road access from both Woodville and Torrens Roads? I see this as a possible strong driving force, I see the Council having a significant increase in revenue via rates for a simple investment of \$400,000 and who knows how much of this may be taken up by current Council workers and is therefore not a completely new \$400,000.

I am more than happy to meet you at your office for you to show me details and data for which I may be in favour of a land swap, but frankly the information provided to date has not convinced me. Sometimes decisions are not popular but at local level I would expect local members to support those that voted for them and if such decisions are still in the best interests to at least fully engage the local community.<sup>324</sup>

575. Councillor G did not respond to the email, but apparently forwarded it to the councillor's private email address. Two days later, Councillor G forwarded the email to the Member for Croydon.<sup>325</sup> When my investigation asked Councillor G the reasons for this, the councillor said:

A. Areas of common interest basically. I mean, Mick has an interest in seeing perhaps the way the decision may have played out. And yeah, just forwarded it on to his office in the same way that he shares information with me about matters affecting residents that affect council.<sup>326</sup>

576. Councillor G did not inform the constituent that his email was being forwarded on to the Member for Croydon. When my investigation asked Councillor G why the constituent was not told, the councillor replied:

A. I just didn't.<sup>327</sup>

<sup>324</sup> Email from a constituent to Cr G, 20 December 2009 (Cr G Exhibit #7).

<sup>325</sup> Email from Cr G to the Member for Croydon, 22 December 2009 (Cr G Exhibit #7).

<sup>326</sup> Cr G, p62, 45.

<sup>327</sup> Cr G, p63, 8.

577. The Member for Croydon commented that he had not solicited the email from Councillor G, but he surmised that the councillor:

just thought I'd be curious to see what reaction [Councillor G] got to [their] letter which I note is sent out some days after the decision ... I imagine that [Councillor G] was motivated by our letterboxing a position on a hot button issue which had become by then a State political issue which was no longer a local government issue, which had resulted in two independent candidates for Parliament standing one against Jay Weatherill and one against me, and it had become an issue where the St Clair activists were saying vote out the current State government because of a decision of the Charles Sturt Council, and [Councillor G] imagined that in the lead-up to the election I would be interested in reaction both positive and negative to [the councillor's] letter.<sup>328</sup>

578. In response to my provisional report, Councillor G made the point that the email raises matters of state government service or policy, and that it is common and proper for such matters to be referred to other political representatives as appropriate.<sup>329</sup> I accept that this is so, and the conduct of council business may require that other spheres of government should be advised about that business.
579. However, the constituent's email was forwarded through the councillor's private email address, just after the Member for Croydon had assisted Councillor G in producing and delivering the councillor's letter to constituents.<sup>330</sup> The council had concluded the revocation process; and as intimated in the Member for Croydon's comments above, there was still some public anxiety about the revocation and land swap which could have ramifications in the upcoming state elections.
580. In these circumstances, and in light of the councillor's ALP affiliation and friendship with the Member for Croydon, I consider it is likely that the councillor forwarded the email to the Member for Croydon to assist him to gauge the community's views for the purposes of the state elections, rather than in the course of conducting council business. I doubt Councillor G would have forwarded the email on to the Member for Croydon if they had not been members of the same political party.
581. In my opinion, Councillor G may have acted in a manner which was inconsistent with the standards expected of councillor conduct under the code of conduct, in that the councillor may have failed to use information obtained as a council member responsibly, and used the information for purposes other than council business.

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## OPINION

In forwarding a community member's email to the Member for Croydon, which was received in their councillor capacity, Councillor G may have acted in a manner that was contrary to the code of conduct.

In accordance with section 18(5) of the Ombudsman Act, I report this evidence to the principal officer of the council.

<sup>328</sup> M for C, p35, 35.

<sup>329</sup> Letter from legal representative for Cr G, 29 August 2011, para 51.

<sup>330</sup> See Part 4 previously.

## PART 5

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# THE CONSULTATION PROCESS

## 5. THE CONSULTATION PROCESS

582. The council was required to undertake community consultation under the Local Government Act, prior to forwarding the revocation proposal to the Minister. The consultation process reflects the circumstances and the (legislative) context surrounding the administrative act, as indicated in the 'Further description of the administrative act' (see Appendix B).

### The council's consultation obligations in the revocation process

583. When dealing with the proposed revocation, section 194(2) of the Local Government Act required the council to:
- prepare a report on the proposal (section 194(2)(a)),<sup>331</sup> and
  - follow the relevant steps in its public consultation policy (section 194(2)(b)).
584. These obligations attached notwithstanding the fact that the council had already agreed (on 28 April 2008 and 9 June 2009) to proceed with the necessary negotiations and investigations to enable a land swap to occur.
585. This section of my report addresses the question of whether the council met its consultation obligations under the Local Government Act and the council's public consultation policy at the relevant time.<sup>332</sup>
586. It also considers whether the council adopted good administrative practice in fulfilling these obligations. In particular, based on the evidence which I received, I identified six issues to be considered:
1. whether the timing of the consultation process was appropriate
  2. whether the council took sufficient action to publicise the consultation process
  3. whether the council made enough information available to the public
  4. whether the council misleadingly described the land as 'same for same'
  5. whether the council should have accepted late submissions
  6. whether the council properly considered the results of the consultation when making decisions.

### Background

587. The purpose of the council's public consultation process in 2009 was 'to provide the community with the opportunity to provide feedback on the proposal to revoke the classification of community land of part of the St Clair Reserve and the proposed subsequent land swap',<sup>333</sup> as required under section 194 of the Local Government Act.

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<sup>331</sup> Section 194(2)(a) was amended by section 27 of the *Local Government (Accountability Framework) Amendment Act 2009* (No 81 of 2009), and came into operation on the 8 April 2010. This amendment requires a council's report to be 'made publicly available'.

<sup>332</sup> City of Charles Sturt, Public Consultation Policy, reference number 4.3, last reviewed December 2009.

<sup>333</sup> City of Charles Sturt, Consultation Report - St Clair Reserve Community Land Revocation, p3.

588. A Communications and Engagement Plan for the St Clair Reserve Community Land Revocation (**the communications plan**) was endorsed by the council on 9 June 2009. The objectives of the plan were:

- That the community and stakeholders are appropriately and regularly informed of the process, status, key stages and outcomes of the project;
- That the community have an opportunity to provide feedback; and
- That the community and stakeholders are informed as to how their feedback and concerns have informed the project.<sup>334</sup>

589. The communications plan involved undertaking the following:

- Letter and information to land owners and residents immediately opposite St Clair and those located within 500 metres (or as specified where appropriate) - informing them of the proposed revocation and inviting them to make a submission to Council;
- Letter and information to external stakeholders and community groups - informing them of the proposed revocation and inviting them to make submissions to Council;
- Full-page colour advertisements in the Weekly Times and Portside Messengers on 19 August;
- Public Notices, as required under section 194, in the Weekly Times and Portside Messengers on 19 August;
- Regular project updates to the Mayor and elected members, in particular ward members;
- Formal submissions - Submissions period to be open for 28 days (longer than the required 21 days);
- Ongoing liaison with other external stakeholders (including the JV, the LMC and the Minister for Local Government); and
- Opportunity to be heard by Council - Opportunity for those who made a submission to give a presentation to Council.
- General call to gallery on the night of deputations being heard for any community member to be heard on this matter.
- Promotion that Council will be considering the matter and hearing deputations via Council's Messenger column in the Weekly Times and Portside Messengers on 21 October 2009.<sup>335</sup>

590. The consultation period ran for 28 working days from Friday 14 August 2009 to Wednesday 23 September 2009; and was extended by two days to Friday 25 September 2009. The total submission period was 30 working days.

591. The results of the consultation period were considered by the council on 26 October 2009, and deputations from the community were heard.

592. The results of the consultation are outlined in the following documents:

- Consultation Report – St Clair Reserve Community Land (**the consultation report**)
- St Clair Reserve Community Land Revocation – Community Engagement Summary (**the community engagement summary**).

593. The consultation report, which was presented to the council on 26 October 2009, outlined in detail the consultation process undertaken, contained copies of submissions received and commented on the results of the consultation process.

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<sup>334</sup> City of Charles Sturt, Communications and Engagement Plan for St Clair Community Land Revocation, Appendix K to report to council from Manager Planning and Development, Cheltenham Racecourse Site and St Clair Reserve and Sheridan Land Exchange, 9 June 2009, Item 13.6, p2.

<sup>335</sup> City of Charles Sturt, Consultation Report - St Clair Reserve Community Land Revocation, p4.

594. The community engagement summary was produced in response to a recommendation in the consultation report that:

the public should be provided with a feedback report (comprising a more concise summary of this report). This report should be sent to all those who indicated a desire for further information, key stakeholders and available on the website.<sup>336</sup>

595. The consultation report records that ‘81 written submissions were received’ (page 12) and also that ‘86 written submissions were received’ (page 3). The CEO confirmed that ‘the correct number is 86’.<sup>337</sup> This figure does not include:

- the informal feedback received from 32 people
- the 24 people who rang and registered their general objection<sup>338</sup>
- the signatures of people on the petition against the revocation who did not send in submissions.<sup>339</sup>

596. Of these submissions:

- 72 submissions were from individuals
- 6 submissions were from community groups:
  1. Adelaide Parklands Preservation Society
  2. Bicycle Institute of Australia
  3. Cheltenham Park Residents Association
  4. Residents of Inner North West Adelaide
  5. St Clair Reserve Ratepayers Association
  6. Woodville Garden Progress Association
- 8 submissions were from other stakeholders and sporting clubs:
  1. Department for Transport, Energy and Infrastructure
  2. ETSA Utilities
  3. LMC
  4. North West Junior Soccer Club
  5. Orion Tennis Club
  6. Vipers Football Club
  7. Woodville District Cricket Club
  8. Woodville High School

597. In addition to the consultation report and the community engagement summary, the council prepared and published a response to the issues raised by the community and stakeholders during the consultation.

598. The document ‘Response to community concerns – St Clair Reserve Community Land Revocation’ was provided to the council meeting held on 9 November 2009. It summarised the issues raised by the community, provided a response to each issue and outlined the action that council proposed to take to deal with that issue. It stated that it:

summarises the issues raised by the community in the consultation process as well as providing commentary by the council’s administration in response to the issues raised together with recommended action where appropriate. In summary, the council has either previously considered and appropriately addressed, or is able to address, each of the issues raised.<sup>340</sup>

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<sup>336</sup> City of Charles Sturt, Consultation Report - St Clair Reserve Community Land Revocation, p20.

<sup>337</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p47.

<sup>338</sup> City of Charles Sturt, Consultation Report - St Clair Reserve Community Land Revocation, p12.

<sup>339</sup> City of Charles Sturt Consultation Report - St Clair Reserve Community Land Revocation, p12.

<sup>340</sup> City of Charles Sturt, St Clair Reserve Community Land Revocation Consultation Report to Council, 9 November 2009, Item 6.121, p30.

## Whether the council complied with the requirement in section 194(2)(a) to prepare a report

599. Section 194(2) and (3) of the Local Government Act provide as follows:

- (2) Before a council revokes the classification of land as community land—
  - (a) the council must prepare a report on the proposal containing—
    - (i) a summary of the reasons for the proposal; and
    - (ii) a statement of any dedication, reservation or trust to which the land is subject; and
    - (iii) a statement of whether revocation of the classification is proposed with a view to sale or disposal of the land and, if so, details of any Government assistance given to acquire the land and a statement of how the council proposes to use the proceeds; and
    - (iv) an assessment of how implementation of the proposal would affect the area and the local community; and
    - (v) if the council is not the owner of the land—a statement of any requirements made by the owner of the land as a condition of approving the proposed revocation of the classification; and
  - (b) the council must follow the relevant steps set out in its public consultation policy.
- (3) After complying with the requirements of subsection (2), the council—
  - (a) must submit the proposal with the report on all submissions made on it as part of the public consultation process to the Minister; and
  - (b) if the Minister approves the proposal—may make a resolution revoking the classification of the land as community land.

600. The first question is whether the council complied with section 194(2)(a), that is, whether the council prepared a report covering the matters listed in section 194(2)(a).

601. I considered this matter in a previous complaint I received from a member of the public (Complaint 1 – Part 2.3). This complaint alleged that the council had failed to comply with its obligations under section 194 of the Local Government Act.

602. I examined the section 194 report.<sup>341</sup> This report was received and noted at item 6.121 of the 9 November 2009 council meeting. At this meeting the council resolved:

that in accordance with the provisions of Section 194 of the Local Government Act 1999, Council submit to the Minister:

- The proposal to revoke the classification of the land described as Portion of Allotment 70 in Filed Plan 124064, as described in Certificate of Title, Volume 5754, Folio 81 and in Appendix B of this report as community land.
- This Council report and
- All submissions made as part of the public consultation process (Appendix A to the report).<sup>342</sup>

<sup>341</sup> City of Charles Sturt, Report prepared in accordance with the requirements of section 194 of the *Local Government Act 1999* - Revocation of land as community land, Appendix Q to report to council from Manager Planning and Development, Cheltenham Racecourse Site and St Clair Reserve and Sheridan Land Exchange, 9 June 2009, Item 13.6, p40.

<sup>342</sup> City of Charles Sturt, Council Minutes, 9 November 2009, Item 6.121, p4.

603. A copy of the section 194 report can be found in the 9 November 2009 report to the council.<sup>343</sup> It is Appendix B to the report to the council from the Manager Planning and Development titled St Clair Reserve Community Land Revocation Consultation. The Report (Appendix B) is called ‘Report prepared in accordance with the requirements of section 194 of the Local Government Act 1999 - Revocation of Land as Community Land’.
604. Based on this report, I considered at the time that the council had complied with its obligations under the Local Government Act.
605. I have again examined the report which the council prepared to meet the requirements of section 194.
606. The table below sets out what the report under section 194(2)(a) must contain, and comments on how the council met these requirements.

	Requirement – as per section 194(2)(a)	Is it contained in the council’s report?
(i)	a summary of the reasons for the proposal	Page 60 - Reasons for disposal
(ii)	a statement of any dedication, reservation or trust to which the land is subject	Page 60-61 - Dedications, Reservations or Trusts
(iii)	a statement of whether revocation of the classification is proposed with a view to sale or disposal of the land and, if so, details of any Government assistance given to acquire the land and a statement of how the council proposes to use the proceeds	Not with a view to sale or disposal - land is to be swapped. There will be no proceeds
(iv)	an assessment of how implementation of the proposal would affect the area and the local community	Page 63 - Effect of the Proposal on the Area and the Local Community
(v)	if the council is not the owner of the land—a statement of any requirements made by the owner of the land as a condition of approving the proposed revocation of the classification	Not applicable

607. My view has not changed. It appears to me that this report met the requirements of section 194(2)(a).

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### OPINION

The council complied with its obligation under section 194(2)(a) of the Local Government Act to make a report available, and in this respect did not act in a way that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

<sup>343</sup> City of Charles Sturt, Report prepared in accordance with the requirements of section 194 of the *Local Government Act 1999* - Revocation of land as community land, Appendix Q to report to council from Manager Planning and Development, Cheltenham Racecourse Site and St Clair Reserve and Sheridan Land Exchange, 9 June 2009, Item 13.6, p40.

## Whether the council complied with the requirement in section 194(2)(b) to follow the steps in its public consultation policy

608. In addition to the requirement to follow the steps set out in section 194(2)(a), the council must comply with section 194(2)(b), which requires it to follow the steps set out in the public consultation policy.
609. Section 50 of the Local Government Act requires a council to prepare and adopt a public consultation policy. It provides as follows:
- (1) For the purposes of this Act, a council must prepare and adopt a public consultation policy.
  - (2) A public consultation policy—
    - (a) must set out steps that the council will follow in cases where this Act requires that a council must follow its public consultation policy; and
    - (b) may set out steps that the council will follow in other cases involving council decision-making.
  - (3) The steps referred to in subsection (2)—
    - (a) in a case referred to in subsection (2)(a)—must provide interested persons with a reasonable opportunity to make submissions in the relevant circumstances; and
    - (b) may vary according to the classes of decisions that are within the scope of the policy.
  - (4) However, a public consultation policy for a case referred to in subsection (2)(a) must at least provide for—
    - (a) the publication in a newspaper circulating within the area of the council a notice describing the matter under consideration and inviting interested persons to make submissions in relation to the matter within a period (which must be at least 21 days) stated in the notice; and
    - (b) the consideration by the council of any submissions made in response to an invitation under paragraph (a).
    - (c) ...
610. In fulfilment of this obligation, the council had adopted a consultation policy at the relevant time.
611. The consultation policy set out its purpose and scope; the principles that are to guide the council in relation to consultation; and the public consultation steps to be followed.<sup>344</sup> Where consultation is to be undertaken, the consultation policy required the following 3 steps:
1. Council Officers will:
    - 1.1. Prepare a document that sets out Council's proposal in relation to the matter; and
    - 1.2. Publish a notice
      - describing the matter under consideration
      - in newspapers circulating within the area of the Council, and

<sup>344</sup> City of Charles Sturt, Public Consultation Policy, last reviewed December 2009, p1.

- inviting interested persons to make submissions within a period stated in the notice (being at least 21 days).
2. When submissions have been received by the specified date, Council Officers will:
    - 2.1. Summarise and analyse the information
    - 2.2. Prepare a report for Council or the relevant Council Committee which
      - summarises the public consultation outcomes
      - presents the information in the broader context of the matter under consideration
      - makes recommendations for Council or the Committee to consider when deciding on the matter/s, and
      - is included on the agenda for the next available Council or Committee meeting.
  3. Council members will consider the report and relevant recommendation/s and decide on the matter/s.

The right to address Council or a Committee of Council by way of deputation in support of any submission may be granted at the discretion of the Mayor or Presiding Member, unless otherwise prescribed in the relevant legislation.

612. The consultation policy also required additional consultation steps to be undertaken for the specific purpose of revocation of community land status under section 194(2) of the Local Government Act. At the relevant time, these were contained within the document Public Consultation Implementation Procedures. They are now included in an amended version of the consultation policy. These additional steps are:

As per steps 1, 2 and 3 previously listed with the addition of:

- Prepare a report
- Obtain the approval of the owner of the land, if council is not the owner of the land
- Submit the proposal and the report (including a report on all submissions made as a result of public consultation) to the Minister
- Obtain approval from the Minister, and
- If the Minister approves the proposal, Council may pass a resolution revoking the classification.

613. The council reviewed its consultation policy after the consultation period. On 21 December 2009, the council's Policy and Delegations committee made some changes to the consultation policy.

614. The report to the committee from the Community Engagement Coordinator said:

In accordance with part 5, section 50 of the Local Government Act 1999, Council is required to have a Public Consultation Policy which sets out the steps to be taken in cases where Council is required to undertake Public Consultation.

Council received legal advice from Norman Waterhouse lawyers in relation to matters concerning the St Clair Reserve Community Land Revocation in October 2009. Part of this advice received was a suggestion to incorporate elements of the current Public Consultation Implementation Procedure into the Public Consultation Policy to better align with the requirements of the Local Government Act 1999.

Council's Public Consultation Policy was last reviewed in September 2008 (refer Appendix A), and so was not due for a review until September 2010, however this review has been brought forward in light of the advice received.<sup>345</sup>

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<sup>345</sup> City of Charles Sturt, Policy Delegations Committee, Report, 21 December 2009, p88.

615. The report says that the following changes were made to the policy:

An amended Public Consultation Policy is provided in Appendix B which incorporates the following changes:

- Insertion of table, previously contained in the Public Consultation Implementation Procedure, into section 3.3, which outlines the matter, relevant section of the Act, and public consultation steps to be taken;
- Inclusion of *Community Land - Classification (Section 193(2))* previously not identified in the policy;
- Amendment to the public consultation steps for Annual Business Plan and Budget in line with the Local Government (Accountability Framework) Amendment Bill 2009 which was recently passed in Parliament. and
- Minor changes for consistent formatting styles.<sup>346</sup>

616. Arising from the obligations that were in effect when the consultation was undertaken, the table below sets out the formal steps which the council was required to follow, and what it did in response:

		Steps in the council's consultation policy	Followed?
Step 1	1.1	Prepare a document that sets out Councils' proposal in relation to the matter.	Report was prepared and attached to the minutes of the council meeting on 9 June 2009, as Appendix Q to the report to the council from the Manager Planning and Development titled St Clair Reserve Community Land Revocation Consultation. <sup>347</sup> The Report (Appendix Q) is called 'Report prepared in accordance with the requirements of section 194 of the Local Government Act 1999 - Revocation of Land as Community Land'. <sup>348</sup>
	1.2	Publish a notice: <ul style="list-style-type: none"> <li>• describing the matter under consideration</li> <li>• in newspapers circulating within the area of the Council, and</li> <li>• inviting interested persons to make submissions within a period stated in the notice (being at least 21 days).</li> </ul>	Public Notices were published in the Weekly Times and Portside Messengers on 19 August 2009, inviting people to make submissions and giving them 25 working days notice.

<sup>346</sup> City of Charles Sturt, Policy Delegations Committee, Report, 21 December 2009, p88.

<sup>347</sup> City of Charles Sturt, Report prepared in accordance with the requirements of section 194 of the *Local Government Act 1999* - Revocation of land as community land, Appendix Q to report to council from Manager Planning and Development, Cheltenham Racecourse Site and St Clair Reserve and Sheridan Land Exchange, 9 June 2009, Item 13.6, p40.

<sup>348</sup> City of Charles Sturt, Report prepared in accordance with the requirements of section 194 of the *Local Government Act 1999* - Revocation of land as community land, Appendix Q to report to council from Manager Planning and Development, Cheltenham Racecourse Site and St Clair Reserve and Sheridan Land Exchange, 9 June 2009, Item 13.6, p40.

<b>Step 2</b>		<p>When submissions have been received by the specified date, Council Officers will:</p> <p>2.1 Summarise and analyse the information</p> <p>2.2 Prepare a report for Council or the relevant Council Committee which:</p> <ul style="list-style-type: none"> <li>• summarises the public consultation outcomes</li> <li>• presents the information in the broader context of the matter under consideration</li> <li>• makes recommendations for Council or the Committee to consider when deciding on the matter/s, and</li> <li>• is included on the agenda for the next available Council or Committee meeting.</li> </ul>	<p>The council prepared the Consultation Report - St Clair Reserve Community Land Revocation which was presented to the council on 26 October 2009.</p>
<b>Step 3</b>		<p>Council members will consider the report and relevant recommendation/s and decide on the matter/s.</p>	<p>The council considered the Consultation Report - St Clair Reserve Community Land Revocation which was presented to the council on 26 October 2009.</p> <p>The council resolved, at the 9 November 2009 meeting, <i>inter alia</i>, that the council submit the proposal to revoke the community land classification to the Minister.</p> <p>Specific actions of the council in relation to this are discussed in detail below.</p>
<b>As required by section 194(2)</b>		<p>Prepare a report.</p>	<p>Report was prepared and attached to the minutes of the council meeting on 9 June 2009, as Appendix Q to the report to Council from the Manager Planning and Development titled St Clair Reserve Community Land Revocation Consultation.</p> <p>The Report (Appendix Q) is called ‘Report prepared in accordance with the requirements of section 194 of the Local Government Act 1999 - Revocation of Land as Community Land’.<sup>349</sup></p>

<sup>349</sup> City of Charles Sturt, Report prepared in accordance with the requirements of section 194 of the *Local Government Act 1999* - Revocation of land as community land, Appendix Q to report to council from Manager Planning and Development, Cheltenham Racecourse Site and St Clair Reserve and Sheridan Land Exchange, 9 June 2009, Item 13.6, p40.

<b>As required by section 194(2)</b>		Obtain the approval of the owner of the land, if council is not the owner of the land	Not applicable
<b>As required by section 194(3)</b>		Submit the proposal and the report (including a report on all submissions made as a result of public consultation) to the Minister	<p>The council resolved at the 9 November 2009 council meeting to proceed with the next stage of the revocation process, and to submit a proposal to revoke the community land classification of part of St Clair Reserve to the Minister for State/Local Relations in accordance with section 194(3) of the Local Government Act.</p> <p>On 10 November 2009, the council sought the approval of Hon Gail Gago MLC, Minister for State/Local Government Relations of the council's proposal to revoke the community land classification of a portion of the St Clair reserve.</p>
<b>As required by section 194(3)</b>		Obtain approval from the Minister.	<p>On 19 November 2009, the Minister for State/Local Relations, Hon Gail Gago MLC, granted her approval for the revocation of the community land status.</p> <p>This approval was declared null and void by the Supreme Court on 2 December 2009.</p> <p>On 10 December 2009 the Minister for the Southern Suburbs approved the revocation proposal as a delegate for the Minister for State/Local Relations.</p>
<b>As required by section 194(3)</b>		If the Minister approves the proposal, Council may pass a resolution revoking the classification.	<p>On 23 November 2009 the council resolved to revoke the community land status of part of the St Clair land.</p> <p>This was invalid as the Minister's approval was declared null and void.</p> <p>On 14 December 2009 the council decided again to revoke the community land status of the land pursuant to section 194(3)(b) of the Local Government Act as the Scheme affecting the St Clair reserve under the <i>Recreation Grounds (Joint Schemes) Act 1947</i> had been varied to exclude the relevant land and the Minister for the Southern Suburbs as delegate of the Minister for State/Local Relations had approved the proposal.</p>

617. Based on the evidence set out in this table, my view is that the council followed the formal steps required by the consultation policy.

