

Report
Full investigation - *Ombudsman Act 1972*

Complainant	Hon John Darley MLC
Agency	City of Burnside
Ombudsman reference	2013/07936
Date complaint received	15 August 2013
Issues	<ol style="list-style-type: none">1. Whether Cr Leni Palk breached the conflict of interest provisions of the Local Government Act2. Whether Cr Palk demonstrated apprehended bias in participating on a selection panel for board members of Burnside Retirement Services Incorporated3. Whether the council failed to make appropriate arrangements to protect the integrity of the interview and selection process

Jurisdiction

Burnside Retirement Services Incorporated (**BRSI**) is a prescribed association under the *Associations Incorporations Act 1985*. The City of Burnside (**the council**) is the sole ordinary member of BRSI, and is responsible for appointing Council Board Members and Independent Board Members (previously known as Council Appointed Members and Council Selected Members) to the board of BRSI (**the board**).

This complaint concerns the actions of the council in fulfilling its responsibilities under the BRSI constitution, and is therefore within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

As one element of the complaint I have considered the council's actions in appointing a probity auditor, and the actions of the probity auditor. I do so on the basis that the probity auditor was acting in performance of functions conferred under a contract for services with the council, being an agency to which the Ombudsman Act applies, and as contemplated by the definition of 'administrative act' in section 3 of the Ombudsman Act.

In his response to my provisional report, the complainant noted that he was aggrieved by the actions of the Local Government Governance Panel (**the LGGP**) in conducting its investigation into his complaint. He asked me to consider whether the LGGP was acting in performance of functions conferred under a contract for services with the council, and was thus within my jurisdiction.

The LGGP is established by the Local Government Association of South Australia (**the LGASA**), but has no separate corporate identity in its own right. Consequently, it has no

capacity to enter into a contract for services. Further, in my view it is clear that the LGGP does not fall within the definition of an agency to which the Ombudsman Act applies. It follows that the LGGP is not within my jurisdiction.

In this case, the council entered into a contract with the LGASA for the LGGP to conduct an investigation into the council member's conduct. It might thus be argued that the LGGP was acting as the agent of the LGASA in carrying out the terms of the contract for services between the LGASA and the council.

However, it is clear from its establishing documents¹ that the LGASA has no capacity to influence the actions or decisions of the LGGP, and thus in my view the LGGP was not acting on behalf of the LGASA in the sense required for an agency relationship.

It might also be argued that there was a separate contract for services between the council and the individual member of the LGGP who conducted the investigation. However, the member was allocated to the investigation by the Chair of the LGGP, and was remunerated by the LGASA. The council had no opportunity to select the member. I can see no evidence of any direct contractual relationship between the council and the individual member.

I therefore maintain my view that in this case the actions of the LGGP are not within my jurisdiction.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the council, including the legal advice with which it was provided
- considering sections 41, 73(1), 74(1) and 75(1) of the *Local Government Act 1993*
- considering the Constitution of BRSI as amended in February 2003, and in operation at the relevant time (**the former rules**)
- considering the replacement rules adopted by the council on 11 June 2013 (**the new rules**)
- considering the Local Government Governance Panel report into alleged breaches of the council's code of conduct by four elected members (**the LGGP report**); and the statement provided by Cr Palk to that investigation
- considering the report dated 21 August 2013 provided to the council by Powell and Co Pty Ltd, Chartered Accountants (**the probity auditor's report**)
- considering the District Court of SA decisions of *Petrovski v Pain* [2013] SADC 6 and *Petrovski v Dolling* [2013] SADC 27; and the SA Local Government Association Guidelines on conflict of interest (**the LGA guidelines**)
- preparing a provisional report and circulating it to the parties and Cr Palk for comment
- meeting with the complainant to discuss his response
- considering the written responses received from the parties and Cr Palk
- preparing this final report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be

¹ See the description on the LGASA website: <http://www.lga.sa.gov.au/page.aspx?u=2136#e3720>, viewed at 26 November 2013.

upheld. That decision recognises that greater care is needed in considering the evidence in some cases.² It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...³

Responses to provisional report

I met with the complainant on 29 October 2013 to discuss my provisional report. He made the following points:

- he considers that the LGGP may be a contractor to the council and thus its actions may be within my jurisdiction. He maintains the view that the LGGP process was badly flawed because it didn't interview all the councillors, and he has never had the opportunity to put his views to the council
- he considers that Cr Palk breached the council's code of conduct in several respects. I note that these alleged breaches were the subject of the LGGP investigation, and for the reasons outlined above I do not intend to revisit that investigation
- he noted that when he made his deputation it was the mayor who disclosed the fact of the complaint against Cr Palk and the other councillors, not him.

The complainant also provided a written response which I received on 1 November 2013. He made the following points:

- he maintains his view that Cr Palk acted with apprehended bias in participating on the selection panel
- he has never been permitted to respond in public to the allegations made by Cr Palk, and he is 'astounded' that she would make the allegations in a public forum without first checking with those involved
- the probity auditor refused to speak to him about the interview process, notwithstanding that the complainant was referred to the auditor by a council staff member of the interview panel
- the probity auditor was unaware of some relevant matters until the complainant raised them
- he did not refuse to answer questions at the interview, but refused to be interviewed by Cr Palk and Cr Piggott.

I have considered the points made by the complainant, but they have not altered my views about his complaint.

The council responded to my provisional report on 4 November 2013, noting that the report incorrectly referred to a transcript of Cr Palk's remarks at the council meeting held on 9 April 2013 as having been provided to me by the council. In fact the transcript was provided by the complainant, and I have amended this report to correct the reference. The council made no other comment.

I discussed my provisional report with Cr Palk on 15 October 2013, and she sought further information by email dated 17 October 2013. On 18 October 2013, she advised me by telephone that she did not wish to make any further comment.

² This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

³ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

Background

1. BRSI manages Pineview retirement village on behalf of the council. The former rules required a maximum of six members to sit on its board. At the relevant time, there were 6 board members, three of whom were elected members of the council; and three who were Council Selected Members, chosen by the council. Clause 6(a) of the former rules provided as follows:

The Board shall consist of a maximum of six (6) members and a minimum of four (4) members. Except in circumstances where there are five (5) members of the Board the Council shall from time to time appoint one half of the total number of members of the Board ('Council Appointed Members'). Where there are five (5) members of the Board, the Council shall from time to time appoint three (3) Council Appointed Members. The remaining members shall be selected and appointed by the Council ('Council Selected Members') following any recommendation from such members as shall remain on the Board so that the number of members of the Board shall not be less than four (4).

- (i) Council selected (sic) Members shall hold office for three (3) years.
 - (ii) Council Selected Members with in excess of three (3) continuous years' service will be deemed to retire at the Annual General Meeting. Should the number of Board Members affected by this provision exceed two (2) then the two (2) longer serving shall retire with the other Member continuing for a further twelve (12) months.
 - (iii) If the members so affected have equality of service the two (2) to retire shall be chosen by lot.
 - (iv) All retiring members shall be eligible for re-appointment.
 - (v) Appointments of Council Selected Members to the Board must not be made without first inviting applications from interested persons, including advertising the vacancy or vacancies and following selection policies and procedures as determined from time to time by the Board or Council. The Board shall consider all such applications and make a recommendation to the Council with respect to appointments. The Council may accept or reject any recommendation of the Board either wholly or in part.
2. In September 2012, the council became aware that the terms of three Council Selected Members were due to expire, including that of the complainant. On the expiration of their appointments, the complainant and the other two members were eligible for reappointment. The minutes from a board meeting held on 5 November 2012 indicate that:
 - the three positions of Council Selected Member were publicly advertised, in accordance with clause 6(v) of the former rules
 - the complainant and the two other members were recommended by the board to the council for reappointment.
 3. The council adopted this recommendation on 26 March 2013. The motion passed by the council was as follows:

Councillor Palk moved:

C9100

1. That the report be received.
2. That, on the recommendation of the Board of Burnside Retirement Services Inc ('BRSI') made 6 November 2102, Council appoints the following persons to the Board of BRSI (in alphabetical order):
 - 2.1 Mr John Attwood

2.2 Hon John Darley, MLC

2.3 Ms Jenny Low

in accordance with clause 6 of the Constitution of BRSI.

2. That the appointees be thanked for their past contribution and informed of the appointments affected by this resolution.
3. That this matter be otherwise adjourned for further consideration at the first meeting of Council in July 2013.
4. That the Board of BRSI be informed of this resolution by the CEO and invited to make such comments as it may see fit in relation to the matter.

Councillor Palk left the meeting at 9.41 pm and returned at 9.43 pm.

Seconded by Councillor Wilkins

CARRIED UNANIMOUSLY

4. On 9 April 2013, on a motion moved by Cr Palk, the council revoked its previous decision to reappoint the complainant and the other two members (**the revocation motion**). The motion passed by the council was as follows:

Councillor Palk moved:

C9114

1. That paragraphs 2, 3 and 4 of Resolution C9100 (including subparagraphs) are revoked.
2. That the Hon. John Darley MLC, Mr John Attwood and Ms Jenny Low be thanked for their past contribution to Burnside Retirement Services Inc.
3. That this matter be otherwise adjourned for further consideration by Council at its meeting on 28 May 2013.
4. That the Board of BRSI be informed of this resolution by the CEO and that the amended adjourned date be brought to its attention.