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**OPINION**

The council complied with the requirement in section 194(2)(b) of the Local Government Act to follow the steps in its public consultation policy, and in this respect did not act in a way that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

**Whether the council adopted good administrative practice in carrying out its public consultation**

618. I have concluded above that the council complied with its legal obligations in undertaking consultation on the proposed revocation. However, one of the criticisms made of the council by parts of the community before and during the course of my investigation was that it did not carry out proper public consultation.
619. I have therefore considered whether the council adopted good administrative practice in fulfilling its legal obligations. Based on the evidence which I received, I identified six issues to be considered:
1. whether the timing of the consultation process was appropriate
  2. whether the council took sufficient action to publicise the consultation process
  3. whether the council made enough information available to the public
  4. whether the council misleadingly described the areas of land to be swapped as 'same for same'
  5. whether the council should have accepted late submissions
  6. whether the council properly considered the results of the consultation when making decisions.

***1. Whether the timing of the consultation process was appropriate***

620. It was suggested to my investigation that the council was aware of community opposition to the revocation and the land swap, and that as a consequence, it deferred consulting with the community.
621. I set out the relevant background in the following paragraphs.
622. In 2005, QED was engaged by the council and the LMC to undertake a study on the future planning directions for the Cheltenham Woodville precinct. This project included two stages of community consultation on what the future planning directions should be for the precinct.
623. Stage one ran from approximately 23 May 2005 to 24 June 2005. It involved the community contributing towards a vision and set of urban design principles for the precinct, resulting in a 'Vision and Urban Design Principles for the Precinct'.
624. Stage two of the consultation ran from approximately 26 November 2005 to 16 December 2005. It asked the community to provide feedback on the set of urban design principles.

625. The results of both stages of consultation were provided in ‘Long Term Planning for the Cheltenham Woodville Precinct, Consultation Report - Stage 2’ prepared by QED (dated 12 January 2006).<sup>350</sup>

626. QED’s report summarising Stage Two of the community feedback concluded:

The points raised by the community need to be considered further in the development of a Structure Plan for the Precinct.  
**A key recommendation** of the Stage Two Consultation Process is for Council to maintain open communication with key stakeholders and the community.<sup>351</sup> [my emphasis].

627. Some two years later, council staff recommended to the council that it undertake a two-stage consultation process in relation to the revocation. The 11 August 2008 report to the council, Item 13.4 stated as follows:

Given the progression of the land swap concept there is now a need for more detailed planning around community engagement. Broadly it is proposed that this would include the following:

- A **2-step consultation process** associated with the Community Land Revocation process.
- The first step would involve an informal consultation process involving workshops with interested community members and key stakeholder groups and broader community surveys to identify all issues and opportunities associated with the land swap and precinct
- The second stage would involve formal notification pursuant to the Local Government Act 1999 in relation to revocation of Community Land along with a revised Management Plan for the remainder of the open space responding to issues raised in the first step and incorporating appropriate ideas.<sup>352</sup> [my emphasis].

628. The council did not follow the recommendation to undertake a two-stage consultation process. When asked why, the CEO advised my investigation that:

A two step style of consultation was not implemented by Council rather a single expanded process exceeding statutory requirements was implemented.

A two step consultation process was decided against following the August meeting as it was considered that this might be unclear in that it would present a repetitive process to the community and that a consolidated process was more effective.<sup>353</sup>

629. Just prior to the 11 August 2008 meeting, there was evidence of some community displeasure with the idea of a land swap. The Weekly Times Messenger on 28 May 2008<sup>354</sup> reported that the land swap was unlikely to go ahead ‘after land swap negotiations stalled between developers and Charles Sturt Council.’ Cheltenham Park Residents Association spokesman, Mr John Dyer, was reported as responding that ‘residents will be delighted it (the land swap) is not going ahead as suggested.’

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<sup>350</sup> City of Charles Sturt, Long Term Planning for the Cheltenham Woodville Precinct, Consultation Report - Stage 2, QED Pty Ltd, 12 January 2006.

<sup>351</sup> City of Charles Sturt, Long Term Planning for the Cheltenham Woodville Precinct, Consultation Report - Stage 2, QED Pty Ltd, 12 January 2006, p9.

<sup>352</sup> City of Charles Sturt, Report to council from Manager Planning and Development, Information Report - St Clair Oval Land Swap, 11 August 2008, Item 13.4, p5.

<sup>353</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p34.

<sup>354</sup> Weekly Times Messenger, ‘St Clair Reprieve’, May 28, 2008, p3.

630. The Weekly Times Messenger also quoted the CEO as saying that ‘the council would still like to see a TOD near the station ‘but in the short term I don’t see how it could happen’. At this time the broader community was not aware that the council was still hoping to proceed with the revocation and land swap.
631. Following the 11 August 2008 council meeting which was held in confidence, the community engagement plan was prepared and dated September 2008. However, it was not endorsed by the council until 9 June 2009.
632. The 11 August 2008 council report and minutes suggest that it was intended that the community was going to be consulted much earlier, in September 2008, via the proposed two-stage consultation process. However, in the event it took almost 12 months before the council commenced the foreshadowed community engagement.
633. In my view a number of factors are relevant in explaining why this delay occurred.
634. First, as the CEO explained to my investigation:

Council and the LMC needed to be confident that a land swap was achievable before commencing the community consultation on the Community Land Revocation.<sup>355</sup>

635. I understand this statement to refer to the following pre-conditions which the council considered it needed to satisfy before it could commence a consultation process:
  - Site history for St Clair Reserve to be satisfied that the land swap land on the Sheridan site was suitable for residential use;
  - Negotiate a series of draft condition contracts relating to the land swap - between LMC, Council and the JV; and
  - Agreement between Council and relevant Minister under the Recreation Grounds (Joint Schemes) Act 1947 to vary scheme under that Act so that St Clair land not subject to scheme.<sup>356</sup>

636. The CEO confirmed:

However Council administration’s position on the land swap and community land revocation was always that progressing to a revocation process would only occur where there was legal agreement on the terms any land swap. The basis of this position was that given the complexity of the land swap in terms of issues, process, finance and stakeholder interests there was no point in progressing to a revocation process unless there was agreement on the conditions and terms of a land swap should Council and the Minister determine to revoke the community land status of portion of St Clair Reserve.

...

Council determined not to commence and therefore announce and [sic] revocation process until legal agreements were in place providing assurance that the land swap would proceed subject to the revocation, which included consultation.<sup>357</sup>

637. The second apparent reason for delay was the need for confirmation of the LMC and state government’s position. On 15 December 2008, the state government approved transactions for the LMC to purchase the Sheridan land and, subject to the revocation of the community land status over the St Clair site held by the council, for the LMC to swap the land with the council.

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<sup>355</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p45.

<sup>356</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p46.

<sup>357</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p49.

638. My investigation asked the CEO if any concerns were ever raised by the LMC, the council or councillors regarding the timing of the community consultation period. The CEO said:

it was important that these other elements were confirmed before commencing the land revocation process and associated community consultation.<sup>358</sup>

it was seen that there was no point in commencing a public consultation process unless all key decision-making parties were in agreement to undertake a land swap subject to revocation and other conditions.<sup>359</sup>

639. In an email to the Chief Executive Officer of the LMC dated 18 September 2008, an LMC officer wrote:

It has just occurred to me that AS SOON AS Council starts this process, the cat will be out of the bag re the land swap/TOD. They can't consult on revocation of the community land status without referring to the land swap/TOD. Therefore do we need to talk to Council about delaying the start of this process until we have been to Cabinet on the Woodville land transactions? Otherwise SA Government in the position of reacting to a council initiative before considered by Cabinet. Will also need to ensure close coordination between SA Govt and Council on any announcements on land swaps, TODs etc. I had been thinking that there would be no announcement following Cabinet approval, only after all the "deals" with the JV have been documented at least

...

640. In an internal LMC email to another officer dated 18 September 2008, this LMC officer wrote:

... we had a meeting with Council and the JV this morning re the Cheltenham Commitment Deed. Prior to the meeting, [the CEO] and [council's Manager Planning and Development] confirmed that they would DO NOTHING on the revocation process until the State Government is in a position to make an announcement - which in my vies [sic] is after we have documented and agreed terms with the JV at least ...

641. In my view, the third apparent reason for delay was the council's expectation that the community reaction would not be entirely positive.

642. The proposed revocation was considered at the council meetings of 28 April 2008, 11 August 2008 and 9 June 2009, prior to the commencement of the consultation period. These items were all dealt with in confidential sessions of the council. There was no open council discussion of the revocation prior to the consultation period.

643. Although I understand that the report and minutes of the 28 April 2008 and 9 June 2009 meetings were released from confidence on 11 August 2008 and 22 June 2009 respectively, it appears to me that the broader community was not aware of the proposal until the time of the consultation. A community member said:

I had spoken to people in my area, I had spoken to people at various community groups, church groups, whatever, and no-one seemed to be aware of it.<sup>360</sup>

644. Given that one of the key recommendations of the Stage Two consultation process of QED was to 'maintain open communication with key stakeholders and the community' and the displeasure expressed about the land swap in the Weekly Times Messenger from the Cheltenham Park Residents Association spokesman, my investigation asked

<sup>358</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p46.

<sup>359</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p48.

<sup>360</sup> Witness 3 (T2) p54, 46.

the CEO if the council was aware of or concerned about the public's reaction to the land swap. The CEO said:

Council expected the process to be contentious given the nature of the matter. Council nevertheless was satisfied that the consultation and communication strategy adopted exceeded statutory requirements and would properly inform the community and provide the opportunity for feedback.<sup>361</sup>

645. One elected member told my investigation:

Q. And when you came to consult with the community, did you have a sense of how advanced the process had gone, how it had progressed, at what point it was at?

A. I think, yes. I think I was aware that we were already well on track, things were moving ahead. There had been some minor consultation at the start but I understand that because of the community outcry, we stopped the public communication, public consultation and then revisited it and started again.<sup>362</sup>

646. In summary, it appears to me that the council made a decision not to consult with the community about the revocation of the community status of the St Clair land until the land swap terms and conditions were agreed upon, all legal agreements were in place and that, subject to the revocation, the land swap could proceed.
647. Whilst I accept that it was reasonable for the council to ensure that all necessary pre-conditions had been met before commencing the consultation, the practical result was that the council had already committed considerable expense and effort to the proposal. The likelihood that it would be prepared to alter its position was minimal.
648. On balance, my view is that as a matter of good administrative practice, the council should have engaged and consulted the community earlier, in accordance with the general process envisaged by consultant and staff recommendations in 2008, and before the council had invested so heavily in the project. Further, this would have ensured that council had properly fulfilled its legislative objectives articulated in section 8 of the Local Government Act, to provide 'open' and 'responsive' government, and be 'responsive to the ... interests ... of groups within its community'.
649. In forming this view I acknowledge that the specific obligation in section 194 of the Local Government Act meant that the council was obliged to consult on a matter on which it had already made an in-principle decision. However, nothing in section 194 would have precluded an earlier consultation, and in my view the community was consulted too late in the day.
650. The CEO put to me in response to my provisional report that its decision to enter into a single stage consultation process was a policy decision, which it is outside my jurisdiction to review.<sup>363</sup> The relevant case law makes it clear that what is a matter of policy, as opposed to a matter of administration, will depend on the particular facts in which the question arises.<sup>364</sup>
651. In this case, I do not agree with the CEO's submission. It is my view that the conduct of the consultation process was an integral part of the administrative act, and is 'an act relating to a matter of administration' within the meaning of the Ombudsman Act. It was a decision which was referable only to the facts of this situation, and which had no broader application to other circumstances. Further, it was clearly distinguishable from the major policy question which was before the council, namely whether the land swap should proceed.

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<sup>361</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p38.

<sup>362</sup> Cr A (T2) p72, 33.

<sup>363</sup> Response from the CEO, 18 August 2011, attached table p10.

<sup>364</sup> *City of Salisbury v Biganovsky* (1990) 54 SASR 117.

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**OPINION**

In failing to engage and consult with its community earlier than it did, in accordance with good administrative practice, the council acted in a way that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

## ***2. Whether the council took sufficient action to publicise the consultation process***

652. The second issue to consider is whether the council gave enough notice to provide a reasonable opportunity for people to participate in the process.
653. A particular criticism in this respect was that the council only directly canvassed residents within 500 metres of the St Clair Reserve. I considered this matter in two previous complaints I received from members of the public (Complaint 1 and Complaint 4 – Part 2.3).
654. In my report on these complaints, I noted and accepted the council's response to this allegation. I determined that it was reasonable to view the decision to send letters and information to land owners residing within 500 metres, in the context of the overall consultation process. I concluded that the council had complied with its consultation policy and the communications plan, and for that reason had not fallen into error.
655. Principle 3.1.1<sup>365</sup> of the consultation policy is as follows:

seek out potential stakeholders to ensure a broad demographic representation of the affected community is involved in the consultation.

656. On this issue, the communications plan proposed:

Letter and information to land owners and residents immediately opposite St Clair and those located within 500 metres (or as specified where appropriate) - informing them of the proposed revocation and inviting them to make a submission to Council; ...<sup>366</sup>

657. The St Clair Reserve, oval and adjoining open space is 'approximately 10.6 hectares in area. This is the area bounded by Woodville Road, the railway line, Actil Avenue and Brocas Avenue'.<sup>367</sup> The CEO advised my investigation that:

Letters and brochures were sent to residents and property owners within 500m of the subject site proposed to be revoked at St Clair (that is 500m from the boundary of the 4.7 hectare site, not the 10.6 hectare site).<sup>368</sup>

658. He also observed that:

This totalled more than 1500 households and included parts of Woodville and Woodville North.<sup>369</sup>

<sup>365</sup> I have adopted the current reference numbering for the consultation policy. The principles did not change when the policy was amended in December 2009, and therefore were the same (albeit with different reference numbers) during the relevant period when the revocation consultation occurred.

<sup>366</sup> City of Charles Sturt, Communications and Engagement Plan for St Clair Community Land Revocation, Appendix K to report to council from Manager Planning and Development, Cheltenham Racecourse Site and St Clair Reserve and Sheridan Land Exchange, 9 June 2009, Item 13.6.

<sup>367</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p46.

<sup>368</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p46.

<sup>369</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p46.

659. The CEO said that for people who lived outside the 500 metres:

Alternative means were used to raise awareness within the community of the St Clair Reserve Community Land Revocation consultation including displays at Council, a sign on the reserve itself, and ads in the Messenger.<sup>370</sup>

660. These alternative means of alerting the community to the revocation of the community land status of the St Clair land also included:

- full-page colour advertisements in the Weekly Times and Portside Messengers on 19 August 2009
- notices in the Weekly Times and Portside Messengers on 19 August 2009
- promotion that council would be considering the matter and hearing deputations via Council's Messenger column in the Weekly Times and Portside Messengers on 21 October 2009.<sup>371</sup>

661. One elected member suggested to my investigation that in hindsight, the council should have consulted more widely:

Whether we could've gone further - you know, in hindsight it's always easy to look back and think, "Oh, yeah, we should've consulted far more people." But at the time - and I think - I don't think the council had ever had such a project like this, and I think in hindsight we could've done a lot better. I do - but I was very reluctant to say that in public, knowing that the staff put so much effort into it and whatever comment I would've made about, you know, whether we should've extended the consultation, it would either look like, you know, "Well, why didn't you think of that earlier?" and it'd really question their professionalism, which I never wanted to do.<sup>372</sup>

662. However, the 9 November 2009 report to the council summarised the extent of the consultation undertaken as follows:

The consultation approach not only meets but exceeds the requirements of the Local Government Act 1999 and council's consultation policy....<sup>373</sup>

663. I accept this statement. In particular, in the context of the alternative means adopted by the council to publicise the proposal, I believe that it was not unreasonable to send letters and information only to land owners residing within 500 metres of the subject land.

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OPINION

In writing directly only to the land owners within 500 metres of the subject land during the consultation process, the council did not act in a way that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

<sup>370</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p46.

<sup>371</sup> City of Charles Sturt, Consultation Report - St Clair Community Land Revocation, p4.

<sup>372</sup> Cr J, p63, 10.

<sup>373</sup> City of Charles Sturt, report to council from Manager Planning and Development, St Clair Reserve Community Land Revocation Consultation Report to Council, 9 November 2009, Item 6.121, p39.

### *3. Whether the council made enough information available to the public*

664. It was also suggested to my investigation that, for those people who were aware of the consultation process, insufficient information was available about the proposal to enable them to properly understand it.
665. It appears to me that the following information was available for public inspection during the consultation period:
- a report from the CEO to the council dated 28 April 2008, recommending that council endorse the concept of a land swap
  - the 28 April 2008 council minutes – showing that the council endorsed in principle the concept of a land swap
  - the 9 June 2009 council report (to the extent that it was not still held under a confidentiality order) and minutes
  - the Woodville Road Revitalisation Strategy - Consultant Brief (contained in the City Development Committee meeting minutes from 3 November 2008)
  - a What's Happening in Woodville! pamphlet
  - the council displays at the Civic Centre and Cheltenham community centre
  - an information sheet, which was mailed with correspondence to stakeholders and ratepayers from 14 August 2009. It was also used in conjunction with displays at the Civic Centre and Cheltenham Community Centre and was available on the council's website
  - a Frequently Asked Questions sheet. This was used in conjunction with displays at the Civic Centre and Cheltenham Community Centre
  - a sign was erected at the St Clair Reserve on 14 August 2009
  - the Community Revocation Report was available for viewing at the customer service desk at the Civic Centre and Cheltenham Community Centre and was available on the City of Charles Sturt website
  - endorsed concept options were available on the City of Charles Sturt website and in hard copy by request.
666. Of course, whilst these materials were available, the extent to which the public was aware of them is another issue. For example, my investigation asked the CEO whether the council alerted the public to the 9 June 2009 council report and minutes during the consultation period. The CEO replied:

The 'Frequently Asked Questions' sheets referred to the concept plans that were endorsed by Council on 9 June 2009. As the majority of the [9 June 2009] report was confidential at that stage, it was not further promoted to the public.<sup>374</sup>

I comment that on the evidence before me, it was only the appendices to the report that were not available, not the substantive report and minutes.

667. I have noted later that the council's prudential report and the Deloitte review of the prudential report were not available to the public during the consultation period.<sup>375</sup> They were presented to the council at the 9 June 2009 meeting when the council, in confidence, resolved to accept numerous contracts to enable the council to proceed with the land swap.

<sup>374</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p45.

<sup>375</sup> See Part 6 of my report – Confidentiality of council meetings.

668. The prudential report and the Deloitte review were released on 26 November 2009, after the completion of the public consultation period, and the council's (purported) revocation decision on 23 November 2009. Having considered the content of these documents, I am of the view that there was no sound reason for not making them available to the community during the course of the consultation period.
669. In response to my provisional report, a community member put to me that:
- the brochure direct mailed to residents within 500m of the site contained a number of material omissions and misstatements of fact, and consequently many residents did not understand the implications of the proposal
  - the council refused to send a letter that clearly outlined the proposal to affected residents, and to hold a public meeting and poll
  - the extent of manifest community dissatisfaction demonstrated that the council's consultation process had been inadequate
  - reports provided to the council by council staff concentrated on the perceived positive aspects of the proposal, and did not adequately address risks such as those arising from land contamination, and the relevant land valuations.<sup>376</sup>
670. I deal with a number of these issues in other parts of this report, but together they do not persuade me that there was insufficient information available to the community to enable them to make a reasonably informed judgement about what was being proposed by the council.

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**OPINION**

The council made sufficient information available to enable the community to make a reasonably informed judgement about the St Clair revocation and land swap; and in this respect the council did not act in a way that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

**4. Whether the council misleadingly described the land area as 'same for same'**

671. The fourth consultation issue raised with my investigation was whether the council misleadingly described the proposal as 'an equivalent land swap' i.e. an area of land on the Sheridan site was proposed to be swapped for an equivalent area of the St Clair Reserve, so that there was no net loss in area of open space community land.
672. I considered this matter in a previous complaint I received from a member of the public (Complaint 1 – see Part 2.3). This complaint alleged that the council had misleadingly described the proposal as 'an equivalent land swap' so that there was no net loss of community land. The complainant alleged that part of the Sheridan site was already required to be open space, and that there would be a net loss of community land of 2.98 hectares as a result of the land swap. On the evidence before me, I concluded that the council had not erred.

<sup>376</sup> Response from Witness 3, 21 September 2011.

673. Principle 3.1.2 of the consultation policy is as follows:

to ensure information is easily understood, relevant, consistent and accessible to identified stakeholders within a reasonable timeframe.

674. The report prepared by the Manager Planning and Development for the 9 November 2009 council meeting (**the 9 November 2009 report**) summarised the proposal in the following terms:

In this context Council is consulting on a proposal to swap 4.7 hectares of the 10 hectare St Clair Reserve with an equivalent 4.7 hectares of adjoining land resulting in a reconfigured St Clair Reserve.<sup>377</sup>

675. Language of this nature had been consistently used to describe the proposal before and through the consultation period. The details of the land swap areas were published in Appendix C of the 9 November 2009 report, as a one-page map of the area. A similar statement and map were included in the brochure which was distributed as a part of the community consultation process.

676. I first investigated how the council determined the land areas to be swapped.

677. In an email to an LMC officer dated 5 August 2008, the council's Manager Planning and Development wrote:

I will have the land area to be swapped to you today. The executive team agreed on Friday to keep it simple and determine the area to be swapped on the total physical area and not complicate things by excluding roads or approved reserves etc This will mean approximately 4.5 hectares can be swapped one for one. ...

678. When my investigation asked for information relating to how the executive team determined the land area to be swapped the CEO said:

The executive team discussed various assumptions that could be factored into determining the land swap area. For example green space for green space i.e. excluding any areas covered by hard surfaces like buildings or roads, land defined as community land or simply equal area for area. It was determined that the current reserve referred to above had roads and buildings and the new reserve would likewise have roads and buildings located on it and there was nothing to be gained or lost by including these elements in a calculation.<sup>378</sup>

679. It seems to me from these statements that the council staff sought to simplify a complex calculation of land areas. Subsequently, the various methods of calculation adopted by different parties led to the differing views about whether the areas of land to be swapped could be legitimately described as 'same for same'.

680. It was suggested to my investigation that the two areas of land involved in the land swap were not of equal area because of two factors:

1. 12.5 percent of the Sheridan site development would have been required as open space if the whole of the Sheridan site had been developed for residential use, with no land swap
2. the current reserve contains no 'through roads', whereas the Sheridan site contains two 'through roads'.

<sup>377</sup> City of Charles Sturt, Report to council from Manager Planning and Development, St Clair Reserve Community Land Revocation Consultation, 9 November 2009, Item 6.121, p29.

<sup>378</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p58.

681. In relation to the first factor, my investigation asked the CEO if the 12.5 percent open space that would have been required if the Sheridan site had been developed for residential use, was considered in the final open space figures. The CEO said:

Yes. Also considered in the final open space figures was the closure of two sections of Actil Avenue which would be returned to open space and the requirement of the developer of the ‘current reserve’ referred to above to provide 12.5% open space. A master plan developed since for the site by Council and LMC proposes 22% of the ‘current reserve’ be retained as open space.<sup>379</sup>

682. In response to the second factor, the CEO stated:

The two areas of land involved in the land swap are equal in areas with both parcels 4.717 hectares in area. The ‘current reserve’ referred to above does contain a road. The road on the ‘current reserve’ is known as Glynnis [sic] Nunn Drive. This road operates as an access road however is not a through road for traffic management purposes.

The land swap was simply for two equal areas and roads were not part of the land swap equation as each parcel contains roads. Distinguishing between the nature of these roads was not determined necessary for the purpose of calculating the area to be swapped.<sup>380</sup>

683. In order to clarify the issue, my investigation sought independent advice from a surveyor. The surveyor identified the open space that was to be required prior to the land swap in the portion of the Sheridan site to be swapped as consisting of three reserves totalling 9,507 m<sup>2</sup> of open space. I proceed based on this figure. However, I note that the council says that the figure is 9,261 m<sup>2</sup>.<sup>381</sup>

684. On this basis, a ‘before and after’ comparison is:

Open space if the land swap had not happened i.e. if the proposed Sheridan area to be swapped was developed for residential use:

Existing St Clair Reserve	47,170m <sup>2</sup>
+ Open space in the portion of the Sheridan site proposed to be swapped	9,507m <sup>2</sup>
TOTAL OPEN SPACE	56,677m <sup>2</sup>

Open space after the land swap:

New reserve land on the Sheridan site	47,170m <sup>2</sup>
+ Additional open space in the developed existing St Clair Reserve (12.5% open space of 5,875m <sup>2</sup> + 3,666m <sup>2</sup> due to the closure of Actil Avenue)	9,541m <sup>2</sup>
TOTAL OPEN SPACE	56,711m <sup>2</sup>

This results in a net increase of 34m<sup>2</sup> of open space, without taking into account the roads.

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<sup>379</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p58.

<sup>380</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p58.

<sup>381</sup> City of Charles Sturt, Report to council from Manager Planning and Development, St Clair Reserve Community Land Revocation Consultation, 9 November 2009, Item 6.121, p45.

685. Portions of Brocas Avenue and St Clair Avenue are within the 47,170 m<sup>2</sup> open space area of the new reserve. The surveyor confirmed that the areas of these roads have not been deducted from the council's calculations.
686. If the area of the roads to be included in the new reserve (calculated by the surveyor to be 7,284 m<sup>2</sup>) is deducted from the open space figure there is a net loss of open space land of 7,250 m<sup>2</sup>.
687. Accordingly, whether the community would lose open space due to the land swap turns on the question of whether roads are considered to be open space. In my mind, the answer would depend on the purpose of the road i.e. whether it is a 'through' road that provides access to houses, or whether it is a 'no-through' road that provides access to open space.
688. I received a submission from a community member in response to my provisional report suggesting that in making my provisional finding I had attached insufficient weight to the fact that the function of the roads on the two land areas is different. In the case of the existing reserve, the relevant road is an internal road primarily used by people wishing to use the reserve, whereas the roads in the proposal are continuous roads which pass through the reconfigured reserve on its perimeter, and which would be used by through traffic. The submission suggested that the through roads could not be used for active or passive recreation.<sup>382</sup>
689. Further, in response to my provisional report, another community member put to me the following comment:

The statement that there would be "no net loss of community land" was consistently used in all Council consultation materials; this statement has been proven to be factually incorrect as roads are not and cannot be community land under the Local Government Act.