Seconded by Councillor Lemon

CARRIED

5. In moving the revocation motion, Cr Palk submitted that the reasons for it were (in summary):
 - that Ms Low worked for the complainant, and this fact had not been disclosed
 - the complainant was involved as a member of the interview panel for the Independent Board Member position.

A transcript of Cr Palk's remarks in moving the revocation motion has been provided to me by the complainant, and this quotes her as follows:

I move in with accordance with what's on the papers I would like to just say as a preliminary thing, that I will have a conflict when it comes to considering the terms of the Constitution and therefore I'd ask that you don't raise that (this doesn't concern it) and I ask that you don't raise it tonight or otherwise you will have to send me out of the room which would be not a very nice thing to do as this is my motion and I would like not to have to make points of order on it. So if I could ask you to bare (sic) that in mind. So here are my submissions to you.

I was the person to move resolution C9100 and I did it in a considered way. After that night was over, after it was all said and done I learned some things I did not know before and had I known them before I would have not done that. One matter is that one of the persons recommended works for one of the other people in there and no information was provided to the council addressing the obvious issue. I'm not saying that you can't do the job if you're in that position but I would be (sic) expected to see the issues that that raises have been addressed in the interview process. More importantly though the selection process which

underpins the recommendations to Council for appointment to this Board with effect from November 2012 was flawed to a material degree and had I been aware of this I would not have moved the motion that I did. Now that I am aware of it, and will tell you of it, I believe that Council actually can't afford to allow this resolution to stand unchanged. I feel I really regret that this has to happen but I feel I have no choice. I feel this is a matter of governance that really has to be attended to – and that is not legal advice.

At the time that the interviews were conducted the terms of all of the three, we'll loosely call them independent members for want of another name, of the Board of I'll call it Pineview, that's easier had not expired. There were four applicants for the three positions, The hree (sic) positions were advertised for the independent members, there were four applicants. Three of the applicants where (sic) existing independent board members, only 1 person was interviewed and that was the outsider, I'll call that person for want of a better word. One of the applicants, Mr Darley, was a member of the panel that interviewed that outside applicant. This may probably be an oversight or a mistake but nonetheless less (sic), it is inappropriate that an applicant for a position have any input whatsoever in the selection process. The fact that this actually happened this time is regrettable but nonetheless I think makes the recommendation to council one that is not appropriate to act upon (sic) and that is why I feel we shouldn't have, even though I did it, shouldn't have done what we did. All applicants should be interviewed and that is the first point you know you don't just take three and interview a fourth. All applicants should be interviewed. No applicants should participate in that process at all other than as a interviewee. I am really concerned that when council made this resolution it wasn't doing it off the back of (sic) its own sort of independent interviewing process if you like, it was acting on a recommendation brought to us and as that recommendation has a fundamental flaw I don't think it can stand. I therefore moved it in the way I have and I've suggested that here the motion that further consideration of this matter, which includes the constitutional issue and all the other things in the report that we had last time. When you read these things in conjunction with C9100 that that day be brought forward to 28th May and that means there's still enough time for of (sic) consultation. Well not consultation – there's still enough time for feedback for anyone who wants to have input but the time span for when there will next be a full Board is kept as short as possible. I'd ask that you support it.

6. On 22 May 2013, the complainant wrote to the mayor complaining that in moving the revocation motion, Cr Palk failed to outline the true facts. He alleged that consequently Cr Palk had breached the council's code of conduct. He stated that:
- whilst Ms Low is his Parliamentary Adviser, she is not his employee. Ms Low is employed by the Department of Treasury and Finance
 - whilst he was involved as a participant in the board's interview panel for the independent members, he was not involved in their selection. He stated that the board had agreed that the interview panel should comprise the three councillor members of the board, and one independent member. In his letter of complaint to the mayor, the complainant states:

It was made clear that the final selection would be left to the Councillor Board members.

7. In his 22 May 2013 letter, the complainant also complained that Crs Mark Osterstock, Di Wilkins and Gail Monceaux had breached the council's code of conduct because they did not consider it necessary to inform the council 'of the agreed process or reasons for not interviewing Ms Low, Mr Attwood and [him]'.⁴
8. The mayor referred the complaint to the Local Government Governance Panel, which commenced an investigation.
9. Following the passage of the revocation motion, at a meeting held on 28 May 2013 the council determined to call for applications for the positions of Independent Board Member⁴ of the BRSI.⁵ In the same motion, the council:

⁴ From this point in this report, I have adopted the terminology used by the council in the relevant motion (Motion C9185 of 28 May 2013), notwithstanding that the former rules were still in operation at this date. The former rules refer to Council Selected Members.