The area of new roads bordering the Actil site was not subtracted; these roads actually protrude into the new residential subdivision on either side of the park and are included in the 4.71ha (although never shown on the consultation materials). See the new deposited plan showing the shape of the 4.71ha on the Actil site, with two "stubs" of road protruding on either side. The closure of Actil Ave was also thrown into the mix at this point to try to further balance the ledger.<sup>383</sup>

690. I accept that the portions of Brocas Avenue and St Clair Avenue contained within the new reserve are through-roads and that their purpose is to provide access to houses. Further, it is clear that these roads would not be classified as community land under section 193 of the Local Government Act. I note also that a proportion of the existing reserve is currently a road and car park,<sup>384</sup> but is not a through-road.
691. The community member also put to me that council staff were wrong in the calculations they presented to the councillors. She stated:

The factual error in the "no net loss" statement was identified both to Council staff and to Councillors before the vote was taken. Council staff appear to have tried to nullify detection of the error by subsequently circulating a report to Councillors with a calculation of the net open space stating that it was actually a net increase of 128 sq metres! This amazing result was obtained by subtracting the new park area from the Actil site area before calculating 12.5% of the site (thus reducing the amount of open space that would have been provided on the Actil site had the swap not proceeded).<sup>385</sup>

<sup>382</sup> Response from a community member, 21 July 2011, pp1-2.

<sup>383</sup> Response from Witness 3, 21 September 2011.

<sup>384</sup> Glynis Nunn Drive.

<sup>385</sup> Response from Witness 3, 21 September 2011.

692. In summary, there are many different methods and factors that could be considered to calculate whether the areas of land to be swapped could be legitimately described as ‘same for same’. I have determined my own calculations and have verified them with a surveyor, and I consider that they justify the council’s position on this issue.
693. I remain of the view that the council was legitimately seeking to simplify a complex calculation of land areas. I accept that the calculations would have been a complex notion to convey to the public, and that there is an acceptable justification for the position put by the council. In these circumstances, I am not prepared to find that there was an administrative error in the council’s description of the land swap areas as ‘same for same’.

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## OPINION

By describing the proposed exchange of the St Clair land and the Sheridan land areas as a ‘same for same’ swap, the council did not act in a way that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

### *5. Whether the council should have accepted submissions after the deadline*

694. The initial formal submission period for the consultation ended on 23 September 2009. Five submissions in favour of the proposal (some conditional) and 64 against the proposal were received during this period.<sup>386</sup>
695. The council extended the formal submission period by two days to end on Friday 25 September, instead of the original date of 23 September 2009.
696. Submissions from the following persons in support of the land swap were received after the initial deadline, during the two day extension:
  - Department for Transport, Energy and Infrastructure (24 September 2009)
  - Woodville High (24 September 2009)
  - Mr Phil Harrison (25 September 2009)<sup>387</sup>
697. The following submissions against the proposal were received in the same period:
  - Woodville Garden Progress Association (undated but received by the council on 25 September 2009)<sup>388</sup>
  - David Mortimer (24 September 2009)
  - Robin Chapman (24 September 2009)
  - Rebecca McGeever (25 September 2009)
  - Dijana Vincekovic (25 September 2009)
  - Lynette Gilbertson (25 September 2009)
  - John Freesmith (24 September 2009)
  - Luciano Agostino (25 September 2009)<sup>389</sup>

<sup>386</sup> See consultation submissions in the City of Charles Sturt Consultation Report - St Clair Reserve Community Land Revocation, Appendix B and Appendix C.

<sup>387</sup> See consultation submissions in the City of Charles Sturt Consultation Report - St Clair Reserve Community Land Revocation, Appendix B and Appendix C.

<sup>388</sup> City of Charles Sturt, Consultation Report - St Clair Reserve Community Land Revocation.

<sup>389</sup> See consultation submissions in the City of Charles Sturt Consultation Report - St Clair Reserve Community Land Revocation, Appendix B and Appendix C.

698. he council informed my investigation that the decision to extend the consultation period by two days was made 'during the week beginning Monday 14 September 2009'<sup>390</sup> for the following reasons:

The consultation period was extended to allow residents more time to consider the issues and prepare submissions while also allowing Council to publish the 'open letter' in the Portside and Weekly Times Messengers (23 September 2009) as it thought it appropriate to allow the community an additional couple of days to respond to the project in context of this letter, rather than the consultation ending on that day and not allowing any further feedback. The open letter was prepared in the last few days in response to misleading reports in the community about certain elements of the project and Council considered it appropriate to provide the facts in response to these claims. Advice of this extension was provided to the community via the Portside and Weekly Times Messengers and on our website.<sup>391</sup>

699. My investigation asked the CEO if the council or any elected members, to his knowledge, communicated with any stakeholders prior to the extended closure date to suggest that they make a submission in support of the land swap. He responded:

Council staff contacted the sporting clubs that use the St Clair Ovals. The clubs had been regularly consulted by Council because of the significance of the impact on them and their members. The Clubs had given their verbal support but had failed to submit anything in writing. The contact was more out of courtesy than facilitation.

The LMC submission was received following the close date and an extension was granted.<sup>392</sup>

700. The following submissions in support of the land swap were received after the extended deadline on 25 September 2009 – when the submission period had closed:

- LMC (7 October 2009)
- North West Junior Soccer Association (8 October 2009)
- Vipers Football Club (13 October 2009)
- Woodville District Cricket Club (13 October 2009)<sup>393</sup>

701. No submissions against the proposal were received after the deadline.

702. Of submissions being accepted after the final deadline, the CEO says:

Yes, some may have been accepted after the date - either to allow for Friday's mail to be received or because extensions had been granted. The Council was being criticised for the consultation process not being comprehensive, accessible and too rigid, so extensions were granted to allow a greater deal of flexibility.<sup>394</sup>

703. The granting of the extension and the accepting of the submissions after the closing date could be viewed cynically. However, I have no evidence to persuade me that there was any attempt by the council to solicit additional submissions in an effort to 'rig' the results of the consultation.

704. In my view, it is in the public interest for a public consultation process to obtain a broad range of community opinion, and this is more important than the strict enforcement of a deadline for participation.

<sup>390</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p47.

<sup>391</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p48.

<sup>392</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p47.

<sup>393</sup> See consultation submissions in the City of Charles Sturt Consultation Report - St Clair Reserve Community Land Revocation, Appendix B and Appendix C.

<sup>394</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p47.

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**OPINION**

In accepting late submissions in relation to consultation with the community about the St Clair revocation and land swap, the council did not act in a way that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

***6. Whether the council properly considered the results of the consultation when making the revocation decision***

705. The final issue is whether the council took account of the results of the consultation when making the decision to revoke the community status of the St Clair land.

706. Principle 3.1.7 of the consultation policy is as follows:

to consider the results of relevant consultations when making decisions.<sup>395</sup>

707. I have said above that the council met the requirements of section 194(2)(b) of the Local Government Act, as it followed the steps in its consultation policy. Step three of the consultation policy requires the council to ‘consider the report and relevant recommendation/s and decide on the matter/s.’<sup>396</sup> At the council meeting held on 26 October 2009, the council considered the consultation report, and resolved to receive and note it.

708. ‘Consult’ is defined by the LGASA as ‘two way communications designed to obtain public feedback about ideas on rationale, alternatives and proposals to inform decision-making.’<sup>397</sup>

709. It was suggested to my investigation that the council did not engage in genuine two-way communication, and that community members were not listened to regarding the revocation.

710. The main areas of concern expressed to my investigation were that:

- the council believed that the feedback received in the consultation did not adequately portray the feelings of the community
- the revocation of the community status of the St Clair land was already ‘a done deal’, and hence the consultation was meaningless.

711. Of the 86 submissions received in the consultation period:

- 71 (or 83%) were not supportive of the proposal
- 7 (or 8%) were fully supportive of the proposal
- 5 (or 6%) were conditionally supportive
- 3 (or 3%) did not indicate.<sup>398</sup>

<sup>395</sup> City of Charles Sturt, Public Consultation Policy, last reviewed December 2009, p2.

<sup>396</sup> City of Charles Sturt, Public Consultation Policy, last reviewed December 2009.

<sup>397</sup> Local Government Association, Community Engagement Handbook, March 2008. p1.

<sup>398</sup> See consultation submissions in the City of Charles Sturt Consultation Report - St Clair Reserve Community Land Revocation, Appendix B and Appendix C.

712. This figure does not include:

- the informal feedback received from 32 people
- the 24 people who rang and registered their general objection
- the signatures of people on the petition against the revocation who did not send in submissions.<sup>399</sup>

713. On the first question of how the council viewed the public responses, there is evidence that it formed the view that consultations such as this only attract feedback from those in the community who are against the proposal. For example, the consultation report says:

Given the nature of the consultation approach and the method of collecting feedback, the results of this consultation are dominated by issues of concern. This is common of this type of land swap initiative where those who are supportive are less likely to take the time to put their support in writing, than those who are opposed to it.<sup>400</sup>

714. As a further example, one councillor said:

But like most things, the people who are in favour of it it doesn't really worry them, they don't say anything.<sup>401</sup>

715. Another councillor said:

- Q. More people objected against the land swap than didn't?
- A. Yes.
- Q. But council proceeded nonetheless?
- A. Well, the objection, I look at it this way, more people object because I think those are the people that like to object. Most of the people, they didn't object, they said, "Well, we've got our councillors there, they'll do the best for us." They didn't object.
- Q. That's what you assumed?
- A. That's what I assumed. As I said, from my area of 7000 people, there's 105,000 in the whole City of Charles Sturt, only one person objected to it and that was the person that had a letter, preprinted a pro forma from someone else who objected. A lot of people didn't object. I would be surprised, I would be upset, if the actual council decided something against the people's will.<sup>402</sup>

716. Several members of the council expressed the opinion to my investigation that only a small minority of the community were against the proposal. One elected member said that 'it was only a handful of people, from memory, that were complaining'.<sup>403</sup> Another said:

- Q. And do you feel that, had the public raised any issues of real concern, that you would not have voted in the revocation?
- A. Absolutely. I felt free to do that, absolutely. But I felt there were no real concerns and I felt that this was a minority group, um, and, um, yeah, I just - I really truly believe that.<sup>404</sup>

717. Another elected member said:

I'm not sure that I agree that the majority of the community said no. I don't agree that that was the case.<sup>405</sup>

<sup>399</sup> City of Charles Sturt Consultation Report - St Clair Reserve Community Land Revocation, p12.

<sup>400</sup> City of Charles Sturt, Consultation Report - St Clair Community Land Revocation, p6.

<sup>401</sup> Cr I, p35, 44.

<sup>402</sup> Cr L, p37, 34.

<sup>403</sup> The (former) mayor, p56, 26.

<sup>404</sup> Cr F (T1), p148, 33.

<sup>405</sup> Cr W, p56, 47.

718. In my view, the elected members were entitled to form their own views about the relevance and weight of the views expressed by the community during the consultation. I do not consider that the evidence indicates any administrative error in this regard.
719. The second concern expressed to my investigation was that some members of the community felt that the revocation was already ‘a done deal’; that the consultation process was a mere following of procedure and a sham.
720. Ten community members submitted responses to the consultation expressing concern that a decision had already been made that the council would proceed with the revocation and land swap anyway, and ‘that their comments would not be listened to’.<sup>406</sup>
721. One member of the community submitted that a neighbour had been told by the council’s Community Engagement Coordinator that:
- the decision to go ahead has already been made and therefore the swap will go ahead regardless of what the majority of the community wants, so this whole exercise is essentially a formality and therefore a farce.<sup>407</sup>
722. Another submission to the consultation says:
- ratepayers all over the State of South Australia are fed up with being told that a “consultation process” in [sic] taking place, when in fact State Government and Councils have already made up their minds and the “consultation process” is a farce.<sup>408</sup>
723. A community member told my investigation that:
- In some cases I spent quite a long time talking to them and I thought there were some that were initially quite sympathetic like, for instance, [Councillor M]. [The councillor] made a statement to me at one of the council meetings that "This is a government project. There's no point in us voting against it it's going to happen anyway". That was [the councillor's] words.<sup>409</sup>
724. This community member also said:
- The only other thing I heard, and this was by a former employee of the council, was that the land swap was an idea that [the CEO] came up with. I don't know whether he was prompted by somebody else, I don't know. But she said to me at the time - this is while we were during the consultation period, she said to me "You won't have any luck. This is a government project and it's going to go ahead, so you are wasting your time basically" . . . "It's a government project. You won't get anywhere with this." She said "They've been working on this for years."<sup>410</sup>
725. Some elected members confirmed to my investigation that in their opinion, the revocation was ‘a done deal’. When told that it has been suggested that the council had already made up its mind before it consulted with the community, a former councillor said ‘I have a sense that is probably true’.<sup>411</sup>

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<sup>406</sup> City of Charles Sturt Consultation Report - St Clair Reserve Community Land Revocation, p18.

<sup>407</sup> City of Charles Sturt Consultation Report - St Clair Reserve Community Land Revocation, submission from Sonja Ledenac dated 24 August 2009.

<sup>408</sup> City of Charles Sturt Consultation Report - St Clair Reserve Community Land Revocation, submission from Mrs Anne Hall, dated 21 September 2009.

<sup>409</sup> Witness 3 (T1) p19, 7.

<sup>410</sup> Witness 3 (T1), p33, 11.

<sup>411</sup> Witness 1, p48, 17.

726. Councillor A said:

A. Obviously it did have to happen but I think - I think it probably was an opportunity for community voice and potential change, just - I don't actually think that there was potential that the community were going to turn around and say 'No we don't want it' and the council were going to say 'Okay'. I don't think that was an option. But in - in reality though, anything that we as a council presented to the community was already well thought about. Because you don't present an idea to the community, you present a plan, you put things together, work out if it's going to work or it's not and then present it. So when we say that there should have been more consultation, I think there should have been. It would have been pointless going to the community and saying 'We're thinking about swapping this piece of land over here for that piece of land there' with no details. You have to have details, you have to have that information in place, which means that you have to almost get a contract signed to get prices of, I don't know, moving the land, doing all those physical things. I think the consultation was done because it had to be done but also it could have offered some potential changes. You know, if the community came up with something that was different and better, there could have been some changes.<sup>412</sup>

727. Councillor B disagreed, saying:

And we were assured that, no, it's not going to happen and yes, it's legally binding, we got protections for the community. It was never actually - that was all subject - all this whole process was - there was no done deal until actually council agreed to revoke it. It could be undone at any time. I always knew that, I was always conscious of that. And if the minister said no as well, well so be it. It was never an assumption that there was going to be a yes/no matter from government which needed a process under a government act. No, it was always contingent on council revoking it; that the protections and all that were in place, it was in the interests of the city and that the government agreed. So it was - there was always open - I always felt that it was always open until (Indecipherable) it went from Minister Gago to John Hill - or the other way around, no, sorry, he took it second.<sup>413</sup>

728. Some elected members were of the view that the purpose of the consultation was to tell the community what was going to happen. Councillor B said:

- Q. Now, what did you see the purpose was of the consultation, apart from the fact that you had to do it?
- A. To inform people.
- Q. Under legislation?
- A. To inform people.
- Q. Of what?
- A. Of the process. Of the intent. Of the plan that here's a plan, what do you think, tell us what you want. I think there were workshops, there was open days, drawings, whiteboards, divider boards with maps, drawings, in the city. The purpose is to inform people that council has a plan and what's your input, and then council adopts those - if that's the majority verdict. As it clearly turned out, it wasn't the majority verdict.<sup>414</sup>

729. Councillor G said:

- Q. What did you see as the purpose of consultation?
- A. The purpose of consultation is to formally receive comment from the community.
- Q. So it's notification?
- A. Mmm-hmm. It's also receiving comment from the community, time to share the vision, that's the part of the deal as well in trying to communicate with residents.
- Q. But the revocation decision went ahead?

<sup>412</sup> Cr A (T2), p74, 1.

<sup>413</sup> Cr B, p54, 35.

<sup>414</sup> Cr B, p55, 38.

- A. Yes.
- Q. So would you say consultation means consensus?
- A. I think there's a certain thing with these consultation processes, is that they do almost invariably elicit the negative.
- Q. Why?
- A. Why? Because it's easier for people to come out and complain and disagree with what council's doing than what it is for people to come out and agree with it. I mean, same with any other consultation process I have ever seen undertaken in my time on council. Even relatively minor things like, for example, land realignments where there's a minor purchase required of the laneway for example. I mean, like, it's a very minor thing but if you're going to get a complain -- sorry, you're going to get a response in consultation, it's generally in the negative. You don't have people coming out with a cheer squad supporting these things. It just doesn't seem to work that way.<sup>415</sup>

730. Councillor K said:

- Q. What was the purpose of the consultation?
  - A. To get people's opinion on it, and also - but it was also to see what factors we needed to consider in making our decision. It wasn't a consultation process which said, you know, "If 10 people respond and nine of you say no, it means we're going to not do this." I certainly didn't see it that way.<sup>416</sup>
731. In response to expressed community concern that the revocation was 'a done deal', the 9 November 2009 report recorded:

Council has not yet made a decision on this proposal. In the land swap documentation the council has undertaken to initiate the process and otherwise act in accordance with its [sic] statutory functions. The Council still needs to resolve to submit to the Minister and then (if the Minister approves, separately to resolve to revoke). Failing this, the conditions of the land swap will not be satisfied and the land swap will not proceed.<sup>417</sup>

732. I have previously expressed the opinion that in failing to consult with its community earlier, the council acted in a way which was wrong. However, in my view once the consultation process occurred, the council's obligation was to consider the results genuinely, and whether the revocation should proceed, in the interests of the community. I have considered four factors which are relevant to whether this genuine consideration occurred.
733. First, on the basis of the history of the matter, by the time that the council was required to comply with section 194 and undertake the consultation, it had already decided in principle at its 28 April 2008 meeting to proceed with a land swap. Further, the state government had subsequently endorsed the land swap in December 2008. It would be surprising if the council was not committed to the project.

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<sup>415</sup> Cr G, p95, 5.

<sup>416</sup> Cr K, p154, 13.

<sup>417</sup> City of Charles Sturt, Report to council from Manager Planning and Development, St Clair Reserve Community Land Revocation Consultation Report to Council, 9 November 2009, p47.

734. Second, the Woodville JV emailed a draft press release to the mayor for his approval on 13 July 2009, prior to the consultation period. The press release included the following:

The development will be enhanced further by the proposed land swap that will enable the development of a planned transit-orientated development (TOD) at Woodville. It involves swapping a portion of the former Sheridan (Actil) factory site with a portion of the St Clair Reserve on Woodville Road.

Wayne Gibbings, Chief Executive of the Land Management Corporation (LMC) said the development was an excellent example of how state and local government could work with the private sector.<sup>418</sup>

735. The Woodville JV placed an advertisement for land sales in the proposed St Clair area in The Advertiser on 22 August 2009, prior to the end of the consultation period. The advertisement showed an image of the area indicating the land swap.
736. This advertisement was interpreted by a community member as indicating that the consultation was not being conducted in a meaningful way. One community member said:

- A. This was given to me by another resident. They pulled it out of the paper. I didn't see it. This was given to me well after the fact. The person who raised it with me was concerned about the fact that here's an advertisement from a developer before the end of the consultation period. Clearly they had prior knowledge of it. Clearly the council, as the CEO's performance agreement says, has been working with the developers but they weren't working with the community. The community doesn't get told about it until well after the fact. They have already put submissions to the council meetings on 9 June. I think the community should have been consulted well in advance of anything happening like that. This is a significant piece of community land. For something like that, they should have consulted much, much earlier before they had formed draft contracts, before they had put things to Cabinet, before any of this happened. It should have been happening the year before, back when they first thought of the concept. That is when they should have done their consultation and then they would have found there was significant community concern about the loss of St Clair because there is. There is no doubt about that. All the comments from people, members of the government like Michael Atkinson and I think even Jay Weatherill has come out and said "This is a minority group", that is absolute rubbish.
- Q. Why do you say it's rubbish?
- A. From all the door knocking I have done, all the people spoken to 2,000 people signed a petition. That was not a minority group. We have said all along that if you think we are a minority do a ratepayers' poll, because that is what they did last time they wanted to take St Clair.<sup>419</sup>

737. Third, the mayor was interviewed on television on 9 October 2009, after the closing of the consultation period but prior to the council's consideration of the consultation results at the 26 October 2009 meeting. He said:

So we are going to do it, but we have to go through the consultation process and that's what we are doing and I'm confident that it'll come out in favour of our proposal.<sup>420</sup>

738. Also on television, on 10 November 2009, after the consultation period but prior to the making of the decision to revoke the community status, the mayor said:

Council has committed to it so we're going to do it.<sup>421</sup>

<sup>418</sup> Concept plan for new parkland community at St Clair unveiled, draft media release for release June xxx, 2009 (TBC) - subject to approval, attached to internal email to the mayor dated 13 July 2009.

<sup>419</sup> Witness 3 (T1) p39, 1.

<sup>420</sup> ABC Stateline, 9 October 2009.

<sup>421</sup> Channel 7, Today Tonight, 10 November 2009.

739. My investigation asked the mayor about these comments:

- Q. But in that, that was prior to the consultation process, you said, "We are going to do it" --
- A. A brilliant idea, yes, I remember saying that.
- Q. "We're going to do it, but we have to go through the consultation process, and that's what we're doing and I'm confident that it will come out in favour of our proposal"?
- A. Yes.<sup>422</sup>

740. A fourth factor which was suggested to my investigation as an indication of a pre-determined view was the fact that the land swap process was included in the CEO's performance agreement. For example, a community member said:

- Q. He gave a report to council, what, during an annual performance review?
- A. Yep. It was his September 2009 quarterly update to their leadership committee. One of our residents copied part of it because they were so annoyed about the way this had been written. It's his performance program for '09/10. That's a copy of part of it. If you look on the back the words that I was concerned about are in the report. Basically it says "report presented to council on 9 June. Item 13.6 have managed the communication and media processes as much as possible to achieve a positive and cooperative result between the Charles Sturt Council, LMC and the joint developers". There is no mention there of the community. His defined outcome is to "establish a land swap agreement with the State government regarding the St Clair precinct to create usable open space". It's very clear from that performance agreement that there is a clear intention from the council and from Mark Withers to proceed with that land swap regardless of what the community said. But that was not made clear to the community in the consultation materials.<sup>423</sup>

741. When asked about this, the CEO said:

As explained during the interview referred to, the land swap process was in the CEO performance agreement. This did not predetermine an outcome. This component of the performance agreement was also subject to the revocation process being conducted and a decision by the Council and the Minister. Therefore the success or otherwise of the actual land swap played no role in determining the CEO performance, other than the conditions for such a land swap transaction were put in place for the parties (Council, community and Government) to consider. There was no bonus payment attached to any of this work or indeed in any part of the CEO's employment contract or Performance Agreement.<sup>424</sup>

- 742. I accept the CEO's evidence on this issue. Whilst I understand how some members of the community could have formed the view that this arrangement contributed to the perception that the consultation was not genuine, in my view this is not borne out by the facts.
- 743. On the basis of this evidence, I consider that the council had a clear direction in mind, consistent with the in-principle decision which it made on 28 April 2008. In my view, its obligation was to consider genuinely the views expressed in the community consultation process. This does not imply that it was required to make a decision in accordance with the expressed views, even if a single decision could properly reflect the full range of those views.

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<sup>422</sup> The mayor, p58, 10.

<sup>423</sup> Witness 3 (T1), p35, 4.

<sup>424</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p59.

744. The CEO, when asked what sort of feedback from the community he thought would have influenced the council to change its view on the revocation, said:

I believe the Council had in its possession, at the time of making the decision, information from both sides of the argument. It was a difficult decision given the public interest, and therefore I'm not sure what would have changed the Council's mind. In the response to the community, it was communicated that Council considered the following while making their decision to proceed with the revocation:

*"The City of Charles Sturt Council has decided to go ahead with the proposed St Clair Land Revocation to facilitate a 'Land Swap', with the Land Management Corporation. This follows a review by the Minister for State Local Government Relations Gail Gago, whose decision was quashed by the Supreme Court and then a review by Hon John Hill MP, Minister for the Southern Suburbs who provided his agreement for the revocation to proceed.*

*The decision to go ahead with the St Clair Land Swap reflects Council's commitment to improve the quality of living and working within Charles Sturt and will achieve the following positive outcomes for the entire community:*

- *There will be no net loss of community land.*
- *The 'land swap' will create a continuous green link of public open space and playing fields all the way from Woodville Road to Cheltenham Parade, making up 17 hectares for open space for residents of Cheltenham, Woodville and Pennington to enjoy.*
- *In total, there will be approximately 28.2 hectares of open space between Woodville Road and Cheltenham Parade, which is equivalent to approximately 14 AAMI Stadium ovals.*
- *A network of new sporting and recreation areas will be added to the St Clair facilities, including brand new and enhanced change rooms, facilities and playing fields (plus an additional field) for the local sporting clubs who use St Clair reserve, such as soccer and cricket. This renewal is to the value of \$2.5m.*
- *It will set aside land next to the Woodville train station to create a future transit oriented mixed use development (TOD), which will contribute significantly to the revitalisation of Woodville Road to create a vibrant hub for the City of Charles Sturt. It will create a destination for visitors and residents, all of which would be serviced by an excellent electrified public transport system (quiet, regular and reliable). The area would have sufficient population density to keep it safe, vibrant and economically viable for businesses and the public transport.*
- *A TOD comprises of mixed-use (residential, commercial, and retail), normally at a higher density integrated with public transport. All of this means a win to the environment, with the local community being less car dependent, and the link to the CBD, Semaphore and the Port will attract people into the area in a boost to the local economy.*
- *The TOD will form part of the broader development of the area that will deliver 6 hectares of wetlands for storm water harvesting, with storm water reuse connected to every home (lilac pipe) and 15% of high quality affordable housing.*
- *The 'swap' will ensure that Brocas Avenue be closed (as a no through road) to maintain the safety of Woodville High School students.<sup>425</sup>*

745. At the council meeting held on 26 October 2009, the council considered the consultation report, and resolved to receive and note it. In my view this document adequately summarises the results of the consultation process, and describes a response to each of the concerns raised during the consultation period. I consider that this document properly implements the council's statutory and administrative obligations in respect of the consultation process, and that it adequately portrayed the feelings of the community.

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<sup>425</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p49.

746. I consider also that it is reasonable to conclude on the evidence that the results of the consultation were not influential in the council's decision-making. However, the weight to be assigned to expressed community views in this instance was properly a matter for elected members, and I can see no administrative error in the manner in which the council approached the making of that decision.
747. In responding to my provisional report, a community member expressed the view that the council staff 'made an error in not acknowledging the significant community response, reconsidering the community impact of the proposal and providing more balanced advice to elected members'.<sup>426</sup> However, I consider that during the relevant period the council staff were bound by the council decision of 28 April 2008, which endorsed in principle the concept of the land swap; and ultimate responsibility of course rested with the elected members.
748. In summary, my role is not to substitute my judgment for the council's as to whether the proposed revocation and land swap was a good idea, but rather to consider whether there was any administrative error under the Ombudsman Act in the council acting in the way that it did.
749. I accept that the council as an elected body was entitled to form its views on the revocation proposal, and was not bound to follow what may or may not have been an expressed community sentiment about the proposal. On balance, it appears to me that the council gave reasonable consideration to the expressed community views, and - for the reasons outlined above by the CEO - decided to proceed with the land swap. In my view this approach was reasonably open to the council as an elected representative body, and I can see no administrative error in it.

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OPINION

In making a decision to proceed with the land swap notwithstanding the disagreement expressed during the consultation period by some community members, the council did not act in a way that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

<sup>426</sup> Response from Witness 3, 21 September 2011.

## PART 6

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# CONFIDENTIALITY OF COUNCIL MEETINGS AND DOCUMENTS

## 6. CONFIDENTIALITY OF COUNCIL MEETINGS AND DOCUMENTS

750. The confidentiality of the council meetings leading up to the forwarding of the revocation proposal to the Minister form part of the circumstances and context surrounding the administrative act, as indicated in the 'Further description of the administrative act' (see Appendix B).

### Council meetings of 28 April 2008, 11 August 2008 and 9 June 2009

751. The council provided the community with information to assist community members in responding during the consultation period. As previously indicated, I consider that the council provided sufficient information to the community to make an informed judgement about the revocation proposal.
752. In my opinion, however, there was additional information which could and should have been made available to the public for their consideration during the consultation process. This relates to my view that in some instances prior to the consultation process, there was a doubtful legal basis for the council excluding the public from its meetings, and ordering that some reports and minutes be kept confidential.
753. In its response to my provisional report, the council suggested that, at the time of making the relevant orders, the councillors involved had a genuine belief that appropriate grounds to enter into confidential discussions existed, and that the making of the confidentiality orders was necessary and appropriate. I accept that the council may well have had such a belief at the time, but the nature of an Ombudsman investigation is that in effect I must express a view as to whether, with the benefit of what I have learned through my investigation, the council's belief was well-founded. I do so in this part.
754. The council meetings of 28 April 2008, 11 August 2008 and 9 June 2009 were the only council meetings which dealt with the revocation and land swap issue prior to the consultation period.
755. The provisions of the Local Government Act reflect the need for openness and accountability in council meetings. They also reflect a council's objectives in the performance of its roles and functions to provide its community with open, responsive and accountable government (section 8(b)).
756. The relevant provisions state in section 90:
- Part 3—Public access to council and committee meetings**  
**90—Meetings to be held in public except in special circumstances**
- (1) Subject to this section, a meeting of a council or council committee must be conducted in a place open to the public.
- (2) A council or council committee may order that the public be excluded from attendance at a meeting to the extent (and only to the extent) that the council or council committee considers it to be necessary and appropriate to act in a meeting closed to the public in order to receive, discuss or consider in confidence any information or matter listed in subsection (3) (after taking into account any relevant consideration under that subsection).
- (3) The following information and matters are listed for the purposes of subsection (2):

- (a) information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead);
  - (b) information the disclosure of which—
    - (i) could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the council; and
    - (ii) would, on balance, be contrary to the public interest;
  - (c) information the disclosure of which would reveal a trade secret;
  - (d) commercial information of a confidential nature (not being a trade secret) the disclosure of which—
    - (i) could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party; and
    - (ii) would, on balance, be contrary to the public interest;
- ....
- (4) In considering whether an order should be made under subsection (2), it is irrelevant that discussion of a matter in public may—
    - (a) cause embarrassment to the council or council committee concerned, or to members or employees of the council; or
    - (b) cause a loss of confidence in the council or council committee.

757. Section 91 provides for minutes of meetings, reports, recommendations and budgetary or other financial statements to be kept confidential in certain circumstances:

#### **Part 4—Minutes of council and committee meetings and release of documents**

##### **91—Minutes and release of documents**

- (1) The chief executive officer must ensure that minutes are kept of the proceedings at every meeting of the council or a council committee.

....
- (4) A copy of the minutes of a meeting of the council must be placed on public display in the principal office of the council within five days after the meeting and kept on display for a period of one month.
- (5) A person is entitled to inspect, without payment of a fee, at the principal office of the council—
  - (a) minutes kept under this section; and
  - (b) reports to the council or a council committee received at a meeting of the council or committee; and
  - (c) recommendations presented to the council in writing and adopted by resolution of the council; and
  - (d) budgetary or other financial statements adopted by the council.
- (6) A person is entitled, on payment of a fee fixed by the council, to a copy of any documents available for inspection under subsection (5).
- (7) However, subsections (4), (5) and (6) do not apply to a document or part of a document if—
  - (a) the document or part relates to a matter dealt with by the council or council committee on a confidential basis under Part 3; and

- (b) the council or council committee orders that the document or part be kept confidential.
- ...
- (9) If an order is made under subsection (7)–
- (a) the council or council committee must specify the duration of the order or the circumstances in which the order will cease to apply, or a period after which the order must be reviewed, and, in any event, any order that operates for a period exceeding 12 months must be reviewed at least once in every year; and
  - (b) the council or council committee must ensure that a note is made in the minutes recording the making of the order, the grounds on which it was made, and the decision of the council or council committee under paragraph (a); and
  - (c) the council or council committee may delegate to an employee of the council the power to revoke the order.

### Whether the council acted in accordance with section 90(2) and (3)

758. The council's reasons for moving into confidence in the meetings of 28 April 2008, 11 August 2008 and 9 June 2009 above were based on the provisions of section 90(3)(d), namely:
- (d) commercial information of a confidential nature (not being a trade secret) the disclosure of which–
    - (i) could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party; and
    - (ii) would, on balance, be contrary to the public interest
759. Section 90(7) provides that where a confidentiality order is made under section 90(2), a note must be made in the minutes of the order and of the 'grounds on which it was made'. This should be interpreted with the democratic objects of section 90 in mind. In my opinion, it is insufficient for a council to justify a section 90(2) order to exclude the public from a council meeting, simply by recounting the paragraphs in section 90(3) that the council considers are relevant. This approach is unhelpful for the public, and it lacks transparency.
760. I consider that a council should, where possible, provide details of the reasons for relying on the particular paragraphs in section 90(3) in order to allow the public to better understand the council's decision to move into confidence. This is part of good administrative decision-making.<sup>427</sup> Further, providing reasons may also help councillors think more carefully about why the public should be excluded from the meeting, and be more cautious in making their decisions.
761. I note that the LGASA also states in its 'Meeting Procedures Handbook for Council Members':

The Council may by resolution, exclude the public from the meeting in order to receive, discuss or consider in confidence only those specific matters or information the details of which are set out in S90(3). Each item must be considered on its merits. Even though the subject matter is within the provisions of S90(3) it does not automatically flow that the Council will resolve to close the meeting to the public. Separate consideration must be given to each matter in accordance with the

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<sup>427</sup> See: Administrative Review Council, Best Practice Guide 4, Decision Making: Reasons, August 2007.

requirements of S90 for the purpose of determining if the public will be excluded whilst that matter is considered.

The resolution to exclude the public must contain reference to the relevant clause(s) of S90(3) and also include details of the reasons why the Council is satisfied that the principle that the meeting should be conducted in a place open to the public has been outweighed in relation to the matter.<sup>428</sup>

762. If a council relies on section 90(3)(d) to exclude the public, for example, in my opinion, it should as a minimum, consider showing how and why:

- the information is of a commercial and confidential nature
- disclosure of the information would harm the commercial position of the person who supplied the information, or confer a commercial advantage on a third party
- disclosure of the information would, on balance, be contrary to the public interest.

763. The expectation of the commercial advantage or the harm to the council's commercial position must be based on reason, and not be inconsequential.<sup>429</sup>

764. Further, in my opinion, a council should show how disclosure of the information being considered would, on balance, be contrary to the public interest. There are identical requirements to this provision in the *Freedom of Information Act 1991* (SA), where the District Court in South Australia has described the need to balance competing public interest factors in favour and against disclosure. The court said:

This does not mean merely showing that there is something adverse to the public interest likely to flow from disclosure ..., but that on balance the factors in the public interest against disclosure outweigh the factors in favour of disclosure.<sup>430</sup>

765. I consider this view is helpful in interpreting the provisions in section 90(3) which contain a public interest balancing obligation. I note also that the LGASA adopts a similar view in its 'Meeting Procedures Handbook for Council Members' publication:

Some of the specific clauses in S90(3) also require the Council to consider whether disclosure of information of that kind would, in this particular case, be contrary to the public interest. The public interest consideration requires a Council or committee to decide what the public interest is for the matter. The Council or committee must consider the factors for and against disclosure and determine, on balance, whether the exclusion of the public from the discussion or denial of access to documents is contrary to the public interest. The Council must also appropriately record the reasons for excluding the public and holding the meeting 'in confidence' S90(7).<sup>431</sup>

766. I note that in its minutes of the meetings of 28 April 2008, 11 August 2008 and 9 June 2009, the council did not provide details of its reasons for excluding the public, and simply recited the provisions of section 90(3)(d) as the grounds.

<sup>428</sup> Local Government Association of South Australia, Meeting Procedures Handbook for Council Members Reprint 2, 2010, p11.

<sup>429</sup> See *Iplex Info Tech v Dept of Info Tech Services* (1997) 192 LSJS 54.

<sup>430</sup> Ibid.

<sup>431</sup> Local Government Association of South Australia, Meeting Procedures Handbook for Council Members Reprint 2, 2010, p11.

767. I also comment that the council noted in the minutes that it was relying on section 90(3)(d)(i) to exclude the public in Item 13.3 of the 28 April 2008 meeting and Item 13.4 of the 11 August 2008 meeting. No mention was made of section 90(3)(d)(ii). I also note that no mention was made of section 90(3)(d)(ii) when it came to reviewing the confidentiality order in relation to the report and appendices of the 11 August 2008 meeting in the council's annual Report and Review of the Confidential Items Register at the meeting of 10 August 2009. I suggest that if the council was in the practice of taking the time to provide reasons for relying on the particular paragraphs of section 90(3) to exclude the public, this error would have been less likely to occur.
768. I am aware that the council may not be alone in its apparent practice of simply recording the paragraphs of section 90(3), and that it is commonplace for councils to recite their confidentiality orders under section 90(2) in this way. In my view, this is a matter that should also be addressed at a broader level across local government.

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#### OPINION

The council's failure to provide details of its reasons to exclude the public under section 90(2) and 90(3)(d) of the Local Government Act in the meetings of 28 April 2008, 11 August 2008, and 9 June 2009 was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

I recommend under section 25(2) of the Ombudsman Act that in future, the council record details of its reasons for excluding the public in council meetings under section 90(2) and the relevant paragraphs of section 90(3) of the Local Government Act

#### Meeting of 28 April 2008 – whether the council acted in accordance with section 91

769. At the council meeting of 28 April 2008 at Item 13.3, council's Manager Planning and Development presented a report with appendices, entitled Cheltenham Racecourse and Environs Future Development. The purpose of the report was to brief the council on a proposal by the Woodville JV 'involving a portion of the St Clair Oval while retaining an equal amount of open space'. Further, the report's purpose was to 'canvass support or otherwise for the three options being proposed by the developer, and to pave a way forward for council and the developer regarding the broader precinct'.
770. Appendix A to the report was Concept Plan 2 which had been developed by GHD and was considered on 5 November 2007 by the council's City Development Committee (Item 3.41). It was considered at that time to be the preferred option of the master plan developing the Cheltenham Park Racecourse and environs precinct.
771. Appendix B to the report was a letter dated 16 April 2008 to the council's CEO from the General Manager of Urban Pacific Ltd and the Executive General Manager of AV Jennings. The letter attached precinct concept plans which were 'essentially the same master plan' across the precinct with three different scenarios (named as options A, B and C) for the configuration of open space. In its options, the developer had considered 'the State Government commitment to rail infrastructure to appropriately deliver an optimal TOD around Woodville Railway Station'.

772. The following recommendations were presented to the council for resolution:
1. That Council endorses in principle the concept of a land swap arrangement involving the redevelopment of St Clair Oval site and the land surrounding the Woodville Train station based on the Option B proposal attached to the UPL/Jennings letter dated 16 April 2008.
  2. That Council reserves the right, to withdraw support for the project outlined in this report at any time if it believes by resolution that the benefits to the Charles Sturt community cannot be achieved by the redevelopment.
  3. That Council authorises the Chief Executive Officer to commence investigations into the Community Land Revocation process under the requirements of the Local Government Act 1999 for any land affected in item 1 above.
  4. That Council authorises the Chief Executive Officer to commence negotiations with the AV Jennings/Urban Pacific consortium on the potential for future redevelopment and land swap arrangements based on item 1 above.
  5. That the Chief Executive Officer report back to Council on progress at key stages including possible commercial arrangements to be entered into with the developer.
  6. That pursuant to section 91(7) of the Local Government Act 1999, Council hereby orders that the report, appendices and minutes of this item be kept confidential for 12 months or reviewed by Council (whichever is sooner). [Note: The grounds for this order are outlined in the resolution above whereby the matter was considered in confidence by Council under Section 90(2)].
773. The council informed my investigation that its confidentiality order was lifted on 11 August 2008. However, my investigation found that the letter in Appendix B was not accessible from the council's website as at 26 March 2010. It was visible on the website on 19 July 2010.
774. Further, it appears from the minutes that recommendation 6 above was not formally adopted by the council, as no mention is made of the council resolving to keep the report, appendices and minutes confidential.
775. Even so, I comment that on 15 May 2008, the developer informed the CEO that it did not wish to proceed with the land swap. In my opinion, if there was any risk at all of a prejudicial effect from disclosure of the information as claimed by the council under section 90(3)(d), that effect would arguably no longer be relevant after that date – and the council should have lifted the confidentiality order at that time. I also add that Appendix A, GHD's Concept Plan 2, was not a confidential document.

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**OPINION**

In relation to the meeting of 28 April 2008, the council's order to keep the council's report, appendices and minutes confidential had no basis in law, as the council had not resolved to order that they be so kept under section 91(7)(b) of the Local Government Act. The council therefore acted contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

I recommend under section 25(2) of the Ombudsman Act that the council ensure in the future to formally adopt and record recommendations of the council administration where appropriate.

## Meeting of 9 June 2009 – the council's report and resolutions

776. At Item 13.6 of the meeting of 9 June 2009, a report with appendices was presented to the council entitled 'Cheltenham Racecourse Site and St Clair Reserve and Sheridan Land Exchange'. The appendices were labelled A through to Q, and can be briefly described as follows:

Appendix A	St Clair/ Cheltenham Concept Plans
Appendix B	Development Deed
Appendix C	Draft contract for the sale and purchase of St Clair land between LMC (as vendor) and the council (as purchaser)
Appendix D	Contract for the sale and purchase of the Sheridan land between the council (as vendor) and LMC (as purchaser)
Appendix E	Draft agreement re Brocas Avenue between the LMC, Woodville JV and the council
Appendix F	Sheridan Land Community Facilities Works Agreement (the council and Woodville JV)
Appendix G	Recreation Grounds (Joint Schemes) Variation Agreement
Appendix H	St Clair Reserve and Sheridan Site Land Exchange Indicative Structure Plan
Appendix I	Draft heads of agreement for the Scheme Variation
Appendix J	Summary of the St Clair land exchange documentation by the council's lawyers
Appendix K	Communications and Engagement Plan – St Clair Community Land Revocation.
Appendix L	Prudential Report (internal)
Appendix M	Concept Plan 2
Appendix N	Media releases regarding the Cheltenham Water Partnership
Appendix O	Information Sheet
Appendix P	Independent Review of the Prudential Report, the council's Auditor, Deloitte
Appendix Q	The council's Public Consultation Policy.

777. The council resolved to accept all seven recommendations proposed. These included:

1. Cheltenham Park Racecourse Residential Development
  - the Concept Plan (Hassell) (49 pages) in Appendix A
  - the Development Deed in Appendix B and authorisation for its execution by the CEO and the Mayor.
2. Land Exchange involving the St Clair land and Sheridan land
  - the land exchange, plans of which were set out in Appendix H which would facilitate:
    - integrating the St Clair land with the Cheltenham Park Racecourse site and creating 'a multipurpose green belt' from Woodville Road to Cheltenham Parade
    - new playing fields and change rooms
    - keeping Brocas Avenue closed (safety for high school students)
    - potential establishment on the St Clair land of a TOD.
  - authorising the mayor and the CEO to execute the agreements in Appendices C, D, E, F, G
  - the revocation proposal set out in Appendix Q prepared under section 194(2)(a) of the Local Government Act of that portion of the land set out in Appendix H (area of approximately 4.7 hectares of the St Clair land)

- authorising the CEO, in accordance with the proposal in Appendix Q (subject to minor variations), to cause relevant steps set out in council's Public Consultation Policy to be followed in accordance with section 194(2)(b) of the Local Government Act and the Community Consultation and Engagement Plan in Appendix K.
  - disposal of St Clair land to the LMC in exchange for the LMC's transfer of the Sheridan land, subject to satisfaction of conditions precedent (or council waiver) articulated in the Land Exchange Agreements and the LMC bearing cost of all government fees.
3. Having considered a report prepared on the basis of the prudential obligations under section 48(1) and (2) of the Local Government Act, notes the report in Appendix L. That report has been reviewed by council's internal auditor Deloitte.
4. For the purposes of satisfying the requirements of council's Disposal of Land Policy prepared and adopted under section 49 Local Government Act
- resolves that the St Clair land is surplus to requirements on the basis that a similar parcel of land will be acquired through the land swap
  - approves the following as council's aims and objectives for entering into the land swap
    - to provide a single connected corridor of open space between Woodville Road and Cheltenham Parade
    - to upgrade and enhance existing recreational facilities
    - to revitalise Woodville Road through a mixed use TOD adjacent the Woodville Railway Station.
  - resolves that the disposal of the St Clair land shall be via contractual arrangements negotiated directly with the LMC and Woodville JV providing for the land swap of the St Clair land for the Sheridan land and the development of comparable facilities on the Sheridan land to those on the St Clair land shown in Appendices F, C, D.
5. That subject to the agreement in Appendix F, council design, construct and maintain to a cost of \$440,000 new change rooms and two additional light towers to be established on the reshaped St Clair oval.
6. That pursuant to section 91(7) and (9) of the Local Government Act, the report 'Cheltenham Racecourse Site and St Clair Reserve and Sheridan Land Exchange' and its annexures, appendices and any minutes arising from consideration of the report remain confidential and not available for public inspection.
7. That the documents referred to in paragraph 6 of this resolution remain confidential for a period of 12 months and that council delegate to the CEO the authority, after consultation with the Mayor, to revoke this order at such earlier date as he thinks fit.
778. I have several concerns about the council excluding the public from this meeting, as well as its confidentiality order in relation to the report, appendices and minutes.

*Whether the council acted in accordance with section 90 – 9 June 2009*

779. When questioned by my investigation about the reasons why it was considered necessary to exclude members of the public under section 90(2) and 90(3)(d) of the Local Government Act, the council's CEO responded that it was considered that the information was 'commercial in confidence' information pertaining to land sale contracts.
780. As I have indicated previously, my view is that the council should have provided detailed reasons in its minutes for moving into confidence – and it did not do so.
781. In addition to this, it is not sufficient that the council considers the information to have been 'commercial in confidence'. The provisions of section 90(3)(d) require additional criteria to be satisfied, as set out above, namely:
- the information be of a commercial and confidential nature
  - disclosure of the information would harm the commercial position of the person who supplied the information, or confer a commercial advantage on a third party
  - disclosure of the information must be considered on balance, to be injurious to the public interest.
782. Judging from the report, appendices and minutes, I do not consider that excluding the public on the basis of section 90(3)(d) was warranted. In saying this, I appreciate that when excluding the public under any of the paragraphs in sections 90(3), the council can only ever have a predictive view about what might be discussed; and this view can only be based on the contents of the reports being presented by the council administration before the council meeting.

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**OPINION**

There was an insufficient basis for the council moving into confidence under section 90(2) and 90(3)(d) of the Local Government Act at the council meeting of 9 June 2009. In doing so, the council acted contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

I recommend under section 25(2) of the Ombudsman Act that in future, the council carefully consider the wording in the paragraphs of section 90(3) before resolving to exclude the public from its meetings.

*Whether the council acted in accordance with section 91 – 9 June 2009*

783. The report and minutes were released by the CEO from the confidentiality order on 22 June 2009. When my investigation asked the CEO why the order was lifted only 13 days after the council's meeting, he advised that he assessed that the report and minutes did not meet the confidentiality criteria. I agree with the CEO's view.
784. It is not evident that the information in the report was of a commercial and confidential nature; who the supplier of the information was; nor that their commercial position would be harmed if the information was disclosed or a commercial advantage would be conferred on a third party under the requirements of section 90(3)(d).

785. More significantly perhaps, I consider that the public interest factors in favour of disclosure outweighed those against disclosure. There were several public interest factors which, in my view, supported disclosure of the information. These were the council's objectives to be open and accountable (section 8 of the Local Government Act) and the principles of openness underpinning section 90 and 91. Further, the LMC is a public body, which is subject to the *Freedom of Information Act 1991* and is answerable to a Minister of the Crown. As such, it should also operate and be seen to be operating under these principles.
786. In addition, the revocation and land swap was a controversial issue; and I refer to the negative public reaction to the council's proposal with the developer, 12 months previously in May 2008 (reported in the local press).<sup>432</sup> I understand that there were no publicly accessible council documents between that time and the 9 June 2009 meeting, which would have informed the community of the council's resumption of negotiations in relation to the land swap (albeit with the LMC).
787. The 9 June 2009 meeting was a significant meeting, and it effectively set the council on the path to realising the land swap. This was a very persuasive factor supporting the public interest in the council keeping the meeting open to the community, and resisting any confidentiality order over the report and the minutes at the time.

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**OPINION**

In resolving to keep the council's report and minutes confidential at the council's meeting of 9 June 2009 under section 91(7) the Local Government Act, the council acted contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

I recommend under section 25(2) of the Ombudsman Act that the council in future carefully consider the contents of the relevant documents before placing them under a confidentiality order under the Local Government Act.

788. The CEO informed my investigation that Appendices A, G, H, I, K, L, M, N, O, and P were released from the confidentiality order on 26 November 2009.<sup>433</sup> This was after the completion of the public consultation process, the Minister's (purported) approval and the council's (purported) revocation decision on 23 November 2009.
789. On the information before me, I consider that these appendices did not merit being the subject of a confidentiality order. Some were already in the public domain (such as M, N, Q), and I see nothing in the others that would have prejudiced the parties were they to be available to the public. There are sound public interest reasons why they should have been available to the community at the outset. I have previously referred to these reasons.
790. My investigation commented to the CEO that these particular appendices either did not appear themselves to be 'commercial in confidence' or they were already available to the public through previous reports to the council. The CEO agreed to some extent, and informed my investigation that 'on reflection', some of the documents should not have been subjected to a confidentiality order as they were already public documents. He submitted that 'the only explanation could be that the volume and extent of documentation, and the processes at that time, complex as they were, created this oversight'.<sup>434</sup>

<sup>432</sup> Weekly Times Messenger, 'St Clair Reprieve', May 28, 2008, p3.

<sup>433</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p42.

<sup>434</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p43.