- established the Burnside Retirement Services Incorporated Independent Board Member Selection Panel (**the selection panel**) to assess candidates and to recommend a shortlist for final consideration by the council
- determined that the selection panel should consist of three elected members along with the Chief Executive Officer and the General Manager, Corporate Services of the council
- determined that a secret ballot should be undertaken to identify the three elected members to participate on the selection panel
- determined that the selection panel should report to the council; and should cease to exist once the Independent Board Members had been appointed.

10. The relevant motion was moved by Cr Palk in the following terms:

Councillor Palk moved:

C9185

1. That the Report be received.
2. That Council calls for applications for the positions of Independent Board Members to the Burnside Retirement Services Incorporated Board from interested persons with experience and/or qualifications in finance, law, management/business administration and retirement village services.
3. That a Burnside Retirement Services Incorporated Independent Board Member Selection Panel be established and that it consist of three Elected Members appointed by Council, the Chief Executive Officer and the General Manager, Corporate Services and be tasked with short-listing the applications received, conducting interviews and making recommendations to Council for the positions of Independent Board Members on the Burnside Retirement Services Incorporated Board.
4. That Council undertakes a secret ballot process, as identified in Attachment A of this Report, to determine the three Elected Members to be appointed to the Burnside Retirement Services Incorporated Independent Board Member Selection Panel.
5. That a report be presented to Council by the Burnside Retirement Services Incorporated Independent Board Member Selection Panel (through the Administration) as soon as practicable following the interviews, with recommendations for the positions of Independent Board Members.
6. That the Burnside Retirement Services Incorporated Independent Board Member Selection Panel will cease to exist once both Independent Board Members are appointed to the Burnside Retirement Services Incorporated Board.

Seconded by Councillor Lemon

CARRIED

11. Crs Palk, Grant Piggott and Osterstock were successful in the secret ballot, and Cr Palk then moved a motion appointing them to the selection panel. Three elected members⁶ declared an interest in the motion arising from their positions as board members on BRSI, but the minutes of the meeting noted that section 74(4b) of the Local Government Act applied in these circumstances to exempt them from leaving the meeting, and to enable them to continue to participate in the performance of their functions as elected members.

12. The relevant motion was moved by Cr Palk in the following terms:

Councillor Palk moved:

⁵ Motion C9185, 28 May 2013.

⁶ Crs Osterstock, Wilkins and Monceaux.

C9186

That Councillor Palk, Councillor Piggott and Councillor Osterstock be appointed to the Burnside Retirement Services Incorporated Independent Board Member Selection Panel.

Councillor Hasenohr left the meeting at 8.39 pm.

Seconded by Councillor Monceaux

CARRIED UNANIMOUSLY

13. On 11 June 2013, the council adopted new rules for BRSI. Amongst other things, these altered the appointment requirements for Council Selected Members (now termed 'Independent Board Members'). Under clause 18 of the new rules, Independent Board Members shall hold office for a term of 2 years, and are eligible for reappointment only if they have not served for 4 or more years.
14. In his complaint to me, the complainant stated that he had expressed concern to the General Manager, Corporate Services about the CEO and Crs Palk and Osterstock being on the selection panel. On 2 July 2013, the CEO wrote by email to the selection panel:

I wish to advise that I am resigning from the position of member of the Burnside Retirement Services Inc Selection Panel forthwith.

I recommend that Graeme Brown be appointed by Council to take my place on the Panel. As my appointment was ratified by a Council resolution, any changes to the composition of the Panel will need to be via Motion on Notice.

In addition to the above, I also recommend that the Council engages a Probity Auditor to oversee the activities of the Selection Panel.
15. At the council meeting held on 9 July 2013, the CEO was replaced on the selection panel by the General Manager, Urban Services. The council also agreed to engage a probity auditor.⁷
16. By letter dated 22 July 2013, the council engaged Powell & Co as probity auditor. The probity auditor subsequently produced a report to the CEO dated 21 August 2013.
17. On 5 August 2013, Cr Osterstock resigned from the selection panel by email. He commented:

It has been drawn to my attention that one of the candidates that our panel has chosen for interview is of the perception that I may exhibit a bias against them, given their recent interactions with our Council, and me, personally.

...