791. I note in particular that Appendices L and P, the council's prudential report and the Deloitte review were withheld from public access during the consultation period. I have previously commented that the council in fact, supplied the community with sufficient information to allow them to make an informed judgement about the revocation and land swap.
792. However, for the public interest reasons which I have mentioned above, the community were entitled to view these reports.
793. Furthermore, I note that the council apparently prepared the prudential report under the requirements of section 48 of the Local Government Act, although the council subsequently commented to my investigation it had no need to do so.<sup>435</sup>
794. The provisions of section 48(5) and (6) of the Local Government Act state that a report under section 48(1) 'must be available for public inspection ... once the council has made a decision on the relevant project'. It also says that the report may be available at an earlier time 'unless the council orders that the report be kept confidential until that time'. The issue of the propriety of the confidentiality order aside, I consider that the council should have lifted the confidentiality order in relation to the prudential report and the Deloitte review prior to the consultation period, just as the CEO had done in relation to the report and minutes on 22 June 2009. That it did not do so, was contrary to the principles of openness and accountability.
795. I also comment that I do not consider the draft contracts in Appendices B, C, D, E, F, J warranted being kept confidential under section 91(7), principally for the public interest reasons which I have outlined above. I understand that by the council's own admission, ostensibly there was no 'commercial' basis for the council engaging in the revocation and land swap. The CEO informed my investigation that it was not 'driven by financial motives' but for 'potential community benefit'.<sup>436</sup>

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### OPINION

In ordering that the appendices of the council's report be kept confidential at the meeting of 9 June 2009 under section 91(7) of the Local Government Act, the council acted contrary to law under section 25(1)(a) of the Ombudsman Act.

I recommend under section 25(2) of the Ombudsman Act that the council in future carefully consider the contents of the relevant documents before placing them under a confidentiality order under the Local Government Act.

### *Whether the council should have alerted the public to the release of the 9 June 2009 report and minutes*

796. One community member complained to my investigation that the council failed to alert him to the availability of the 9 June 2009 council report and minutes during the consultation period.<sup>437</sup> I have dealt with this by way of separate investigation.

<sup>435</sup> Email from the CEO to the Deputy Ombudsman dated 17 May 2011.

<sup>436</sup> City of Charles Sturt, Responses to community concerns - St Clair Reserve Community Land Revocation, p 14.

<sup>437</sup> Witness 7, Complaint to the Ombudsman, 22 September 2009.

797. The CEO informed my investigation that the council did not expressly alert the public to the existence of the 9 June 2009 report and minutes. In my opinion, there was no reason why the council should not have done so, as they provided considerable detail about not only the history and context of the revocation and land swap process, but also the council's resolutions of 9 June 2009 and an outline of the numerous documents and contracts that were involved.
798. In saying this, I do not think the council was unreasonable or wrong not to 'promote' the report and minutes to the public during the consultation phase, because I assume that they would have been accessible via the council's website once the order was lifted by the CEO on 22 June 2009.

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OPINION

In not expressly alerting the public to the accessibility of the council's report and minutes of its 9 June 2009 meeting during the consultation period, the council did not act in a way that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

## PART 7

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# PRUDENTIAL REQUIREMENTS

## 7. PRUDENTIAL REQUIREMENTS

799. The manner in which the council considered the prudential issues in section 48 of the Local Government Act prior to forwarding the revocation proposal to the Minister form part of the circumstances and context surrounding the administrative act, as indicated in the document ‘Further description of the administrative act’ (see Appendix B).

### Section 48 Local Government Act

800. Section 48 of the Local Government Act addresses the need for a council to obtain and consider a prudential report in certain circumstances. These circumstances are based on predicted financial expenditure in capital cost projects. Section 48 endeavours to ensure sound management by the council of such projects; however, it also reflects principles of good governance and aims to ensure the council’s accountability to its community.
801. The circumstances in which a prudential report is required are set out in section 48(1)(a), (b)(i) or b(ii):

#### 48—Prudential requirements for certain activities

- (1) A council must obtain and consider a report that addresses the prudential issues set out in subsection (2) before the council—
- (a) engages in a commercial project (including through a subsidiary or participation in a joint venture, trust, partnership or other similar body) where the expected recurrent or capital expenditure of the project exceeds an amount set by the council for the purposes of this section; or
  - (b) engages in any project (whether commercial or otherwise and including through a subsidiary or participation in a joint venture, trust, partnership or other similar body)—
    - (i) where the expected expenditure of the council over the ensuing five years is likely to exceed 20 per cent of the council's average annual operating expenses over the previous five financial years (as shown in the council's financial statements); or
    - (ii) where the expected capital cost of the project over the ensuing five years is likely to exceed \$4 000 000.
802. Should a prudential report be required under one of the three circumstances set out in section 48(1), the report must address the prudential issues which are set out in section 48(2):
- (2) The following are prudential issues for the purposes of subsection (1):
- (a) the relationship between the project and relevant strategic management plans;
  - (b) the objectives of the Development Plan in the area where the project is to occur;
  - (c) the expected contribution of the project to the economic development of the local area, the impact that the project may have on businesses carried on in the proximity and, if appropriate, how the project should be established in a way that ensures fair competition in the market place;
  - (d) the level of consultation with the local community, including contact with persons who may be affected by the project and the representations that have been made by them, and the means by which the community can influence or contribute to the project or its outcomes;

- (e) if the project is intended to produce revenue, revenue projections and potential financial risks;
- (f) the recurrent and whole-of-life costs associated with the project including any costs arising out of proposed financial arrangements;
- (g) the financial viability of the project, and the short and longer term estimated net effect of the project on the financial position of the council;
- (h) any risks associated with the project, and the steps that can be taken to manage, reduce or eliminate those risks (including by the provision of periodic reports to the chief executive officer and to the council);
- (i) the most appropriate mechanisms or arrangements for carrying out the project.

803. Sections 48(3) to 48(7) further provide:

- (3) A report is not required under subsection (1) in relation to—
    - (a) road construction or maintenance; or
    - (b) drainage works.
  - (4) A report under subsection (1) must be prepared by a person whom the council reasonably believes to be qualified to address the prudential issues set out in subsection (2).
  - (5) A report under subsection (1) must be available for public inspection at the principal office of the council once the council has made a decision on the relevant project (and may be available at an earlier time unless the council orders that the report be kept confidential until that time).
  - (6) However, a council may take steps to prevent the disclosure of specific information in order to protect its commercial value or to avoid disclosing the financial affairs of a person (other than the council).
  - (7) The provisions of this section extend to subsidiaries as if a subsidiary were a council subject to any modifications, exclusions or additions prescribed by the regulations.
804. These provisions were amended in the *Local Government (Accountability Framework) Act 2009*, but the amendments have yet to come into operation.<sup>438</sup>

### Meeting of 9 June 2009 – the prudential report and the Deloitte review

805. As I have previously stated, at the meeting of 9 June 2009, the council administration provided to the council the prudential report, as well as a review of the prudential report by Deloitte in relation to the revocation and land swap.
806. At the relevant time, Deloitte were the council's internal auditors. They were engaged by the council in June 2009 to review the prudential report and consider simply, whether its contents were 'in accordance with contractual and/or published documents'.<sup>439</sup> After corroborating the prudential report with these documents, the review concluded:

Based on our review, which is not an audit, nothing has come to our attention to indicate that, in all material respects, the contents of the Land Swap Prudential Report as reported by the management of Charles Sturt is not in accordance with the contractual and/or published documents as listed in section 1.3 above.<sup>440</sup>

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<sup>438</sup> *Local Government (Accountability Framework) Amendment Act 2009* (No 81 of 2009), section 8.

<sup>439</sup> City of Charles Sturt, Land Swap Prudential Report Review, Deloitte Corporate Finance Pty Limited, June 2009, Part 2.

<sup>440</sup> City of Charles Sturt, Land Swap Prudential Report Review, Deloitte Corporate Finance Pty Limited, June 2009, Part 1.6.

807. The documents referred to in 'section 1.3' comprised:

- draft St Clair and Sheridan land exchange contracts
- draft Sheridan Land Community Facilities Works Deed
- SA Strategic Plan 2007
- SA government Planning Reforms 2008
- the council's Corporate Plan, Shaping the Western Suburbs 2008-2012
- the council's Development Plan consolidated 4 September 2008
- the council's Communications Engagement Plan for the revocation-June 2009
- Maintenance Expenditure Summary of the St Clair reserve 2002/2003-2008/2009
- draft agreement Brocas Avenue
- draft Variation of Scheme - Recreation Grounds (Joint Schemes) Act 1947 (SA).<sup>441</sup>

808. In the covering report to the council at the meeting of 9 June 2009, it was written:

Section 48 Local Government Act Prudential Requirements

The Council is required to obtain and consider a Prudential Report that addresses a range of issues described in Section 48(2) of the *Local Government Act* before committing itself to "certain activities".

Staff have undertaken consideration of the required elements of this section of the Act and the ensuing report is provided in **Appendix L**. Information to prepare this report was obtained from relevant professional officers across the organisation to ensure that detailed understanding was provided on each area (Development Planning considerations, financial etc). Further, Council's Internal Auditor Deloitte has conducted an independent review of this work and their letter of satisfaction is also attached as **Appendix P**.

In summary all of the requirements of Section 48(2) are satisfied such that Council can commit itself to the project subject to the conditions set out in the contracts.

809. Motion 3, which was carried by the council at the 9 June 2009 meeting, was expressed in the following terms:

That Council, having considered a report prepared on the basis of the prudential obligations under Section 48(1) and (2) of the *Local Government Act 1999*, notes the report comprised in Appendix L to this report. That the report has been reviewed by Council's internal auditor Deloitte.

810. I have previously stated that the prudential report and the Deloitte review did not merit being placed under a confidentiality order.<sup>442</sup>

### Whether a report was required to be prepared by the council under section 48(1)

811. The CEO informed my investigation that the council staff did not believe that the revocation and land swap proposal triggered a requirement to produce a prudential report under section 48(1) of the Local Government Act. However, he considered that it would be '... good practice to prepare such a report given the magnitude of the decision, notwithstanding the fact that it wasn't required by legislation'.<sup>443</sup> He said the prudential report was '... prepared under Section 48 generally, using this section as

<sup>441</sup> City of Charles Sturt, Land Swap Prudential Report Review, Deloitte Corporate Finance Pty Limited, June 2009, Part 1.3.

<sup>442</sup> Refer Part 6 Confidentiality of Council Meetings. However, I formed the view that in fact, the community had been provided with sufficient information in order to consider the proposed revocation and land swap.

<sup>443</sup> Email to Deputy Ombudsman from council CEO, 17 May 2011.

guide [sic] and drew its structure from the requirements of 48(2).<sup>444</sup> In the CEO's letter to me dated 9 December 2009 in relation to a previous investigation, the CEO stated that it was considered 'prudent to undertake a report pursuant to section 48 of the Act' because of the 'sensitivity around the issue and that because the value of the land involved (as individual parcels) was greater than the amount specified in the [Local Government] Act'.<sup>445</sup>

812. I note an email from the council's solicitors to the council dated 26 April 2009 indicated that a report was to be prepared under section 48 of the Local Government Act, and it was anticipated that it would be completed by late May/early June 2009.<sup>446</sup>
813. I also note that the prudential report states in its opening paragraph that it had been:
- prepared under the requirements of Section 48 of the Local Government Act for the Cheltenham Precinct Development. The report applies to the Land Swap initiative within the Cheltenham Project.
814. The prudential report stated that it did not consider 'the Aquifer Storage and Recovery (ASR) component of the Cheltenham Precinct Development', as this fell within the definition of 'a "stormwater drainage project" for the purposes of this Section 48 Prudential Report and therefore in line with Section 48(3) of the Local Government Act it is excluded from the report below.'<sup>447</sup>
815. The prudential report then purported to address each of the paragraphs itemised in section 48(2).
816. Further, the Deloitte review reflected an understanding in its Executive Summary that the prudential report was required by section 48(1)(b)(ii):

### 1.2 Background

Section 48 of the Local Government Act, 1999 states that a council must obtain and consider a report that addresses the prudential issues [in section 48(2)] before the council engages in any project (whether commercial or otherwise and including through a subsidiary or participation in a joint venture, trust, partnership or other similar body) where the expected capital cost of the project over the ensuing five years is likely to exceed \$4,000,000.

817. The relevant figures would appear to be the amount reflected in the contract of sale of the St Clair and Sheridan land between the council and the LMC of \$17,382,200 inclusive of GST. (I understand this was the figure that the LMC paid the Woodville JV for the Sheridan land.)<sup>448</sup>
818. It appears that the prudential report itself viewed the land swap initiative as part of the broader Cheltenham and Environs Precinct Development project, although it is not clear to me whether it was part of Cheltenham Precinct Masterplan Risk Management Review conducted by Deloitte between February 2009 and July 2009. Be this as it may, I would have thought that being part of the larger Cheltenham project would have brought the land swap initiative within the purview of section 48(1).

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<sup>444</sup> Email to Deputy Ombudsman from council CEO, 17 May 2011.

<sup>445</sup> Letter to SA Ombudsman from council CEO, 9 December 2009.

<sup>446</sup> Email from the council's solicitors to council, 26 April 2009.

<sup>447</sup> City of Charles Sturt, Report to council from Manager Planning and Development, Cheltenham Racecourse Site and St Clair Reserve and Sheridan Land Exchange, 9 June 2009, Item 13.6, Appendix L - Cheltenham Precinct Development Land Swap Prudential Report (undated), p1.

<sup>448</sup> Minutes forming enclosure to The Treasurer from Hon Patrick Conlon MP, Minister for Infrastructure, June 2009, p1.

819. In any event, based on the CEO's comments above; the council's comments in the email from their solicitors dated 26 April 2009; the council's comment in its report to the 9 June 2009 meeting and the contents of the prudential report, the council appeared to accept that a report was required under section 48(1) – and the prudential report was prepared accordingly. Also, Deloitte apparently reviewed the prudential report on the understanding that the report was required and prepared under section 48(1).
820. I note that in the Internal Audit Project Scope document sent to the council by Deloitte and signed by the council's Acting CEO on 3 June 2009, there is no indication to suggest that section 48 was not applicable, or that a prudential report was not required. Deloitte stipulated in a paragraph titled 'Assumptions' in this document that the council would 'make [Deloitte] aware of any incidents or information relevant to the contents of the prudential report of which council was aware or of which they became aware during the course of field work'.<sup>449</sup> My investigation obtained no evidence to suggest that the council corrected Deloitte's assumptions about the necessity of obtaining a prudential report or that section 48 was not applicable in the circumstances.
821. Regardless of the fact that money did not change hands between the council and the LMC in the contract to swap the St Clair and Sheridan land, in light of the above, I consider that the better view is that the amount contracted for enlivened section 48(1)(b)(ii) and a prudential report was required to be prepared by the council.
822. Further, the council purported to prepare the prudential report under section 48, and the report was reviewed by Deloitte on this basis. In my view these factors are sufficient to suggest that the council was bound to address the requirements set out in section 48(2) in the prudential report.

### **Whether the council adequately addressed the risk of 'conflict of interest'**

823. Where a report is required under section 48(1), 'a council must obtain and consider a report that addresses the prudential issues set out in subsection (2).'<sup>450</sup> There is no prudential issue in section 48(2) which directly refers to 'conflict of interest'. However, the provisions of section 48(2)(h) are apposite:
- (h) any risks associated with the project, and the steps that can be taken to manage, reduce or eliminate those risks (including by the provision of periodic reports to the chief executive officer and to the council)
824. In my view, the term 'risks' in section 48(2)(h) accommodates risks such as 'conflict of interest', and other governance issues.
825. In addressing section 48(2)(h) in its prudential report, the council did not apparently consider any risks of any conflict of interest that might be associated with the revocation and land swap. The prudential report addressed financial risks (which were considered negligible), and 'legal risks'. Of the latter, the council wrote that 'Throughout the process legal risks have been identified and addressed by obtaining legal advice at relevant stages of the project'. This '... included the overall framework of the contingent arrangements between the parties to ensure the satisfaction of all interests.' I assume that these 'legal risks' related to development of the contracts in relation to the land swap and their preconditions.

<sup>449</sup> Undated Internal Audit Project Scope document sent to the council by Deloitte and signed by the council's Acting CEO on 3 June 2009.

<sup>450</sup> Local Government Act, section 48(1).

826. The prudential report also noted in relation to section 48(2)(h) that Deloitte had been engaged to undertake a ‘Risk Analysis review of the entire Cheltenham Precinct Development Project’.
827. It appears that this ‘risk analysis’ did not consider conflict of interest issues. A question then arises then as to whether the council ought to have considered and addressed in the prudential report any conflict of interest issues in relation to the revocation and land swap, under section 48(2)(h).
828. As I have set out previously, one of the purposes of the revocation was to facilitate the opportunity for a land swap between the council and the LMC of the St Clair and Sheridan land to enable the development of a TOD near Woodville Railway Station. TODs were a part of the 2009 South Australian Labor Platform, and the state government’s Draft Plan for Greater Adelaide (Planning the Adelaide We All Want - Progressing the 30-year Plan for Greater Adelaide).<sup>451</sup> The council’s report to the 9 June 2009 meeting states this, in comments such as:

The land exchange [put to the Land Management Corporation] would only be on the only basis of providing ‘like for like’ new playing fields and facilities, keeping Brocas Avenue closed to maintain safety and amenity for Woodville High School students and to allow for the revitalisation of Woodville Road through a Transit Oriented Development (TOD) adjacent [sic] the Woodville Railway station. The establishment of a TOD is consistent with the State’s recently announced Planning Reforms ...<sup>452</sup>

The Cheltenham Racecourse Site and the St Clair Land Exchange would provide Council with the opportunity to be on the front foot in terms of implementing the Greater Adelaide 30 Year Plan.<sup>453</sup>

829. I note that at the time the prudential report was prepared in June 2009, the council’s Register of Interests would have contained copies of elected members’ returns up to 2008. I note from the 2008 returns:
- 12 out of the 17 council members had indicated their membership of the ALP
  - five elected members indicated at least one of their income sources as the state government. In this respect, they wrote in their 2008 return:
    - Employment with South Australian Department for Transport, Energy & Infrastructure
    - State Govt John Rau
    - Dept of Treasury & Finance (State Govt) and Commonwealth Govt
    - PIRSA - SA government
    - SA Public Service, Planning SA
830. In my view, these facts suggest that when the prudential report was being prepared, there may have been potential conflict of interest issues in relation to these councillors concerning the revocation and land swap. Accordingly, it was proper for the council to consider and address these issues under section 48(2)(h) in the prudential report.

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<sup>451</sup> See City of Charles Sturt, Report to council from Manager Planning and Development, Cheltenham Racecourse Site and St Clair Reserve and Sheridan Land Exchange, 9 June 2009, Item 13.6.

<sup>452</sup> See City of Charles Sturt, Report to council from Manager Planning and Development, Cheltenham Racecourse Site and St Clair Reserve and Sheridan Land Exchange, 9 June 2009, Item 13.6. p8.

<sup>453</sup> See City of Charles Sturt, Report to council from Manager Planning and Development, Cheltenham Racecourse Site and St Clair Reserve and Sheridan Land Exchange, 9 June 2009, Item 13.6. p10.

831. I understand from my investigation that issues of conflict of interest are not commonly considered by councils in relation to prudential reports. A witness with experience over two decades in local government told my investigation:

I had never thought about that in any of the reports or prudential reviews that I've ever been involved with.<sup>454</sup>

832. I also note that the amendments to section 48 in the *Local Government (Accountability Framework) Amendment Act 2009* do not specifically address conflict of interest issues. However, they do require councils to develop and maintain prudential management policies, practices and procedures for assessing projects to ensure council acts with due care, diligence and foresight, and identify and manage risks associated with a project, to ensure that a council-

- (a) acts with due care, diligence and foresight; and
- (b) identifies and manages risks associated with a project; and
- (c) makes informed decisions; and
- (d) is accountable for the use of council and other public resources.<sup>455</sup>

833. Conflict of interest is a significant governance and prudential issue which contributes to ensuring amongst council members appropriate probity and legal and community stakeholder accountability.

834. Further, in my view, section 48(2) envisages that councils approach their prudential reports holistically, not just from a financial perspective.

835. In responding to my provisional report, the CEO made the point that it is up to each individual councillor to comply with his or her obligations in relation to any conflict of interest, and not a responsibility of council.<sup>456</sup> He commented further that membership of a political party is no more likely than membership of any other organisation to result in a councillor having a personal or pecuniary interest in any matter, and that it is not clear why the 'risk' of conflict of interest would affect the particular project.

836. I accept that the principal responsibility for ensuring compliance with the conflict of interest provisions in the Local Government Act falls on each elected member, but in my view it is also a responsibility of councils to ensure that their governance arrangements are sound. Further, the CEO's comments regarding the likely risks associated with conflict of interest relate only to threats to the legal and procedural steps required for the project to be undertaken. In my view, they ignore other equally valid dimensions of risk, such as damage to the council's reputation and standing. I consider that these other dimensions need to be managed as well, and should properly be addressed in a prudential report.

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### OPINION

In failing to consider governance risks such as conflict of interest in the prudential report, the council failed to comply with the intent of section 48(2)(h) of the Local Government Act and acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

I recommend under section 25(2) of the Ombudsman Act that the council review the prudential requirements in section 48(2)(h) of the Local Government Act, and in future consider addressing conflict of interest risks where relevant.

<sup>454</sup> Witness 4, p52.

<sup>455</sup> *Local Government (Accountability Framework) Amendment Act 2009*, section 8(1).

<sup>456</sup> Response from the CEO, 19 August 2011, attached table p12.

## Whether the council complied with section 48(4) in preparing the prudential report

837. Section 48(4) provides:
- (4) A report under subsection (1) must be prepared by a person whom the council reasonably believes to be qualified to address the prudential issues set out in subsection (2).
838. This section requires the council to form a reasonable belief that the person to prepare the report is suitably qualified to address the prudential issues in section 48(2). This belief should be formed prior to preparation of the report.
839. My investigation's inspection of the delegation register for the year 2010 revealed that the General Manager of Corporate Services of the council was delegated the duty to obtain a report under section 48(1). I consider that this delegation would also include the responsibility under section 48(4) to form the reasonable belief that the person preparing the report was qualified to address the prudential issues in section 48(2).
840. I note the report to the council at the 9 June 2009 meeting stated that the council '[s]taff had 'undertaken consideration' of the elements of section 48, and that information to prepare the prudential report 'was obtained from relevant professional officers across the organisation to ensure that detailed understanding was provided on each area (Development Planning considerations, financial etc).'
841. It was not stated in this report or the prudential report who in fact prepared the prudential report.
842. The CEO informed my investigation that a range of the council's officers contributed to the prudential report, but the prime author was the council's Manager, Business Improvement and Performance. This person had qualifications in accounting and experience as a Senior Risk Advisor and Internal Auditor with Price Waterhouse Coopers. Further, the report was overviewed by Deloitte.<sup>457</sup>
843. In my view, for reasons of probity, the identity of the author of a prudential report and the fact that the council turned their mind to the qualifications of the author prior to a report's preparation should be demonstrable by the council. Logically this information would be contained in the prudential report document itself.
844. Apart from not indicating who in fact prepared the prudential report, it is also not apparent that the council had turned its mind to consider the suitability of the person(s) who prepared the prudential report. Further, it is not evident when the report was prepared, as it contains no date.
845. It is concerning that the council body accepted the prudential report at the 9 June 2009 meeting without knowing who in fact was responsible for preparing it, what their credentials were, nor when the report was prepared.
846. I hold this view, in spite of the fact that Deloitte reviewed and signed off on the report. As I have previously commented, the Deloitte review was limited to considering whether the contents of the prudential report were in accordance with relevant documents not whether section 48 in its totality, was complied with.

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<sup>457</sup> Email from CEO to Deputy Ombudsman, 17 May 2011.

847. In addition, I comment that the prudential report appears in parts to be self-serving. In my view, it lacks the necessary objectivity which should be brought to preparing prudential reports. The following are examples:

The Land Swap Initiative and the playing fields and facilities are not designed to be a transaction having a commercial rate of return. Rather the project will result in a community facility and is being undertaken for the public good.<sup>458</sup>

The administration has been diligently managing the progress of these contractual agreements to ensure a successful outcome ...<sup>459</sup>

848. In my view, this lack of impartiality undermines the integrity and reliability of the prudential report.
849. The CEO acknowledged the 'magnitude' of the revocation and land swap decision and the 'sensitivity around the issue'. In my view, these factors suggested that the council should have engaged an independent party to prepare the prudential report. Again, I hold this view in spite of the fact that Deloitte reviewed the prudential report; and I refer to my previous comments about the limited scope of the Deloitte review.
850. I note the amendments to section 48 in section 8(7) and (8) of the *Local Government (Accountability Framework) Act 2009* which have yet to come into operation. In my view, these provisions are sufficient to alert councils to the potential difficulties that can arise with internal prudential reports.
851. In responding to my provisional report, the CEO noted that:
- it does not consider that it was unreasonable to have the report prepared by a suitably qualified member of council staff, notably because of the budgetary and time constraints which applied in this case
  - the amendments to section 48 will preclude any person who has an 'interest' from preparing a prudential report, but they specifically provide that a report may be prepared by a council employee
  - the report which was prepared was not lacking in objectivity or impartiality, and the quotes outlined above do not substantiate the claim that it was
  - because the prudential report was submitted to the 9 June 2009 council meeting as an attachment to the agenda report, that date should be attributed to the prudential report.<sup>460</sup>
852. I acknowledge these comments, but they do not change my substantive view that given the magnitude and public interest in the project, the council should have made more appropriate arrangements for the preparation of the prudential report.

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<sup>458</sup> City of Charles Sturt, Report to council from Manager Planning and Development, Cheltenham Racecourse Site and St Clair Reserve and Sheridan Land Exchange, 9 June 2009, Item 13.6, Appendix L - Cheltenham Precinct Development Land Swap Prudential Report (undated), p5.

<sup>459</sup> City of Charles Sturt, Report to council from Manager Planning and Development, Cheltenham Racecourse Site and St Clair Reserve and Sheridan Land Exchange, 9 June 2009, Item 13.6, Appendix L - Cheltenham Precinct Development Land Swap Prudential Report (undated), p6.

<sup>460</sup> Response from the CEO, 18 August 2011, attached table pp12-14.

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## OPINION

In failing to identify the date and author of the prudential report and their credentials, the council acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

Further, in failing to engage an independent person to prepare the prudential report, the council acted in a way that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

While noting the proposed amendments to section 48 under the Local Government (Accountability Framework) Amendment Act 2009 (section 8(7) and (8)), I recommend under section 25(2) of the Ombudsman Act that in the interests of accountability and probity, the council should in future:

1. consider engaging an independent party to prepare a prudential report for larger projects which have involved significant prior contribution by council staff
2. be able to identify not only the author and date of its prudential report, but also
3. be able to demonstrate that the council has turned its mind to the qualifications of the author of the report (section 48(4) of the Local Government Act).

## Whether the council should have sought valuations of the St Clair and the Sheridan land

853. The council did not address the issue of valuations of the St Clair and Sheridan land in the prudential report. I note that the Response to Community Concerns document on the council's website states:

The proposal is for a land exchange and this is not being driven by financial motives, but driven by the potential community benefit. Council does not stand to financially benefit from this initiative, rather the community will benefit from an improved mix of land use and development outcomes linked to the rollout of light rail transport along the outer harbour rail line.

...  
In reality the value of the two parcels can be argued are different, but ultimately if the swap is to proceed the value of each parcel will be determined to be the same as part of contract for transfer. Council staff have sought a valuation from the Valuer General as the land is not currently rateable.

854. My investigation asked the CEO about the valuation from the Valuer General referred to in the Response document. The CEO replied as follows:

At Council meeting on 9 March 2010, a response to a question on notice regarding the valuation was provided (item 9.6) and the minutes read:

"Questions without Notice were asked by Councillor Grant at Council's meeting on Monday, 25 January 2010 regarding the St Clair Reserve land swap land valuations. These questions were taken "on notice".

Questions:

1. As of the 1st January 2010 what is the Valuer General's Valuation of the 4.7 hectares of Council land at St. Clair Reserve Woodville to be swapped with the Land Management Corporation.
2. As of the 1st January 2010 what is the Valuer General's Valuation of the 4.7 hectares of Land Management Corporation land at the former Aclil Site Woodville to be swapped with the Council."

A response to the questions has now been received from the State Valuation Office and is provided below.

1. The proposed land division prepared by Alexander & Symonds Pty Ltd, and referenced A051409LTO(B), specifically Lot 1 of this proposed plan of division, has a site and capital value of \$8,000,000, as at 1 January 2010. This value has been determined based upon the subject properties zoning as District Centre (Woodville) Zone (Recreation / Education Policy Area 35). The subsequent amendment via the Development Plan consolidated 13 August 2009, is as per your guidance, reflective of no policy change within the subject zone.

Data pertaining to the potential approved uses of the site, given the current zoning, in conjunction with AEC Environmental Site Assessment reports and supporting documentation all supplied by the City of Charles [sic] were considered in arriving at this determination.

In relation to the assessment of Lot 1, transfers of similarly zoned land with comparable development potential are limited. In these circumstances it is accepted practice that a valuation opinion is based upon the available market evidence and the exercise of the Valuer General's judgement in arriving at a fair and equitable level of assessed value.

2. Assessment 25 04800 30\* has a site and capital value of \$7,750,000, as at 1 January 2010. This value has been determined based upon the subject properties existing Residential 68 zoning. Data contained within the Site Contamination Audit Statement, and additional information provided by Mr Adrian Hall, Principle [sic] Environmental Auditor for GHD was also considered.”<sup>461</sup>
855. It appears that this valuation referred to would have been obtained after the Response to Community Concerns was prepared.
856. At the council meeting on 22 February 2010, there was a Question on Notice regarding the prospective value of the St Clair land after rezoning for housing:

What is the Valuer's Generals [sic] valuation of the prospective value of part of St Clair reserve when it is rezoned for housing and subsequently swapped with the Land Management Corporation for an equal amount of land from the former Actil Industrial Site.<sup>462</sup>

857. The answer given by the CEO was that the Valuer General only provided such valuations on a fee for service basis:

The Chief Executive Officer indicated that he had asked the Valuer General to provide the hypothetical valuation as requested by Councillor Grant and the Valuer General indicated they do not, as a rule, provide this type of valuation, however they could provide a hypothetical valuation on a fee for service basis and said the cost of that service would likely to be between \$5000-\$10,000, therefore the Chief Executive Officer would need a Council resolution to allocate funds to the request as no budget exists currently for the expenditure.<sup>463</sup>

<sup>461</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p52.

<sup>462</sup> City of Charles Sturt, Council Minutes, 22 February 2010, p12.

<sup>463</sup> City of Charles Sturt, Council Minutes, 22 February 2010, p12.

858. I also understand that the council informed the LMC that it would only be involved in the land swap if it was cost neutral to the council, and endeavoured to achieve cost savings. The CEO informed my investigation:

The Council was also keen to ensure that the new recreational facilities on the Actil land were the same to [sic] those on the St Clair reserve being swapped. The Sheridan Land Facilities Agreement identifies all facilities and amenities to be provided and funded by the Woodville JV. In recognition that Council would be receiving brand new change rooms Council agreed to contribute \$400,000 to new change rooms and to fund to a value of \$40,000 two additional light towers.<sup>464</sup>

859. I appreciate that from the council's perspective, the land exchange was not 'driven by financial motives' but for 'potential community benefit,' and that the council did not stand to benefit financially from the revocation and land swap.<sup>465</sup>

860. However, a financial gain was anticipated by the LMC, and was effectively acknowledged in a minute to the Treasurer from the Minister for Infrastructure:

If the TOD development does not proceed, the State also forgoes income it would have otherwise received via LMC value adding to the site through rezoning and infrastructure development before offering the site to the market.<sup>466</sup>

Not only will the opportunity for the TOD be lost but also the revenue to be raised by Treasury as a result of the stamp duty on the acquisition of the St Clair site by LMC and the sale of all of the allotments in the development proposed to be facilitated by LMC on the St Clair Site.<sup>467</sup>

861. Further, an officer of the LMC suggested in an email to an officer for the Minister for Infrastructure, dated 19 November 2009:

community members have pointed out with some force and common sense that prime recreational land which is uncontaminated with frontage to a major road will be more than contaminated industrial land that is not a high quality reserve. We do not know the difference, but whatever the difference is, in some way it probably constitutes at the very least a potential benefit to the Land Management Corporation which may be passed on to a developer. ...

The contract for the sale of the Actil site to Council and the contract for the sale of the St Clair site to LMC are for the exact same amount - \$17,382,200 (inc GST). For the purposes of the land swap they were value [sic] equally - so the St Clair site is not valued much lower than the Actil site. The value figure on Actil was based on the obligation of the developer to fund \$2m towards developing the open space/playing fields as well as an obligation on council to contribute \$440,000 to new change rooms. No cheques will be actually written out, as it is a land swap, but transfer costs will be payable by both council and LMC - cabinet has approved that LMC accept responsibility for council's transfer costs, as council would only be in on the land swap if the swap was cost neutral to them.<sup>468</sup>

862. In my view, as the custodian and trustee of a public asset in the St Clair land, it was in the public interest for the council to have obtained land valuations, addressed these in the prudential report, and made full disclosure to the community. Whilst I acknowledge that this would have required the provision of valuations which reflected then current zonings, I note that such valuations were subsequently provided by the Valuer General and reported to the council on 9 March 2010.

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<sup>464</sup> City of Charles Sturt CEO, Response to the Ombudsman, 4 February 2011, p54.

<sup>465</sup> City of Charles Sturt, Responses to community concerns - St Clair Reserve Community Land Revocation, p14.

<sup>466</sup> Minutes forming enclosure to The Treasurer from Hon Patrick Conlon MP, Minister for Infrastructure, June 2009, p3.

<sup>467</sup> Minutes forming enclosure to The Treasurer from Hon Patrick Conlon MP, Minister for Infrastructure, June 2009, p4.

<sup>468</sup> Email dated 19 November 2009.

863. I consider that obtaining such valuations should have been part of a standard due diligence process required in circumstances such as those involving the land swap. In this context, I note with interest that there is a legislative requirement in the Victorian *Local Government Act 1989* to obtain a valuation before selling or exchanging land, other than where it is sold for unpaid rates or is transferred without consideration. The relevant parts of section 189 of that Act are as follows:

**189 Restriction on power to sell land**

- (1) Except where section 181 or 191 applies, if a Council sells or exchanges any land it must comply with this section.
- (2) Before selling or exchanging the land the Council must-
  - (a) ensure that public notice of intention to do so is given at least 4 weeks prior to selling or exchanging the land; and
  - (b) obtain from a person who holds the qualifications or experience specified under section 13DA(2) of the Valuation of Land Act 1960 a valuation of the land which is made not more than 6 months prior to the sale or exchange.

864. In his response to my provisional report, the CEO confirmed his view that valuations of the parcels of land would not have given any reliable indication of the relative ‘values’ of the two parcels land, because of:
- the lack of market evidence of comparable sales
  - the fact that the Sheridan land was zoned for residential development and therefore had a higher and better economic use under its current zoning than the St Clair land
  - the terms agreed to by the LMC for the Sheridan land established its value as an arm’s length transaction, and indicate that that there was no reason to believe that the value of the Sheridan land was significantly lower (if it was lower at all) than the value of the St Clair land
  - the suggestion in my provisional report that valuations should have been obtained ‘based on the proposed rezoning and proposed development on the sites’ is inconsistent with long-established principles of valuation. It would have involved a high degree of ‘guesstimation’, because the development envisaged a novel kind of development (i.e. a TOD) and there is no indication of how that will be received by the market.<sup>469</sup>
865. I accept that there would have been difficulty in obtaining valuations based on the proposed rezoning and proposed redevelopment, and I comment that the Victorian legislation is relevant only insofar as it provides an example of a possible approach. However, there is no doubt that the relative valuations of the two sites contributed to the community’s unease about the value of the land swap. I consider it likely that if the response provided at the council meeting held on 9 March 2010 (which outlined the Valuer General’s opinion on the matter) had been obtained earlier, this may have been avoided.
866. In my view, the council’s position that it was not going to profit from the land swap did not absolve it from obtaining appropriate land valuations and addressing up front, the potential financial and commercial realities of the land swap. Apart from the council’s responsibilities of due diligence, the community was entitled to know the valuations of the land to help understand the financial and commercial context and viability of the land swap.

<sup>469</sup> Response from the CEO, 18 August 2011, attached table pp14-17.

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## OPINION

The council's failure to obtain land valuations considering future land use in relation to the St Clair land and the Sheridan land, and to address these matters in the prudential report, was unreasonable within the meaning of section 25(1)(b) of the Ombudsman Act.

I recommend under section 25(2) of the Ombudsman Act that the council familiarise itself with the prudential issues which should be addressed in section 48(2) of the Local Government Act, especially in relation to obtaining valuations prior to disposal of land and land swap arrangements.

## PART 8

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# RECOMMENDATIONS FOR AMENDMENT OF THE LAW

## 8. RECOMMENDATIONS FOR AMENDMENT OF THE LAW

867. The Ombudsman Act empowers me, where I find an administrative error has been made, to make recommendations ‘that any law in accordance with which or on the basis of which the action was taken should be amended or repealed’.<sup>470</sup> I make the following recommendations arising from this investigation.

### 8.1 REGISTER OF INTERESTS

#### Changes to information on the Register of Interests

868. The Register of Interests is one of the means by which council members can record potential conflicts of interest. It is also an accountability measure which allows the public to appropriately scrutinise council members’ interests.
869. My investigation found that there were some council members who had not notified the CEO of the council of changes to their information which was required to be recorded on the Register of Interests.
870. Section 67 of the Local Government Act provides that a council member ‘may at any time’ notify the CEO of any change or variation to the information on the register, after submitting a return.
871. I agree with the LGASA’s views in its Guidelines for Primary & Ordinary Returns – Council Members:

Whilst this statutory provision suggests a discretion on the part of a Council Member by use of the word ‘may’, the spirit and intent of these provisions in seeking to achieve transparency and accountability suggests that each Council Member should notify of any change or variation to the information which is other than of a very minor or trivial nature. This is a particularly important obligation given that the Register is available for public inspection.<sup>471</sup>

872. I would go a step further, and suggest that in accordance with a council member’s obligation to exercise reasonable care and diligence in the exercise of their responsibilities<sup>472</sup> and in the interests of accountability, a councillor should notify the CEO *as soon as practicable* when there is any change in information which is required to be entered on the register. Failure to do so, without reasonable excuse, should attract a penalty.

1

#### RECOMMENDATION FOR AMENDMENT OF THE LAW

Consideration should be given to amending the Local Government Act to require that council members notify the Chief Executive Officer of any changes to their information which must be recorded on the Register of Interests, as soon as practicable. Failure to do so without reasonable excuse should attract a penalty.

<sup>470</sup> Ombudsman Act, section 25(2)(d).

<sup>471</sup> LGASA publication: Guidelines for Primary & Ordinary Returns - Council Members, Updated from March 2007 in January 2011, p3.

<sup>472</sup> Local Government Act 1999, section 62(2).

## Ready public access to the Register of Interests

873. Members of the public may inspect the Register of Interests at the council without charge during ordinary office hours (section 70(1)). However, they are required to submit a written application to the Chief Executive Officer to obtain a copy of a council's Register of Interests. In the interests of transparency, I consider the public should be able to more readily access, as a minimum, information relating to councillors' income sources; membership of any political party, any body or association formed for political purposes or any trade or professional organisation; hospitality benefits; and pecuniary gifts. This information should be accessible on a council's website.
874. I note such interests of elected members of the Brisbane City Council are readily accessible to the public on that council's website.<sup>473</sup>

## 2

### RECOMMENDATION FOR AMENDMENT OF THE LAW

Consideration should be given to amending the Local Government Act so that the public is not required to lodge a written application to access a copy of certain parts of a council's Register of Interests, such as income sources, membership of any political party, any body or association formed for political purposes, any trade or professional organisation, hospitality benefits, and pecuniary gifts.

Consideration should be given to amending the Local Government Act to require that councils provide immediate access to this information via their website.

<sup>473</sup> <http://www.brisbane.qld.gov.au/about-council/councillors-wards/register-of-interests/index.htm>

## 8.2 CONFLICT OF INTEREST

875. My investigation has highlighted that the Local Government Act is inadequate in capturing and addressing some conflict of interest situations that can arise. In my opinion, the legislation is out of step with community expectations as to how council members should conduct themselves when their other interests encroach on their duty as a council member to act in the public interest. In my view, the issues that have arisen in the course of my investigation may be avoided in the future if the legislation:
- provided for the disclosure and better management of perceived conflicts of interest
  - extended conflict of duty to situations outside the public sector
  - prohibited electorate officers (and others engaged under section 72 of the *Public Sector Act 2009 (SA)*<sup>474</sup> (**Public Sector Act**)) from becoming a member of a council
  - provided for the disclosure of political affiliations as a requirement when nominating for election
  - allowed elected members to declare conflicts of interest but not abstain from voting in certain circumstances.

### Addressing perceived conflict of interest

876. A perceived conflict of interest is one which a fair minded and informed member of the public might perceive as existing. The Local Government Act does not contemplate perceived conflicts of interest. However, my investigation has shown that the management of perceived conflicts of interest is important for the integrity of the council.
877. Certainly there was a perception in some sectors of the community that ALP councillors and those who were employed by the state government had a conflict of interest in the revocation decisions; and these perceptions further led to allegations of bias.
878. In Queensland, section 173(4) of the *Local Government Act 2009* (Qld) requires others who are entitled to vote at a council meeting to decide whether a council member has a conflict of interest, or could reasonably be taken to have a conflict of interest. Council members themselves can inform the others about their interest in the matter, or it can be someone else. If the council decides that the council member does not have a disclosable interest, they can continue to participate and vote in the meeting.
879. I note also that model codes of conduct for local councils have been developed by the Local Government Association of Western Australia<sup>475</sup> and New South Wales<sup>476</sup> which include perceived conflicts of interest.

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<sup>474</sup> The Public Sector Act came into operation on 1 February 2010.

<sup>475</sup> WA Local Government Association, Model Code of Conduct for Council Members, Committee Members and Staff, February 2008, para 2.1(a).

<sup>476</sup> NSW Department of Local Government, The Model Code of Conduct for Local Councils in NSW, June 2008, para 7.1.

880. In my view, an amendment to the South Australian Local Government Act to include an objective test similar to that in the Queensland legislation would provide a number of benefits:
- it would encourage individual council members to err on the side of caution by disclosing interests
  - it would encourage councils themselves to take more responsibility for what I see as a major contributor to their standing in the community and public confidence in local government
  - it would introduce an objective test into the identification of conflicts
  - it may circumvent claims of apprehended bias.
881. I acknowledge that there are some potential downsides, for example, where a divided council may exercise its majority power against an individual council member or a minority group. But I consider it is worth living with this potential drawback in the interests of dealing with conflicts of interest and enhancing the integrity of local government.

### 3

#### RECOMMENDATION FOR AMENDMENT OF THE LAW

Consideration should be given to amending the Local Government Act to include an objective test for council members' conflicts of interest.

Consideration should be given to amending the Local Government Act to allow those in attendance at a council meeting to decide whether a particular council member has a conflict of interest or could reasonably be taken to have a conflict of interest.

I propose an objective test as has been adopted by Queensland in section 173(4) of the Local Government Act 2009 (Qld).

#### Conflict of duty – extending section 73(3)

882. I commented in Part 3.2 about the limited coverage of a 'conflict of duty' in the Local Government Act.
883. Section 73(3) deals with a council member's 'conflict of duty', where it provides:
- (3) A member of a council who is a member, officer or employee of an agency or instrumentality of the Crown, will be regarded as having an interest in a matter before the council if the matter directly concerns that agency or instrumentality but otherwise will not be regarded as having an interest in a matter by virtue of being a member, officer or employee of the agency or instrumentality.
- (4) In this section—
- agency or instrumentality of the Crown* includes—
- (a) an administrative unit of the Public Service;
- (b) a body corporate comprised of, or including or having a governing body comprised of or including, a Minister or Ministers of the Crown or a person or persons appointed by the Governor or a Minister or other agency or instrumentality of the Crown.
884. My investigation highlighted that section 73(3) of the Local Government Act is deficient in two respects.

885. First, I consider that a conflict of duty can arise for a council member who is engaged as a member, officer or employee in *any* organisation, not just the public sector. All employees, for example, owe a duty of fidelity to their employer. Where the employee is also a council member, this duty may conflict with a council member's duty to act in the interests of their community, where a matter before the council might directly concern their employer.
886. For example, if a council member was employed by the Woodville JV during the revocation and land swap deliberations of the council, in my opinion, this should be covered by section 73(3) as *prima facie* there would have been a conflict of duty.
887. I consider the section is too limited and should cover other organisations, not just public sector ones.

## 4

### RECOMMENDATION FOR AMENDMENT OF THE LAW

Consideration should be given to amending section 73(3) of the Local Government Act to include a council member who is a member, officer or employee of any organisation, not just an agency or instrumentality of the Crown.

888. Secondly, I am of the view that where a conflict of duty arises under section 73(3), the consequences prescribed in section 74 should be narrowed.
889. As I have noted above, the actual role of a member, officer or employee in relation to a matter before the council is not relevant under section 73(3). This means that where a matter directly concerns the relevant organisation, a council member who is a member, officer or employee of the organisation who has no involvement or indeed no knowledge of the matter, must still disclose an interest and abstain from voting on that matter.
890. In my view, council members should have to disclose an interest where a matter directly concerns the organisation of which they are a member, officer or employee, but should only have to abstain from voting where there is a conflict of interest arising from their involvement in the matter.
891. I note this approach may allow for the operation of 'chinese walls', so that council members employed in organisations which are dealing with council matters may still be able to vote in relation to those matters.

## 5

### RECOMMENDATION FOR AMENDMENT OF THE LAW

Consideration should be given to amending section 73(3) of the Local Government Act to provide that where a matter directly concerns any organisation of which a council member is a member, officer or employee, the council member will be regarded as having an interest which they must disclose under section 74.

In conjunction, consideration should be given to amending the Local Government Act so that a councillor who has an interest is required to abstain from voting only if they are actually involved in the matter within the organisation of which they are a member, officer or employee.

## Conflict of duty – being a council member and an electorate officer

892. I have commented in Part 3 that the two council members, Councillor J and Councillor P who were employed in the Enfield electorate office did not breach the conflict of interest provisions in the Local Government Act in their participation in the revocation vote.
893. However, I also considered that Councillor J and Councillor P were conflicted in their duties, as they were required to serve both the interests of their council community as well as their state MP.
894. Councillor J gave evidence of being responsible for administering the Enfield sub-branch; and responded to possible conflict issues to my investigation saying:

sub-branch members may often come in with a constituent issue. I may get asked during the meeting but, generally speaking, I try to be as neutral as possible in the running of the sub-branch.<sup>477</sup>

895. Councillor P intimated to my investigation that the fact being both a councillor and an electorate officer meant help could be given to the community with both their local government and state government concerns at the same time:

I'm in a unique position because my position, I'm a councillor in that actual ward and I'm working - well, I'm not working [sic]. I was working before [sic] for that Member of Parliament. So people come in there with problems from the ward. So that's the only interaction that could be. But, if it's, you know, that interaction, as I said it would be helpful, because if people come to the member to take care of the actions that are happening in local government, then I can have it looked at because they approached me as a both representative of their ward and representative of, you know, and working for the member. So they bring it - you know, they bring the point to the member. I'm the elected member for local government and I - you know, that's the only interaction that I could see that, as I've said before that could be helpful.<sup>478</sup>

896. In my opinion, Councillor P confuses the notions of conflict of interest and alignment of interest.
897. Council members have an obligation to ‘represent the interests of residents and ratepayers, to provide community leadership and guidance, and to facilitate communication between the community and the council’ under section 59(1)(b) of the Local Government Act.<sup>479</sup> They take an oath to ‘undertake to discharge [their] duties conscientiously and to the best of [their] abilities’;<sup>480</sup> and they are required by section 62(2) to ‘act with reasonable care and diligence in the performance and discharge of official functions and duties’.
898. As electorate officers, they are required to assist their MPs in their work in their electorate.<sup>481</sup> They are recruited by the MP who directs their day to day duties; and they are bound to comply with all lawful and reasonable directions given to them by their MP.

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<sup>477</sup> Cr J (T1) p25, 15.

<sup>478</sup> Cr P (T2) p50, 14.

<sup>479</sup> Section 59 was amended by section 10 of the *Local Government (Accountability Framework) Amendment Act 2009*. Section 10 inserts subparagraph (iv) of section 59(1)(a) which adds that a council member’s role is ‘to ensure, as far as is practicable, that the principles set out in section 8 are observed.’ Section 10 has yet to commence operation.

<sup>480</sup> *Local Government (General) Regulations 1999*, regulation 6, Schedule 1, Form 2.

<sup>481</sup> The Premier is the relevant Minister under the Public Sector Act; and has delegated this function to the Treasurer, for Research Officers and Assistants employed by MPs.

899. In my view, the parliamentary debate in Victoria discussing the reasoning behind the *Local Government Amendment (Conflicting Duties) Act 2009* (Vic) is apposite, where it was said:

Significant potential exists for conflicts between a person's obligations to the member they work for and their ability to freely represent themselves and their policies to the local community as a candidate for the office of councillor.

..

It also addresses the underlying principle that a person should not hold the office of councillor if they have a direct competing duty to another democratically and publicly elected body.<sup>482</sup>

#### ***The interests of the council and interests of the state government***

900. My concern about the conflict of duty for Councillors J and P as electorate officers is that in relation to the revocation and land swap, the council and the state government (and the LMC) were jointly engaged in effecting development within the precinct - each was seeking to achieve their own policy directions. I have referred previously to these policy directions.
901. I note that a council is required in the performance of its roles and functions under section 8 of the Local Government Act, to consider the interests of the state government; such as:
- (c) participate with other councils, and with State and national governments, in setting public policy and achieving regional, State and national objectives;
  - (d) give due weight, in all its plans, policies and activities, to regional, State and national objectives and strategies concerning the economic, social, physical and environmental development and management of the community;
  - (e) seek to co-ordinate with State and national government in the planning and delivery of services in which those governments have an interest; (section 8)
902. Section 122 of the Local Government Act also requires a council to develop its strategic plans consistently with the state government's Planning Strategy.
903. Further, I note the State-Local Government relations agreement between the state government and the LGASA ('for and on behalf of South Australian local governments') initially signed on 8 March 2004 and revised on 21 November 2006 (**the revised agreement**).<sup>483</sup> While not legally binding, this agreement was established between the state and local government sector to improve consultation processes, communications, and allow collaboration between the two tiers of government.
904. Paragraph 9 of the revised agreement states that the agreement has been developed 'on the basis that a level of trust and goodwill exists between State and Local Government in which the interests of their shared constituencies are considered paramount.'

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<sup>482</sup> Victoria Parliamentary Debates, Legislative Assembly, 29 July 2009, page 2389 - 2390.

<sup>483</sup> The revised agreement was executed in order to reflect the national *Inter-governmental Agreement Establishing Principles Guiding Inter-Governmental Relations on Local Government Matters* signed by the Commonwealth Minister for Local Government, State and Territory Ministers for Local Government and the President of the Local Government Association on behalf of all State Local Government Associations in April 2006.