Whilst I am of the firm view that their perception is unfounded and indeed, without merit, I have decided, in the best interests of the panel, and more importantly the process, to stand down as a member of the BRSI selection panel.
18. At a council meeting on 13 August 2013, Cr Palk moved to not appoint a replacement for Cr Osterstock, due to the fact that the selection process had commenced, and concerns over delay in filling the board positions. This motion was carried unanimously.⁸ Three elected members⁹ declared an interest in the relevant motion arising from their positions as board members on BRSI, but the minutes of the meeting noted that section 74(4b) of the Local Government Act applied in these circumstances

⁷ Motion C9275, 9 July 2013.

⁸ Motion C9327, 13 August 2013.

⁹ Crs Osterstock, Wilkins and Monceaux.

to exempt them from leaving the meeting, and to enable them to continue to participate in the performance of their functions as elected members.

19. The terms of the motion were as follows:

Councillor Palk moved:

C9327

1. That Council notes the resignation of Cr Osterstock from the Burnside Retirement Services Incorporated Selection Panel.
2. That having regard to:
 - 2.1 the fact that the Panel has completed the formulation of questions and short-listing of applicants and has provisionally scheduled interviews;
 - 2.2 the need for the appointment of the "Independent Members" of the Burnside Retirement Services Incorporated Board to be effected as soon as possible; and
 - 2.3 the delay inherent in re-commencing the process in order to appoint another person in Cr Osterstock's place.

Council resolves not to appoint an Elected Member to take the place of Cr Osterstock and authorises the Panel as now constituted (namely, Crs Palk and Piggott, Mr Morris and Mr Brown) to proceed with the process of making recommendations to Council for the positions of independent members of the Burnside Retirement Services Incorporated Board.

Seconded by Councillor Lemon

CARRIED UNANIMOUSLY

20. The selection panel shortlisted the complainant for the position and offered him an interview. This interview was originally scheduled for 8 August 2013, but was rescheduled to 15 August 2013 after Cr Osterstock withdrew from the selection panel.
21. The complainant contacted the probity auditor on 12 August 2013 raising his concerns about Cr Palk's perceived conflict of interest in participating on the selection panel, resulting from his complaint against her.
22. On 13 August 2013, the council considered the LGGP report into the complainant's complaint against Crs Palk, Monceaux, Wilkins and Osterstock. The panel found that none of the councillors had breached the council's code of conduct. The report was considered by the council in confidence on the basis that to deal with it in public would involve an unreasonable disclosure of the personal affairs of the four elected members;¹⁰ and each of them declared an interest and left the meeting. The remaining members of the council carried the following motion:

Councillor Lemon moved:

C9347

1. That the Report be received.
2. That the Local Government Governance Panel Report on the investigation of a Code of Conduct Complaint, the Kellely Jones letter dated 21 July 2013 to Stephen Hains and the letter from the Local Government Governance Panel dated 1 August 2013, be received.
3. That Council notes that the investigation undertaken by the Local Government Governance Panel, in relation to the alleged breach of the Code of Conduct by Councillor Palk, Osterstock Wilkins and Monceaux, found that Councillors Palk, Osterstock, Wilkins and Monceaux did not breach the Council's Code of Conduct.

¹⁰ I note that the code of conduct promulgated under section 63 of the Local Government Act on 29 August 2013 requires that the report of an investigation by the Ombudsman of an alleged breach of Part 3 of the code (which deals with misconduct) should be provided to a public meeting of the council.

4. That Council acknowledges that there has been no breach of the Code of Conduct by Councillor Palk, Osterstock Wilkins and Monceaux and that Council takes no further action in relation to the complaint.

Seconded by Councillor Davey

CARRIED UNANIMOUSLY

23. On 14 August 2013, the complainant was informed of the outcome of his complaint.

24. Prior to the selection panel conducting interviews on 15 August 2013, the probity auditor was advised that there were no existing code of conduct matters against elected members. According to his report:

I was satisfied that based on evidence demonstrated throughout the process and now that the code of conduct had been lifted, the perceived conflict of interest had been effectively managed and the interviews should proceed as planned.

25. On 15 August 2013, the complainant attended his interview. The selection panel consisted of Crs Palk and Piggott, Mr Nigel Morris, Mr Graeme Brown and the probity auditor.
26. The complainant requested the presence of his counsel, which the selection panel accepted. The complainant objected to Cr Palk's involvement and refused to respond to questions, though he did not withdraw his application. He also objected to the probity auditor's determination that the conflict of interest was no longer an issue.
27. At its meeting held on 27 August 2013, the council appointed three candidates to the positions as Independent Board Members of the board. The complainant was unsuccessful in his application. Three elected members¹¹ declared an interest in the relevant motion arising from their positions as board members on BRSI, but the minutes of the meeting noted that section 74(4b) of the Local Government Act applied in these circumstances to exempt them from leaving the meeting, and to enable them to continue to participate in the performance of their functions as elected members.
28. The relevant motion was moved by Cr Piggott, and seconded by Cr Palk, in the following terms:
- Councillor Piggott moved:
- C9368
1. That the Report be received.
 2. That the following recommendations from the Burnside Retirement Services Incorporated Selection Panel be adopted by Council:
 - 2.1 That subject to National Police Clearance Certificate clearance, that Council appoints the following persons as Independent Board Members of Burnside Retirement Services Incorporated.
 - 2.1.1 Alison Evenden
 - 2.1.2 Bruce Spangler
 - 2.1.3 Roseanne Healy
 - 2.2 That subject to 2.1 above, that Council appoints Alison Evenden as Chair of Burnside Retirement Services Incorporated.

Seconded by Councillor Palk

CARRIED UNANIMOUSLY

¹¹ Crs Osterstock, Wilkins and Monceaux.

Whether Cr Palk breached the conflict of interest provisions of the Local Government Act

29. Section 73(1) of the Local Government Act defines the circumstances in which an elected member has 'an interest in a matter' as follows:

73—Conflict of interest

- (1) A member of a council has an interest in a matter before 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).

30. Section 74(1) provides:

A member of a council who has an interest in a matter before the council must disclose the interest to the council.

31. Section 74(4) provides:

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.

32. Section 75(1) provides that the provisions of Division 3 of Part 4 extend to committees and to members of committees established by councils as if a committee were a council; and a member of a committee were a member of a council.

33. In my view, the selection panel falls within the definition of a 'committee' provided by section 41 of the Local Government Act. It was established 'to inquire into and report to the council on a matter within the ambit of the council's responsibilities.'¹²

34. The complainant has alleged that Cr Palk had a conflict of interest in participating on the selection panel in light of the fact that he had complained to the mayor about her conduct in moving the revocation motion. I have interpreted this complaint as extending to Cr Palk's participation in the council debates concerning the revocation motion and the establishment of the selection panel; and to her participation in the selection panel proceedings as a committee of the council.

35. I must first be satisfied that Cr Palk had an 'interest in a matter' in relation to the council and selection panel decisions, within the meaning of section 73(1). That is, I

¹² Section 41(2)(b) of the Local Government Act.

must be satisfied that by participating in the deliberations as she did, Cr Palk would receive a benefit or suffer a detriment or would have a reasonable expectation of receiving a benefit or suffering a detriment of the type described in section 73. Such benefit or detriment should not be shared with all or a substantial proportion of ratepayers, electors or residents of the area, or some other substantial class of persons.

36. In the recent case of *Petrovski v Dolling*,¹³ the District Court emphasised that the legislation is confined to the type of interest referred to in section 73 and ‘not to conflicts of interest at large’.¹⁴ The disclosure requirement in section 74 is confined to disclosure of the type of interest in a matter described in section 73.
37. Further, the court said that the question of whether a council’s resolution gives rise to a section 73 interest, must be determined by a consideration of the actual terms of the resolution.¹⁵ In addition, the test is that the elected member ‘would’ receive a benefit or suffer a detriment or ‘would have a reasonable expectation’ of receiving a benefit or suffering a detriment. Speculation about the consequences of the matter being decided in a particular manner is not sufficient.

The council debates

38. Over the course of the council’s consideration of this matter, Cr Palk moved five relevant motions, and participated in debate on them. They were:
- Motion C9100 moved at the meeting held on 26 March 2013
 - Motion C9114 moved at the meeting held on 9 April 2013 (**the revocation motion**)
 - Motions 9185 and 9186 moved at the meeting held on 28 May 2013
 - Motion C9327 moved at the meeting held on 13 August 2013.

Cr Palk also seconded, and participated in debate on, Motion C9368 moved at the meeting held on 27 August 2013 by Cr Piggott.

39. The full text of each of the six relevant motions is set out above.
40. I have considered the terms of each of the resolutions contained within the six motions set out above. I do not consider that Cr Palk had an interest within the meaning of section 73(1) of the Local Government Act in any of them.
41. I acknowledge that a dispassionate observer may conclude that Motion 9186 moved at the meeting held on 28 May 2013, through which Cr Palk effectively proposed to appoint herself to the selection panel, involved an interest on her part as that phrase is commonly understood. However, in my view Cr Palk had no identifiable pecuniary or non-pecuniary benefit or detriment (and no reasonable expectation of such a benefit or detriment) arising from the appointment; and hence she was under no requirement to declare an interest as defined in section 73(1). Further, the proposed appointment followed the conduct of a secret ballot, and to that extent Cr Palk was doing no more than giving effect to the wishes of the council as expressed through the ballot.