905. Paragraph 18 provides that:

The parties should jointly commit to regular and effective consultation and negotiation on the formulation and implementation of key policies, legislative proposals and significant programs /projects that affect the other party.

- 906. The revised agreement in paragraph 23 also talks of state and local government having the opportunity to contribute to each others' strategic planning processes, enabling more aligned strategic plans.
- 907. A schedule of agreed annual priorities is appended to the revised agreement. The schedule for the years between 2006 and 2009 on page 1, for example, refers to 'the wide range of joint endeavours on matters of mutual interest between the State and local Government, many of which progress the implementation of South Australia's Strategic Plan.'
- 908. In my view, the above highlights a potential requirement for council members who are electorate officers for state MPs, to serve two masters.

#### ***Conflict of duty - Local Government Act 1989 (Vic)***

- 909. In 2009, Victorian legislation was amended following an Ombudsman investigation into the Brimbank City Council. The Ombudsman's report referred to the tensions in allegiance for a council member who is also an electorate officer:
 

In such situations, there is more than a risk that tensions can develop between the councillor's two duties, which may impact on the honest performance of their functions as an elected councillor.<sup>484</sup>
- 910. The Victorian Ombudsman found that a councillor could experience a conflict of interest in two possible ways as a result of their employment in an electorate office. Firstly, a conflict can exist between their public duty as a councillor to the municipality, and their public duty as an electorate officer to an MP. Secondly, a conflict can exist between their public duty to their municipality and their private interests (including their private interest in maintaining their employment as an electorate officer).<sup>485</sup> As I have previously stated, I have similar concerns.
- 911. The Victorian Ombudsman consequently recommended that the *Local Government Act 1989 (Vic)* be amended to prohibit councillors from being employed by federal or state MPs during their term on council.<sup>486</sup> The *Local Government Amendment (Conflicting Duties) Act 2009 (Vic)* was passed prohibiting employees of federal or state MPs from being able to become elected members in local government.
- 912. Under section 28A of the *Local Government Act 1989 (Vic)* a person is not capable of becoming or continuing to be a councillor or nominating as a candidate at an election under the Act if the person is—
  - (a) a member of any State or Territory Parliament or of the Parliament of the Commonwealth of Australia; or

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<sup>484</sup> Ombudsman Victoria, Whistleblowers Protection Act 2001 - Investigation into the Alleged Improper Conduct of Councillors at Brimbank City Council, May 2009, p33.

<sup>485</sup> Ombudsman Victoria, Whistleblowers Protection Act 2001 - Investigation into the Alleged Improper Conduct of Councillors at Brimbank City Council, May 2009, p33, para 128.

<sup>486</sup> Ombudsman Victoria, Whistleblowers Protection Act 2001 - Investigation into the Alleged Improper Conduct of Councillors at Brimbank City Council, May 2009, p46.

- (b) employed as a Ministerial officer, a Parliamentary adviser or an electorate officer by a member of the Parliament of the Commonwealth of Australia or of any State or a Territory of the Commonwealth; or
- (c) a councillor of another council constituted under the Act or a member of a corresponding body under an Act of another State or a Territory of the Commonwealth.

#### *LGASA response*

913. In response to the Victorian amendment, I note that the LGASA considered whether ministerial advisers and electorate officers should be allowed to stand for council in South Australia.
914. The following motion was passed at the LGASA Annual General meeting on 23 April 2010:

The General Meeting calls upon the LGA to consider supporting a “conflicting of duties” clause being included into the South Australian Local Government Act, this amendment being consistent with the recent Victorian Government’s changes to its Local Government Act that prohibits elected members of Council from working as Ministerial advisors or working in electorate offices of Members of Parliament.<sup>487</sup>

915. Following this resolution, the LGASA requested that the state government make similar legislative changes to Victoria, but this was declined.<sup>488</sup>
916. I understand that a provision was then inserted in the Local Government Act which requires council members to include on the Register of Interests not just their ‘income source’ but the name and business address of all employers, as well as the name of the office or place where they work or a concise description of the nature of their work.<sup>489</sup> As I discuss below, in my view it is preferable that such disclosures occur prior to election.

#### *Prohibition in the code of ethics*

917. Based on advice from the Department of Treasury and Finance, I understand that electorate officers (and those appointed on contracts under section 72 of the Public Sector Act) are now bound by the code of ethics developed under the Public Sector Act. This obligation has been in place since 1 February 2010, when both the Public Sector Act and the code of ethics commenced operation - though it did not apply during the relevant period.
918. I note the following provisions in the code of ethics, which state:

##### Outside Employment

- public sector employees employed on a full-time basis must not engage in other employment or other remunerative activity where the activity conflicts or has the potential to conflict with their role as a public sector employee or the performance of such outside employment or activity might affect their capacity to perform their duties<sup>490</sup> (**the prohibition**)

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<sup>487</sup> Local Government Association of South Australia, Minutes, General Meeting 23 April 2010.

<sup>488</sup> Local Government Association of South Australia, Conflicting Duties - Issues Paper, January 2011, p2.

<sup>489</sup> Schedule 3, clause 2(3) of the *Local Government Act 1999* was amended by section 50 of the *Local Government (Accountability Framework) Amendment Act 2009*. Section 50 inserts clause 2(3)(ab) which requires insertion onto the form of the return for the Register of Interests: ‘the name and business address of any employer of the member and, if the member is employed, the name of the office or place where the member works or a concise description of the nature of the member’s work’. Section 50 came into operation on 15 November 2010.

<sup>490</sup> South Australian Public Sector, Code of Ethics p18.

- public sector employees will obtain written permission from their agency head before engaging in any outside employment or remunerative activity (including any employment, work or service for which payment is made by way of pay, salary, honorarium, commission, fee, allowance or other reward)

919. Also:

Conflicts of Interest

...

- employees will disclose in writing to the agency heads any actual or potential conflicts of interest at the earliest available opportunity and comply with any lawful and reasonable direction issued by a person with authority to issue such direction to resolve the conflict or potential conflict, including written direction by a relevant authority pursuant to the *Public Sector (Honesty and Accountability) Act 1995*.<sup>491</sup>

920. On the basis of my view that a potential conflict of interest exists for councillors who are also electorate officers, the prohibition above effectively prevents full time electorate officer employees from becoming members of councils. However, the prohibition is contained only in the code of ethics, and no such provision exists in the Local Government Act.
921. It is not clear to me if the code of ethics had any impact on electorate officers who wished to seek election onto a council in the last November 2010 elections. I intend to refer this matter to the Under Treasurer.
922. In my view, the issue of the potential conflict of duty for a council member who is employed as an MP's electorate officer (and others engaged under section 72 of the Public Sector Act) undermines the integrity of local government.
923. For this reason, I consider that there should be a prohibition in the Local Government Act preventing electorate officers from becoming council members, or nominating as a candidate for local government.

## 6

### RECOMMENDATION FOR AMENDMENT OF THE LAW

There exists a potential for elected members of a council who are also electorate officers (and others engaged under section 72 of the Public Sector Act) to have a conflict of interest in the exercise of their duties.

This potential conflict of interest undermines the integrity of local government.

In my view the public sector code of ethics prevents full time public sector employees, such as electorate officers, from becoming elected members of a council because of the potential for a conflict of interest.

I intend to refer this matter to the Under Treasurer for his consideration.

Consideration should be given to amending the Local Government Act to prohibit electorate officers (and others engaged under section 72 of the Public Sector Act) from becoming a council member or nominating as a candidate for council at an election under the Local Government Act.

<sup>491</sup> Ibid, p17.

## Disclosure of political affiliation

924. A ‘Council Members’ Survey Report’ commissioned by the LGASA in 2004 stated that local government elections in South Australia (unlike in some states) ‘are not dominated by political parties’. However, it commented:

There are members of Councils who are party members ..., and the influence of party in elections, Council affairs and deliberations, and Council decisions is growing, especially in the metropolitan Councils.<sup>492</sup>

925. In the survey, an anonymous questionnaire was posted to each elected council member in South Australia, and a response rate of 48.9 percent was received. Of that portion, it was found that 72.4 percent of council members had some political party involvement. The report commented:

The high level of involvement with political parties does not necessarily mean that party politics dominates Council involvement. A “political” involvement in the Local Council and involvement through a party with the State and National politics are logically connected. There are some Councils where there has been a trend to party membership becoming important in Council deliberations and decisions, but that was not explored in the 2004 survey.<sup>493</sup>

926. As I have previously commented, elected members in local government are not prohibited from being members of a political party in South Australia. In my opinion, neither they should be.

927. That said, there is a suspicion within the community about the presence of party politics in local government, and there is a view that party aligned elected members may bring party bias to their decision-making. As a former elected member of the council told my investigation:

... if you get an alliance, you don't get a clean vote.<sup>494</sup>

928. Indeed, it is clear that the community was very concerned about councillors’ affiliations with the ALP and the possible influence of the ALP on the decision-making process in relation to the revocation. In my view, local government legislation should address these concerns.

929. Currently, council members are required to disclose their political affiliation after they are elected, through the Register of Interests. This obligation is an important transparency mechanism.

930. In my view, however, the legislation should be extended such that political affiliations are submitted prior to election. I agree with the resolution passed at the LGASA AGM in October 2010 to pursue the resolution requiring disclosure of political affiliation in a candidate’s nomination, namely:

That the LGA petition the State Government to amend the *Local Government (Elections) Act 1999* to include a requirement, consistent with that which applies to Elected Members through the register of interest provisions of the *Local Government Act 1999*, that all candidates in Local Government elections must declare in their nomination, information consistent with the register of interest requirements under the

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<sup>492</sup> [http://www.lga.sa.gov.au/webdata/resources/files/2004\\_Council\\_Members\\_Survey\\_Report\\_Pdf](http://www.lga.sa.gov.au/webdata/resources/files/2004_Council_Members_Survey_Report_Pdf) Professor Dean Jaensch AO Professor, School of Political and International Studies Flinders University, p19.

<sup>493</sup> Ibid, p26.

<sup>494</sup> The mayor, p24, 4.

Local Government Act (including membership of professional bodies and political parties in the preceding two years) and that this disclosure be publicly available for the information of electors.<sup>495</sup>

931. The public has a right to know information which could impact on a council member's approach in performing the role of an elected member - so they can make an informed decision in their voting.
932. Furthermore, disclosure of political affiliation prior to an election is important as electors should be able to make a decision about whether they want politically aligned councillors. They can only make this decision if information about a nominee's political affiliation is revealed prior to an election.

## 7

### RECOMMENDATION FOR AMENDMENT OF THE LAW

Consideration should be given to amending the Local Government (Elections) Act 1999 to require disclosure of political affiliation prior to election.

### Remove the requirement to abstain from voting in some circumstances

933. Section 74(4) of the South Australian Local Government Act provides that a councillor who has disclosed an interest in a matter before the council must not:
  - (a) propose or second a motion relating to the matter
  - (b) take part in discussion by the council relating to that matter or
  - (c) while such discussion is taking place, be in, or in the close vicinity of, the room in which or other place at which that matter is being discussed or
  - (d) vote in relation to that matter.
934. In my view, there are some types of disclosable interests for which these consequences may not always be necessary (as noted above, for example where a conflict of duty situation arises under section 73(3) but the elected member has no involvement in the matter at their work). If disclosure of interests is to be encouraged, I consider that an obligation to abstain in all circumstances is too significant a consequence.
935. I already note this 'non-abstention' principle already applies in the non-profit association exemption. I consider it could be extended to apply to at least some other types of non-pecuniary benefits; and to benefits or detriments shared with other ratepayers - which are not currently required to be disclosed.

## 8

### RECOMMENDATION FOR AMENDMENT OF THE LAW

Consideration should be given to amending the Local Government Act to remove the application of section 74(4) to some types of non-pecuniary benefits; and to benefits or detriments shared with other ratepayers.

<sup>495</sup> Local Government Association of South Australia, Conflicting Duties - Issues Paper, January 2011, p9.

## Councillors' lack of understanding of conflict of interest

936. My investigation highlighted a concerning lack of understanding by council members about conflict of interest and about the need for further training and guidance as to how to identify and manage conflicts that may arise.
937. In my view, in the interests of the integrity of the local government system, it is crucial that council members understand conflicts of interest and conflicts of duty, and their obligations to either avoid them, or to manage them when they do exist. Conflicts of interest cannot always be avoided. Early recognition and management of conflicts of interest is crucial in maintaining public confidence in the integrity of local government.

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### RECOMMENDATION FOR AMENDMENT OF THE LAW

Consideration should be given to amending the Local Government Act to introduce ongoing mandatory training in relation to conflict of interest for council members.

## Past benefits / inducements

938. Section 73(1) only contemplates actual conflicts of interest which would accrue in the future. It does not include benefits which have been received in the past. This frequently occurs, perhaps with an expectation on the part of the donor that the council member will have to make a decision affecting them at some future time - or perhaps totally innocently. In a situation where there is no attempt to bribe, and thus the allegation does not involve possible criminal conduct under the Criminal Law Consolidation Act, the Local Government Act is silent. The benefit or detriment which the section catches has to occur, or be expected to occur, in the future.
939. I note that the Victorian *Local Government Act 1989* (Vic) contemplates both past and future benefits.
940. There has been no suggestion that this has been an issue in the context of the revocation and land swap. However, I raise this as an issue as I have proposed other amendments in relation to section 73 of the Local Government Act.

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### RECOMMENDATION FOR AMENDMENT OF THE LAW

Consideration should be given to amending the conflict of interest provisions in the Local Government Act to include past benefits / inducements.

## 8.3 CODE OF CONDUCT

### Lack of enforceability of the code of conduct

941. Two former officers of the council told my investigation that the code of conduct was very weak, because council members get to choose its terms:

But the point about the code of conduct is, you know, it's a waste of time, really. Elected members get the right to define it for themselves. They choose to make it very, very weak.<sup>496</sup>

942. Another said the code of conduct was:

... not worth the paper it's written on at the moment, the way it is structured.<sup>497</sup>

943. In my investigation, while it appeared that elected members had a general idea about their code of conduct, some seemed to have little understanding of the specific terms of their code.<sup>498</sup>

944. In my opinion, the current scheme is ineffective.

945. I note that the Integrated Model for public integrity institutions being proposed by the Attorney General<sup>499</sup> suggests a single model code of conduct for elected members of councils, with coercive sanctions for breaches of the code.<sup>500</sup> I support this proposal, as I consider it would assist in establishing consistent standards and expectation of behaviour of council members within local government and necessary enforceable remedies for breaches.<sup>501</sup>

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### RECOMMENDATION FOR AMENDMENT OF THE LAW

Consideration should be given to amending the Local Government Act to provide for a single code of conduct with coercive sanctions for breaches, in accordance with the proposals in An Integrated Model – A Review of the Public Integrity Institutions in South Australia and an Integrated Model for the Future, Discussion Paper, 25 November 2010.

### Elected members' perceptions of their role – training and the oath of office

946. In my investigation, it was notable that most elected members in their evidence saw themselves as volunteers:

A. I've got no qualms with the way the local government is working. You know, we're all volunteers and we do a good job.<sup>502</sup>

A. I'm a volunteer in the true sense ...<sup>503</sup>

<sup>496</sup> Witness 2, p59, 15.

<sup>497</sup> Witness 4, p30.

<sup>498</sup> Cr J, p89, 18; Cr I, p8, 32; Cr C, p26, 31.

<sup>499</sup> Government of South Australia, An Integrated Model - A Review of the Public Integrity Institutions in South Australia and an Integrated Model for the Future, 25 November 2010, p2.

<sup>500</sup> Ibid, Recommendation 6.

<sup>501</sup> Ibid, Recommendation 9.

<sup>502</sup> Cr P (T1) p103, 22.

<sup>503</sup> The mayor, p58, 22.

- A. it's not a full-time job and not considered an employee of Charles Sturt. I do it voluntarily and I do it wherever possible in my own time.<sup>504</sup>
- A. Yeah. It's a lot for a volunteer, really. I don't get paid enough. I don't do it for the money. It seems like a lot of a process to take full - a position that's ultimately a hobby.<sup>505</sup>
947. On the one hand and on the basis of their form of remuneration, this is true. It can also be what gives local government its community flavour. Council members can sometimes contribute a huge amount to the social capital of our communities. Professor Dean Jaensch has commented:

For many members, it is a matter of essentially voluntary service. The responsibilities of membership are wide, intrusive and constant. There is never enough time; never enough resources. Politicians have public-funded electoral offices and public-funded staff. Local government members do not.<sup>506</sup>

948. However, the reality is also that elected membership of a council brings with it concomitant duties and responsibilities as a public officer under the Local Government Act, and other legislation.
949. Further, as stated in a joint NSW ICAC and Queensland Crime and Misconduct Commission publication:

The community expects that public officials will perform their duties in a fair and impartial way, putting the public interest first at all times.<sup>507</sup>

950. On the basis of the evidence received in my investigation, many of the council members appeared to have either little understanding of this aspect of their roles, or little concern about it.
951. Further, it appears to me from the evidence obtained in my investigation, that the declaration which is required to be made on taking office has little impact on councillors. One councillor who was elected onto the council on two separate occasions could barely recall their declaration:

- Q. When you become a councillor and you take an oath, is that - I believe you take an oath, can you recall?
- A. I can't remember taking an oath.
- Q. Okay.
- A. I remember signing a - a --
- Q. A code of conduct document?
- A. A code of conduct being stuck up in the foyer of council.
- Q. Okay. Thank you. I'll research that.
- A. There may have been an oath, but I don't - don't recall.
- Q. Like an oath of office?
- A. I may have. I don't remember that.
- Q. Yeah, thank you.
- A. Unless we all do one in the chamber.
- Q. Right.
- A. That rings a bell.
- Q. What, when you first start on council?
- A. Mmm, unless I'm just thinking of an Australia Day function.<sup>508</sup>

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<sup>504</sup> Cr D (T1) p17, 41.

<sup>505</sup> Cr D (T2) p12, 8.

<sup>506</sup> National General Assembly of Local Government, Keynote Address, The Possibilities for Local Government, Prof. Dean Jaensch, Canberra, 8 November 2004.

<sup>507</sup> Joint NSW ICAC and Queensland Crime and Misconduct Commission publication, Managing Conflicts of Interest in the Public Sector - Guidelines, November 2004.

952. The making of the declaration should play a more significant role in reinforcing elected members' public officer responsibilities. In my opinion, prior to making a declaration before commencing office, it should be ensured that elected members know what the duties are that they will be required to fulfil.
953. While there are numerous training opportunities provided by the council and the LGASA, in my opinion, elected members must be obligated to undertake training on a regular basis in order to understand their public officer roles and responsibilities, and the significance of the declaration on taking office.

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### RECOMMENDATION FOR AMENDMENT OF THE LAW

Consideration should be given to amending the Local Government Act to introduce mandatory training for council members to better appreciate their public officer roles and responsibilities, and the significance of the declaration on taking office.

<sup>508</sup> Cr C,p26, 35.

## 8.4 VALUATION OF COMMUNITY LAND

954. I have stated previously that as the custodian and trustee of a public asset in the St Clair land, it was in the public interest for the council to have obtained land valuations, addressed these in the prudential report, and made full disclosure to the community. However, there was no legislative obligation on the council to do so.
955. In this context, I referred to the legislative requirement in the Victorian *Local Government Act 1989*, which obliges a council to obtain a valuation before selling or exchanging land, other than where it is sold for unpaid rates or is transferred without consideration. The relevant parts of section 189 of that Act are as follows:

### 189 Restriction on power to sell land

- (1) Except where section 181 or 191 applies, if a Council sells or exchanges any land it must comply with this section.
- (2) Before selling or exchanging the land the Council must-
- (a) ensure that public notice of intention to do so is given at least 4 weeks prior to selling or exchanging the land; and
- (b) obtain from a person who holds the qualifications or experience specified under section 13DA(2) of the Valuation of Land Act 1960 a valuation of the land which is made not more than 6 months prior to the sale or exchange.
956. I consider that it would be in the public interest to adopt a similar provision in South Australian law.

13

### RECOMMENDATION FOR AMENDMENT OF THE LAW

Consideration should be given to amending the Local Government Act to require councils to obtain a land valuation before selling or exchanging land, other than where the land is sold for unpaid rates or is transferred without consideration.

## PART 9

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# CHRONOLOGY of EVENTS

23 November 1950	The Minister for Education and the Corporation of the City of Woodville (the predecessor of the City of Charles Sturt) prepared a scheme under the <i>Recreational Grounds (Joint Schemes) Act 1947</i> in relation to the St Clair Reserve. The scheme was confirmed by the Corporation and the Governor as required under sections 5 and 7 of the Act (it was varied in 1960, 1965, 1971 and 1974). Under the scheme the land is required to be used solely for the purposes of a recreation ground and public park and also portions of the land and certain facilities must be available for the use of the students of Woodville High School
9 May 1964	A poll of the ratepayers is held by the council in relation to development of St Clair. The community votes against the council borrowing funds to develop St Clair as a major sporting facility
2004	Stockland Pty Ltd purchases the former Sheridan industrial site
8 March 2004	The <i>State-Local Government Relations Agreement</i> is executed. The purpose of the agreement is to improve consultation arrangements, government communication practices and to build a closer, more productive and collaborative working relationship between state and local government. The Agreement is presented in two parts. The first part is the overarching statement on the working relations between state and local government that sets out the principles and protocols for the relationship. The second part is an appended schedule of agreed priorities. The <i>State Government Relations Agreement</i> is to be reviewed annually
August 2004	The South Australian Jockey Club announces their intention to sell the Cheltenham Park Racecourse
22 November 2004	The first meeting of the council's Cheltenham Racecourse Redevelopment Reference Group is held. This reference group comprised elected members and was intended as a forum for the council to review the issues and options and to maximise the benefit to the Charles Sturt community, should the proposed redevelopment of Cheltenham proceed. The agenda provides project background and states that 'there will be opportunities for land swaps'
April 2005	The council, in conjunction with the state government, initiates investigations and consultation into the Planning Directions for the Cheltenham Woodville Precinct
	The LMC, Planning SA and the council establish a steering committee to select, appoint and oversee the work undertaken on the project by consultants, QED
15 June 2005	An evening community workshop is held as part of the first community consultation in relation to the Planning Directions for the Cheltenham Woodville Precinct project. TODs are discussed
24 June 2005	The first community consultation stage in relation to the Planning Directions for the Cheltenham Woodville Precinct project undertaken by QED ends. The consultation results in a set of nine urban design principles for the precinct
26 November 2005	The second community consultation stage in relation to the Planning Directions for the Cheltenham Woodville Precinct project undertaken by QED commences. This stage of consultation asks the community to provide feedback on the urban design principles developed in the first stage of the community consultation

<b>16 December 2005</b>	The second community consultation stage in relation to the Planning Directions for the Cheltenham Woodville Precinct project undertaken by QED ends
<b>12 January 2006</b>	The results of both stages of the community consultation conducted by the consultant, QED, in relation to the Planning Directions for the Cheltenham Woodville Precinct project are released in the document Long Term Planning for the Cheltenham Woodville Precinct, Consultation Report - Stage 2
<b>24 March 2006</b>	The Minister for Urban Development and Planning agrees to a request from the council to initiate a PAR to rezone the Sheridan site from industrial to residential
<b>mid 2006</b>	The South Australian Jockey Club approaches the state government expressing its desire to sell the Cheltenham Park Racecourse site, and requesting that the site be rezoned for other uses
<b>17 July 2006</b>	The LMC commences a consultation process with the local community, key stakeholders and the broader public calling for submissions on three broad concept plans they have developed relating to the Cheltenham Park Racecourse site
<b>27 July 2006</b>	The draft ministerial PAR of the Sheridan Site (to rezone the area from industrial to residential) is released for public consultation
<b>28 August 2006</b>	The council's Strategic Directions and Asset Management Committee reiterates the council's position that it opposes the sale of Cheltenham Park Racecourse site and considers a report on the council's Principles of Development if the sale of Cheltenham Park Racecourse is to go ahead
<b>6 September 2006</b>	The public consultation phase for the Sheridan Site PAR closes
<b>24 September 2006</b>	The LMC releases three broad concept plans to illustrate how some conditions might be imposed on the development of the Cheltenham Park Racecourse if the state government does decide to agree to the South Australian Jockey Club's request to rezone the site. The concept plans are made available to the public for comment
<b>9 October 2006</b>	The council's City Policy and Services Committee considers a submission to the LMC in relation to their concept plans for the Cheltenham Park Racecourse site. The Report to the Committee from the Acting Manager Planning and Development, reiterates the council's position that it opposes the sale of Cheltenham Park Racecourse site saying that 'whilst council formally opposes the sale of the racecourse, it would be prudent to comment on what outcomes we would want to see if redevelopment did eventuate'
<b>13 October 2006</b>	The public consultation period for the LMC's three broad concept plans relating to the Cheltenham Park Racecourse site closes
<b>November 2006</b>	Local government elections
<b>21 November 2006</b>	A revised <i>State-Local Government Relations Agreement</i> is executed. The 2004 Agreement is revised to reflect the national <i>Inter-Governmental Agreement Establishing Principles Guiding Inter-Governmental Relations on Local Government Matters</i> which was signed by the Commonwealth Minister for Local Government, state and territory Ministers for Local Government, and the President of the Australian Local Government Association on behalf of all State Local Government Associations in April 2006. A <i>Schedule of Agreed Priorities</i> is appended to the Agreement