The selection panel proceedings

42. I have considered the task undertaken by the selection panel, namely the selection of candidates for interview; the conduct of interviews; and the selection of the candidates to recommend to the council for appointment. I do not consider that Cr Palk had an

¹³ *Petrovski v Dolling* [2013] SADC 27 (5 March 2013).

¹⁴ *Ibid*, [41].

¹⁵ *Ibid*, [34].

interest within the meaning of section 73(1) of the Local Government Act in any of these matters.

43. I have no evidence of any bad faith on the part of Cr Palk in her participation in the selection panel's deliberations. Nonetheless, I have considered whether possible retribution against a person who lodged a complaint against her (i.e. the complainant) may amount to a non-pecuniary benefit to her.
44. Whatever might be thought about the wisdom of her participation in these circumstances, I have concluded that Cr Palk had no identifiable pecuniary or non-pecuniary benefit or detriment (and no reasonable expectation of such a benefit or detriment) arising from the selection panel's deliberations; and hence she was under no requirement to declare an interest as defined in section 73(1).

Perceived conflict of interest

45. 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; and it may only ever be a 'perception' of a conflict of interest. Concerns about an elected member's perceived conflict of interest may also lead to suggestions that the member has acted with bias in their decision making. In my view, the management of perceived conflicts of interest is just as important for community trust and integrity of a council, as management of actual conflicts.

46. I note the comments of the South Australian District Court in the decision of *Petrovski v Pain*¹⁶ emphasising the importance of the role of elected members and their responsibility to properly discharge their public duties in relation to conflict of interest:

The business of local council is an important one. Those who are elected to council must take their responsibilities and obligations seriously so as to reassure the public, who elected them that they are acting in a proper manner in the discharge of their public duties. This is particularly relevant in relation to any conflict of interest that may arise.

47. I note also that the LGA guidelines provide that elected members should be alert to perceptions of conflict of interest, and act accordingly:

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.¹⁷

48. The LGA recommends that in the circumstances above, the affected council member should declare their interest and withdraw from voting on the particular matter which lies for decision.
49. I agree with the LGA's position; and I consider it accords with community expectations. In my view, the Local Government Act should be amended to reflect these expectations. I have already referred to this issue in my report on my investigation into the City of Charles Sturt in 2011 in response to a parliamentary referral concerning the St Clair Land Swap.¹⁸

¹⁶ *Petrovski v Pain* [2013] SADC 6, [52].

¹⁷ Local Government Association of South Australia, Conflict of Interest Provisions – Guidelines and Examples, March 2007, updated October 2010, p15.

¹⁸ <http://ombudsman.sa.gov.au/publications/reports>

Opinion

In light of my conclusions outlined above, my final view is that Cr Palk did not breach section 74(1) of the Local Government Act. However, I consider that her actions were ‘in accordance with ... a provision of an enactment ... that is or may be unreasonable’ within the meaning of section 25(1)(c) of the Ombudsman Act.

I recommend under section 25(2)(d) of the Ombudsman Act that the Local Government Act be amended to address perceived conflicts of interest on the part of elected members.

Whether Cr Palk demonstrated apprehended bias in participating on a selection panel for board members of Burnside Retirement Services Incorporated

50. I have considered whether Cr Palk brought an open mind to the council’s deliberations about the issue of appointing the members of the BRSI board; and the common law rules of natural justice (or procedural fairness), which require that public officers should make decisions free from any bias.
51. These rules mean that decision-makers must bring an impartial and unprejudiced mind to all matters which affect directly the interests of an individual, and they must approach this administrative decision making with an open mind to ensure that they act fairly and impartially. This is a separate, additional requirement from the conflict of interest obligations (although a bias may be based on an interest or arise out of prejudice). Bias focuses on the conduct of the decision-maker rather than the interests.¹⁹
52. The test for determining if a public officer has an apprehended bias is:
- 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.²⁰
53. The application of the bias rule for elected municipal councillors is much less onerous than for judicial officers.²¹ The reason for this is that elected members will often be familiar with issues that they are expected to vote on, and may indeed hold strong views in relation to them. The law has recognized this reality and taken the view that such circumstances should not invoke a strict application of the rule against bias.
54. Adopting this approach, the courts have made it far more difficult to establish apprehended bias in an elected member based on their personal views in relation to a matter. In the Victorian Supreme Court decision of *Winky Pop Pty Ltd v Hobsons Bay City Council*,²² Kaye J described the task in the following way:
- The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the Court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of council in respect of all matters which are decided at public meetings at which objectors are entitled to be heard.