<b>25 January 2007</b>	The Sheridan Site PAR is approved and gazetted by the Minister for Urban Development and Planning. The PAR changes the zoning of the Sheridan site from industrial to residential
<b>April 2007</b>	The council undertakes an extensive review of its Strategic Planning Framework (as required under section 122 Local Government Act) and embarks on the preparation of a Community Plan (a 20 year community vision)
<b>10 April 2007</b>	The council rejects a proposal put forward by the state government (through the LMC) to contribute \$5m to the Cheltenham Park Racecourse development
<b>18 May 2007</b>	The Minister initiates the preparation of a draft PAR in relation to the Cheltenham Park Racecourse. The PAR changes the zoning from special uses zoning to residential
<b>June 2007</b>	The council undertakes community engagement, consultation and research regarding the Community Plan - Shaping the Western Suburbs 2027
<b>19 June 2007</b>	The state government announces a review of the planning and development system (the State Planning and Development Review)
<b>6 August 2007</b>	The council's Manager Planning and Development reports to the council's City Development Committee that the council administration is in the process of engaging planning consultants to establish a master plan and policy framework for the development of the Cheltenham Park Racecourse site and its surrounding environs to assist the council to provide a response to the draft PAR. GHD Pty Ltd is subsequently engaged as the planning consultant
	The Draft Consultant Brief for the Cheltenham Park Racecourse Environs Masterplan and Policy Study is attached to the Manager's report to the council's City Development Committee. The brief is wide ranging, and includes, <i>inter alia</i> , the requirement to assess, examine and establish opportunities to showcase TOD opportunities. The report is made available to the public on the council's website
<b>18 September 2007</b>	The council's DAP considers and approves an application by Stockland to excavate and fill the Sheridan land for the purpose of site remediation
<b>25 October 2007</b>	The Minister for Urban Development and Planning releases a draft DPA regarding rezoning the Cheltenham Park Racecourse site for public consultation
<b>November 2007</b>	The LMC announces AV Jennings and Urban Pacific Limited as the successful Woodville JV development consortium for the Cheltenham Park Racecourse site
<b>5 November 2007</b>	The council's Manager Planning and Development reports to the City Development Committee that the council, in collaboration with GHD Pty Ltd, has prepared a Master Plan and Strategic Policy Options Report for the future development of the precinct.
<b>26 November 2007</b>	The council's Manager Planning and Development reports to the council regarding the vesting of a portion of the former Sheridan site with the council as public open space
<b>December 2007</b>	The Planning Strategy for Metropolitan Adelaide is released

<b>10 December 2007</b>	The council approves the adoption of the Community Plan - Shaping the Western Suburbs 2027 for public notification. The Community Plan is a 20 year vision developed in conjunction with the community. It includes 'higher density housing serviced by well used transport hubs'
<b>19 December 2007</b>	A decision of the Environmental, Resources and Development Court of South Australia <i>Historical Society of Woodville &amp; Anor v City of Charles Sturt &amp; Anor</i> [2007] SAERDC 71 upholds the council's approval of Stockland's application to remediate the Sheridan site, subject to the council's conditions
<b>11 January 2008</b>	Public consultation in relation to the Cheltenham Park Racecourse DPA ends
<b>27 March 2008</b>	The Woodville JV purchases the former Sheridan site from Stockland
<b>27 March 2008</b>	The Report of the Planning and Development Review Steering Committee (compiled over previous eight months) is presented to the Minister for Urban Development and Planning for consideration by Cabinet. Key recommendations include: <ul style="list-style-type: none"> <li>• partnerships between local and state government</li> <li>• the need for increased density of housing to cater for population growth</li> <li>• transport corridors with potential TODs located along those corridors</li> <li>• joint teams from Planning SA, the Department of Transport, Energy and Infrastructure; the LMC; relevant local government authorities; and key state government agencies to identify priority sites such as potential TODs</li> <li>• 'as a matter of urgency state government should implement the development of Transit Oriented Development (TODs) to accommodate growth'</li> <li>• the LMC becoming the lead project management and implementation agency for TODs</li> </ul>
<b>16 April 2008</b>	The Woodville JV writes to the council's CEO discussing three options for the Precinct Concept Plans for the configuration of 'open space', and the implications of a land swap between parts of the St Clair land and the Sheridan site
	The Concept Plans propose the creation of a TOD at the existing Woodville Railway Station
<b>28 April 2008</b>	The council formally considers the idea of a land swap relating to the St Clair land for the first time and endorses in principle the concept of a land swap arrangement involving the redevelopment of a portion of the St Clair site
	The council agrees to commence the necessary negotiations and investigations to enable a land swap arrangement between the St Clair land and land within the Sheridan or Cheltenham Park Racecourse sites
<b>May 2008</b>	The council commences discussions with the LMC in relation to the concept of a land swap

<b>May 2008</b>	<p>In the 2008-09 State Budget the Premier announces initiatives to transform rail and tram networks in Adelaide.</p> <p>Premier Rann says, in the budget edition of the state government publication, New Connections:</p> <p style="padding-left: 40px;">In this year's State Budget we've announced the biggest single investment ever by a State Government in Adelaide's public transport system. It delivers initiatives to transform Adelaide's network into a vibrant, state-of-the-art system providing faster, cleaner, more frequent and efficient services for train, tram and bus commuters.</p>
<b>12 May 2008</b>	<p>Councillor Grant puts forward a motion to the council that the council recommence community consultation relating to St Clair, Woodville and Cheltenham Park Precinct prior to any endorsement of in principle agreements on behalf of its ratepayers and residents, and that the council accepts its responsibility of good governance relating to probity, transparency, and prudence. The motion is lost, 1 vote to 13 votes</p>
<b>15 May 2008</b>	<p>The Woodville JV informs the council that they are withdrawing from exploring the land swap with the council, for timing reasons</p>
<b>10 June 2008</b>	<p>The final PDR report is released by the state government</p> <p>The report proposes significant changes to the planning system from strategic planning through to development assessment. The State Planning Review identifies, <i>inter alia</i>, regional planning, TODs and higher density development along transport corridors</p>
<b>August 2008</b>	<p>The LMC reaches agreement with the Woodville JV in relation to various land transactions (subject to Cabinet approval) including the acquisition of the 47,171 m<sup>2</sup> of the Sheridan site from the Woodville JV</p>
<b>11 August 2008</b>	<p>The council receives an update on the progress of a previous resolution to explore a land swap involving St Clair land and the Sheridan site to deliver broader community and Woodville Road precinct benefits. The update informs the council members of the interest in proceeding with the land swap with the LMC:</p> <p style="padding-left: 40px;">The LMC is to be involved in this initiative and entails purchasing portion of the former Sheridan/Actil site from the JV and temporarily 'land banking' this land while a community revocation process is undertaken. If the community land process is supported by Council a 'swap' of equivalent land for open space purposes would then occur. If the community land revocation process does not occur then the LMC would develop the portion of the Sheridan/Actil site acquired. The LMC's interest in facilitating such a process is underpinned by the State Governments recent Planning Reform announcements which seek to create urban growth precincts around transport and activity centres ie TOD's. (Report, page 3)</p>
<b>14 August 2008</b>	<p>The Cheltenham Park Racecourse DPA is approved by the Minister for Urban Development and Planning and is adopted into the City of Charles Sturt Development Plan</p>
<b>26 August 2008</b>	<p>The LMC requests council to expeditiously instigate the process to revoke the community land status over 47,171m<sup>2</sup> of the St Clair site</p>
<b>8 September 2008</b>	<p>The council endorses its Corporate Plan - Shaping the Western Suburbs 2008 - 2012. This document is the council's next step in its strategic planning process and outlines the key actions to be put in place over the next four years in order to achieve the delivery of the Community Plan - Shaping the Western Suburbs 2027. The Plan includes TODs</p>

<b>22 September 2008</b>	The state government's Planning Review is endorsed by Cabinet
<b>November 2008</b>	The document Directions for Creating a New Plan for Greater Adelaide (the first step in the preparation of the 30 year Plan for Greater Adelaide) is released by the state government. The document states that transport corridors will be the organising principle of any new plan for Greater Adelaide and that these corridors will include TODs
	The nine-month consultative process to develop the new 30 year plan for Greater Adelaide commences with a series of workshops between state and local government
<b>10 November 2008</b>	The Consultant Brief for the Woodville Road Revitalisation Strategy is endorsed by the council's City Development Committee
	The committee also endorses the council staff to undertake a consultant selection process and to commence work with a suitably qualified consultant to prepare the Woodville Road Revitalisation Strategy for the further consideration of the council
<b>15 December 2008</b>	Cabinet approves transactions for the LMC to acquire 47,171m <sup>2</sup> of the former Sheridan site from the JV at a purchase price of \$15.8m exclusive of GST, and, subject to the revocation of the community land status over the St Clair site held by the council, for the LMC to swap the land with the council for 47,171m <sup>2</sup> of the St Clair site
<b>May 2009</b>	The council commences the Woodville Road Revitalisation Study
<b>9 June 2009</b>	The council resolves that the St Clair land is surplus to council requirements, on the basis that a similar parcel of land will be acquired by the council in exchange for the disposal of that land
	The council notes that the disposal of the St Clair land is subject to the revocation of its classification as community land
	The council endorses the exchange of 4.7 hectares of land that forms part of the existing St Clair Reserve
	The council endorses the Mayor and the CEO to sign and affix the common seal (where necessary) to agreements, including the land exchange agreements
	v considers the prudential report prepared on the basis of the prudential obligations under section 48(1) and (2) of the Local Government Act (attached as Appendix L to the report to the council)
	The council considers the review of the prudential report by the council's internal auditor, Deloitte.
	The council authorises the CEO to cause the relevant steps set out in the council's public consultation policy to be followed in accordance with section 194(2)(b) of the Local Government Act and the Community Consultation and Engagement Plan
<b>6 July 2009</b>	State government releases Planning the Adelaide We All Want - Progressing the 30-year Plan for Greater Adelaide (the draft 30 year plan) for consultation
<b>17 July 2009</b>	The concept plan for the St Clair development is released by the JV

<b>24 July 2009</b>	Cabinet approves a submission in respect of transfer costs associated with the sale of the Sheridan site to the council by the LMC. The result is that the vendor (LMC) is liable for the payment of all stamp duty, registration and other Government fees, rather than the purchaser (the council), as would normally be the case
<b>3 August 2009</b>	A Planning Policy Projects Budget Update presented to the council's City Development Committee informs the committee that \$35,000 has been allocated to undertake master planning of the St Clair TOD site adjacent to Woodville Railway Station and the subsequent DPA. The report says that this project will be driven primarily by the LMC
<b>13 August 2009</b>	The council issues a media release, titled What's Happening in Woodville, in relation to the land swap
<b>14 August 2009</b>	The council commences the public consultation process regarding the St Clair community land revocation. The consultation period is to end on 23 September 2009
<b>19 August 2009</b>	Public Notices and full page information advertisements about the St Clair community land revocation are published in the Weekly Times and Portside Messenger newspapers, as required under section 194 of the Act
<b>14 September 2009</b>	The council consents to rescind the land management agreement for the Sheridan site
<b>14 - 18 Sept 2009</b>	The council administration decides to extend the community consultation period on the St Clair community land revocation from 23 September 2009 to 25 September 2009
<b>25 September 2009</b>	Consultation on the St Clair community land revocation closes
<b>28 September 2009</b>	The council receives a petition of 260 people opposing the St Clair land swap
<b>30 September 2009</b>	End of consultation on the state government's draft 30 Year Plan for Greater Adelaide (Planning the Adelaide we all want - Progressing the 30-year Plan for Greater Adelaide)
<b>12 October 2009</b>	The council votes against a motion to hold a public meeting about St Clair
<b>21 October 2009</b>	The Weekly Times and Portside Messenger newspapers advise the public that the council will consider the land swap matter and hear deputations
<b>26 October 2009</b>	The consultation report on the community land revocation is received by the council. The council considers the results of the public consultation and hears deputations from the community
<b>26 October 2009</b>	Council receives two petitions opposing the St Clair land Swap; the first signed by 86 people, the second by 79 people

<b>9 November 2009</b>	<p>The council resolves to proceed with the next stage of the revocation process, and to submit a proposal to revoke the community land classification of part of St Clair Reserve to the Minister in accordance with section 194(3) of the Local Government Act</p> <p>Council resolves that a number of related matters must occur as part of the land swap including:</p> <ul style="list-style-type: none"> <li>• keeping Brocas Ave closed to through traffic</li> <li>• LMC providing council with a Site Contamination Audit Report or a Site Contamination Audit Statement relating to the Sheridan land confirming it is fit for its intended use as landscaped open space (such a statement was subsequently issued)</li> <li>• that new playing fields be established and fit for use prior to any relocation of sporting clubs, or school activities</li> </ul> <p>The council receives two petitions opposing the St Clair land swap; the first signed by 126 people, the second by 49 people</p>
<b>10 November 2009</b>	<p>The council seeks the approval of the Minister of the council's proposal to revoke the community land classification of a portion of the St Clair Reserve</p>
<b>12 November 2009</b>	<p>A Scheme Variation Agreement is entered into between the council and the Minister for Recreation, Sport and Racing and the Minister for Education varying the Scheme to exclude part of the St Clair Reserve Land and to include the Sheridan Land as community land</p>
<b>12 November 2009</b>	<p>Letters and a summary of council's responses to the issues raised in the community consultation regarding the community land revocation are sent to all correspondents to the consultation</p>
<b>19 November 2009</b>	<p>The Scheme Variation Agreement varying the Scheme to exclude part of the St Clair Reserve Land and to include the Sheridan Land as community land is confirmed by the Governor as required under section 5 of the <i>Recreation Grounds (Joint Schemes) Act 1947</i></p>
<b>19 November 2009</b>	<p>The Minister grants her approval for the revocation of the community land status</p>
<b>23 November 2009</b>	<p>The Scheme Variation Agreement varying the Scheme to exclude part of the St Clair Reserve Land and to include the Sheridan Land as community land is confirmed by the Governor as required under sections 5 and 7 of the <i>Recreation Grounds (Joint Schemes) Act 1947</i></p>
<b>23 November 2009</b>	<p>The council resolves to revoke the community land status of part of the St Clair land</p>
	<p>The Supreme Court grants opponents of the St Clair land swap leave to challenge the validity of the Minister's approval of the revocation of the community land status of portion of the St Clair Reserve</p>
<b>26 November 2009</b>	<p>Opponents of the land swap lodge Supreme Court action against the Minister for State/Local Government Relations</p>
<b>2 December 2009</b>	<p>In the Supreme Court, Justice Bleby quashes the State/Local Government Relations Minister's decision to approve the revocation of the community land status and orders it null and void</p> <p>The court also orders that the council's proposal to revoke the community land classification of portion of the St Clair land be returned to the Minister for State/Local Government Relations 'for consideration afresh'</p>

	according to law'
	The Minister for State/Local Relations formally delegates all of her powers and functions under section 194 of the Local Government Act to the Hon John Hill MP, the Minister for the Southern Suburbs, to review the revocation approval proposal as her delegate
<b>3 December 2009</b>	The Legislative Council refers an investigation to the office of the Ombudsman of South Australia concerning the St Clair revocation and land swap, under section 14(1) of the Ombudsman Act
<b>3 December 2009</b>	The council receives the Environmental Auditors Site Contamination Audit Statement confirming that the Sheridan site has been remediated as per the approved Remediation Strategy confirmed by the Environment, Resources and Development Court
<b>10 December 2009</b>	The Hon John Hill MP, the Minister for the Southern Suburbs, writes to the council to inform them that, as a delegate for the Minister for State/Local Relations, he approves council's revocation proposal
<b>14 December 2009</b>	The council decides again to revoke the community land status of the land pursuant to section 194(3)(b) of the Local Government Act as the Scheme affecting the St Clair reserve under the <i>Recreation Grounds (Joint Schemes) Act 1947</i> has been varied to exclude the relevant land and the Minister for the Southern Suburbs as delegate of the Minister for State/Local Relations has approved the proposal
<b>15 February 2010</b>	The Ombudsman investigation is advertised in The Advertiser
<b>17 February 2010</b>	The state government releases the 30 Year Plan for Greater Adelaide. The Plan identifies Cheltenham/Woodville as one of 14 significant TODs in the metropolitan area. The Plan is formally adopted as a volume of the South Australian Planning Strategy
<b>20 March 2010</b>	State government election
<b>15 June 2010</b>	The council resolves to take legal action against the SA Ombudsman in relation to the investigation
<b>16 June 2010</b>	The Ombudsman agrees to suspend the investigation
<b>8 July 2010</b>	Legal proceedings issued by the council against the Ombudsman in the Supreme Court of South Australia
<b>August 2010</b>	The 4.7 hectares of the Sheridan site is formally transferred to the ownership of the LMC
<b>9 November 2010</b>	The council and the Ombudsman reach a mediated settlement
<b>12 November 2010</b>	Voting closes in the local government elections
<b>17 December 2010</b>	The Ombudsman investigation resumes in light of the mediated outcome of the legal action
<b>9 February 2011</b>	State and Local Governments in South Australia enter into a new <i>State-Local Government Relations Agreement</i> . The purpose of the Agreement is to improve consultation arrangements and communication practices and to build a closer, more productive and collaborative working relationship between state and local government.

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## MAP



Government of South Australia, Department of Environment and Natural Resources 2011

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## **APPENDIX A – Mediation Heads of Agreement**

### **Heads of Agreement**

#### **Parties**

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- 1. City of Charles Sturt (Council)**
- 2. Richard Bingham (Ombudsman)**

#### **Recitals**

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- A. The parties participated in a mediation on 9 November 2010.
- B. The parties have agreed in principle to resolve the matter on these terms, subject to:
  - (1) the provision of the document referred to in paragraph I in terms which are satisfactory to Council;
  - (2) the agreement by resolution of the Council to these terms.

#### **Terms**

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1. The Ombudsman will on or before 17 November 2010 provide a further description of the administrative act that he is investigating together with some further description of the context, history and background to that administrative act.
2. Upon completion of interviews the Ombudsman shall provide transcript to each witness of their evidence and those witnesses who have given evidence prior to 9 November 2010 will be given the opportunity to request to be re-interviewed on that part of their evidence that relates to the topics described as “context, history and background” in paragraph 1.

For these purposes those witnesses who are part heard will be treated as having given evidence prior to 9 November 2010.

3. A transcript is provided on the basis it be kept strictly confidential save for obtaining bona fide legal advice.

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4. Witnesses who give evidence after 9 November 2010 (including those who are re-interviewed or complete their interviews after that date), shall be entitled to have legal representation at their interviews, on condition that each witness has separate representation from each other and the Council.
  5. The proceedings are to be discontinued with no order as to costs.
  6. The parties agree to release a joint press release in terms that are mutually acceptable. The parties will use their best endeavours to agree on the terms of that press release which will be subject to the approval by Council by resolution of the Heads of Agreement.
  7. The Chief Executive of the Council and the legal representative of the Council will, subject to the provision of the document referred to in paragraph 1 in terms which are satisfactory to them, recommend to the Council that it accepts these terms.
  8. These terms are subject to the agreement of Council by resolution. The Chief Executive will use his best endeavours to have the Council consider this agreement with a view to agreeing same prior to 25 December 2010.
  9. The mediation is adjourned pending the agreement of the Council.

DATED 9 November 2010

**Signed by Council**

**Signed by Ombudsman**

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## APPENDIX B – Further description of the administrative act



### FURTHER DESCRIPTION of the ADMINISTRATIVE ACT the subject of the INVESTIGATION by the SA OMBUDSMAN in respect of the CITY OF CHARLES STURT and the ST CLAIR REVOCATION DECISION and LAND SWAP

The administrative act is the proposal submitted in November 2009 and resubmitted in December 2009, by the City of Charles Sturt (**council**) to the Minister for State/Local Government Relations, to revoke the Community Land status of part of the St Clair Reserve (**the administrative act**).

The following issues form part of the context, history and background to the administrative act:

- (a) the manner of discharge by councillors of the council of their responsibilities in respect of the administrative act under the *Local Government Act 1999* (SA) (**LG Act**) and council Members Code of Conduct policy, including:
  - any possible impact of a councillor's membership of a political party
  - any potential or actual conflict of interest due to councillors being
    - members of a political party
    - employees working in the offices of MPs
    - employees of a State Government entity
  - the duty to hold council meetings in public
  - bringing an open mind to decision-making
  - acting without bias
  - acting with integrity and respect

In particular the manner of discharge of those responsibilities will be considered in light of:

- councillors' decision-making processes in considering and voting on the administrative act or in deciding to change their vote. This will also be considered in the context of:
  - the circumstances surrounding the Deputy Mayoral vote of the council in May 2005
  - a gathering at Parliament House in about November 2006 to consider presiding memberships of council committees
  - other gatherings of councillors outside council since the 2005 council and/or State Government initiated investigations and consultation

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- processes concerning the planning direction for the Cheltenham-Woodville precinct
- the extent to which councillors were otherwise influenced by their membership of a political party or by the Member for Croydon in the period since the 2005 council and/or State Government initiated investigations and consultation processes concerning the planning direction for the Cheltenham-Woodville precinct
  - council's engagement of a public relations consultant to communicate the reasons for the council's decision on the administrative act
  - councillors' letters of support for the administrative act
  - councillors' understanding of and reasons for supporting the administrative act
  - councillors' understanding of the role of the Land Management Corporation (LMC), developers and State Government policies in respect of the administrative act
  - the extent to which councillors were assisted by the Member for Croydon in their campaigns and in their council work insofar as that related to the administrative act, such as compiling letters of support for the administrative act
  - councillors' letters to the press about the response of the public to the administrative act
  - councillors' communications with Ms Kirsten Alexander's employer
- (b) confidentiality orders in council meetings leading up to the administrative act and in particular those meetings dated 28 April 2008, 11 August 2008, 23 February 2009 and 9 June 2009
- (c) the consultation process of the council, and the decision of council not to hold a public meeting in relation to the proposed revocation of the Community Land status of the St Clair land including:
- the community consultation process as available under the LG Act in respect of the administrative act
  - the information available to the community in respect of the proposed revocation prior to the administrative act
  - the timing of any consultation process and why council chose to consult when it did
- (d) management of the prudential risk in relation to the administrative act, including whether the council met its obligations under section 48 of the LG Act to manage any potential risk of conflict of interest
- (e) the use of council information and records management issues in relation to the administrative act, including:
- councillors' use of work provided email facilities for council business
  - the alleged provision to the Member for Croydon of an email sent to councillors on 4 December 2009 from Ms Rina Russo

December 2011

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## ABBREVIATIONS

ACB	Anti Corruption Branch of the South Australia Police
ALP	Australian Labor Party
the CEO	Chief Executive Officer of the council
the council	City of Charles Sturt
Cr	councillor
Criminal Law Consolidation Act	<i>Criminal Law Consolidation Act 1935 (SA)</i>
the code of conduct	City of Charles Sturt Code of Conduct
the communications plan	Communications and Engagement Plan for the St Clair Reserve Community Land Revocation endorsed by the council on 9 June 2009
the community engagement summary	St Clair Reserve Community Land Revocation – Community Engagement Summary, produced in response to the consultation report
the code of ethics	South Australian Public Sector Code of Ethics
the developer / Woodville JV	Woodville JV Pty Ltd - joint venture of Urban Pacific Ltd and AV Jennings
the Deloitte review	City of Charles Sturt, Land Swap Prudential Report Review, Deloitte Corporate Finance Pty Limited, June 2009
Development Act	<i>Development Act 1993 (SA)</i>
DAP	the council's Development Assessment Panel
DPA	Development Plan Amendment under the <i>Development Act 1993 (SA)</i>
DPLG	Department of Planning and Local Government
DTF	Department of Treasury and Finance
the land swap	the council proposed to swap the St Clair land for the Sheridan land, owned by the LMC
LGASA	Local Government Association of South Australia
Local Government Elections Act	<i>Local Government (Elections) Act 1999 (SA)</i>
LMC	Land Management Corporation
Local Government Act	<i>Local Government Act 1999 (SA)</i>
the Minister	Minister for State/Local Government Relations
MP	Member of Parliament

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<b>Ombudsman Act</b>	<i>Ombudsman Act 1972 (SA)</i>
<b>PDR Report</b>	Report of the Planning and Development Review Steering Committee released on 10 June 2008
<b>the platform</b>	South Australian Labor Platform for 2009
<b>the precinct</b>	Cheltenham Woodville precinct - land bound by Cheltenham Parade to the west, Torrens Road to the north, Woodville Road to the east and the railway line into the south encompassing the Cheltenham Park racecourse, Trident Plastics, the former Sheridan factory (Actil) site, Woodville High School and the St Clair Recreation Centre and adjacent reserves.
<b>public consultation policy</b>	City of Charles Sturt Public Consultation Policy
<b>the relevant period</b>	2006-2010 term of the council
<b>RCM</b>	Responsible Council Member
<b>the revocation</b>	revocation of the community status of land at St Clair Reserve under section 194 of the <i>Local Government Act 1999 (SA)</i>
<b>the revised agreement</b>	state-local government relations agreement between the state government and the LGASA ('for and on behalf of South Australian local governments') revised on 21 November 2006
<b>Royal Commissions Act</b>	<i>Royal Commissions Act 1917 (SA)</i>
<b>the Sheridan land</b>	land from the former Sheridan industrial site, Woodville to be swapped with the St Clair land,
<b>the St Clair land</b>	land from the St Clair Reserve, Woodville to be swapped with the Sheridan land, Woodville
<b>Stockland</b>	Stockland Pty Ltd, former owners of the Sheridan industrial site
<b>TOD</b>	Transit Oriented Development
<b>Whistleblowers Protection Act</b>	<i>Whistleblowers Protection Act 1993 (SA)</i>







OmbudsmanSA