¹⁹ NSW Ombudsman, Good Conduct and Administrative Practice Guidelines (2nd Edition), p A-31.

²⁰ *Johnson v Johnson* [2000] HCA 48 at 11.

²¹ This paragraph and the next draw from the following publication by the Victorian Crown Solicitor’s Office: <http://vgso.vic.gov.au/content/administrative-decision-making-delegations-and-avoiding-bias-appendix#municipal>

²² [2007] VSC 468 (16 November 2007).

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55. Accordingly, 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 an elected member will have no pre-existing personal views or preferences.
56. In summary, my view is that elected members 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. It is important that the community can be assured that decisions made by its representatives are made and are seen to be made in the public interest, not taking into account irrelevant considerations - such as, in this case, any residual or perceived personal animosity which may follow from the lodging of a complaint against an elected member.
57. The test to be applied is whether a fair-minded lay observer might reasonably apprehend that Cr Palk might not have brought an impartial and unprejudiced mind to her decision-making responsibilities on the selection panel. The test is not whether Cr Palk was actually biased in her decision-making, and I note in this context that the probity auditor's report states that 'all four selection panel members identified the same three applicants as their recommended applicants to be presented to council for their decision'.
58. I consider that a fair-minded lay observer could reasonably apprehend that Cr Palk might not have brought an impartial and unprejudiced mind to her decision-making responsibilities on the selection panel. The following factors are relevant:
- the complaint made against Cr Palk alleged that in moving the revocation motion she had made some significant misrepresentations, namely that:
 - Ms Low was employed within the complainant's office
 - the complainant was involved as a member of the interview panel for the Independent Board Member position
 - Cr Palk initiated the process of revoking the reappointments, and moved five relevant motions. She was not an uninterested party
 - at least one other member of the selection panel against whom a conflict of interest was alleged (Cr Osterstock) chose to stand aside in circumstances in which his interest was less apparent than Cr Palk's
 - the council's dismissal of the complaint against the four elected members occurred less than two days before the interviews were conducted.
59. On the other hand, I have no evidence that Cr Palk had a preconceived view about the complainant's suitability for appointment, and that she was not open to persuasion. I note in this context that the complainant advised me in his letter of complaint that he made the point at interview that he was not prepared to be interviewed by Cr Palk. This is corroborated by the probity auditor's report which states that 'one applicant chose not to answer any questions because of the composition of the panel and left the room stating that the application was not withdrawn'. It would have been difficult in these circumstances for the selection panel to form a view as to the complainant's suitability for the position.
60. Further, I accept that Cr Palk's reservations about the complainant's actions in participating in the original selection process for board members were well-founded. I adopt the comments of the LGGP report as follows:

This lack of clarity in the Constitution as to the responsibility for setting the processes for appointment of external members is one of the central issues in this matter. Others include the failure of the Board to deal with the issue of the appointments in good time, the apparent failure to document an appropriate process for the appointments that accord with standards of good governance, the failure of the Council to respond to the Board's recommendations in

good time, and apparent issues of communication within the Council on the issue outside the formal meeting processes.

In supporting her motion in April, Cr Palk suggested that it was inappropriate for Mr Darley to have participated in the interview with the external candidate, and that accordingly, Council should recall all of the positions. In terms of good governance, the Investigator can only agree with this argument, whether or not, as Mr Darley says, he participated in the final selection. While it may seem unfair, in that the Constitution gave the Board the right to determine this process, and Council Appointed members of the Board no doubt acceded to that process, it was also a perfectly valid concern to be expressed, and fully within Council's rights to reach the decision that it then took.

On the basis of the complaint lodged against Cr Palk, this Investigation therefore finds that there has been no breach of Council's Code of Conduct. Cr Palk was clearly sincere in her concern about the processes for the appointment of members, and was acting in what she believed to be the best interests of her community. Her reference to Ms Low as "working for" Mr Darley was probably irrelevant to the question at hand, but it was reasonable to assume that Ms Low is subject to Mr Darley's direction in his office, even if the Government technically employs her. In her debate, Cr Palk noted that she did not seek to impugn the motives of those involved in this process, but her motivation was primarily a concern about the governance standards employed and the need for the Council to assert its responsibilities as owner of the business.

There is no suggestion that Mr Darley has not acted in accordance with the established practices of the Board – and the passive acceptance of the Council over many years – and he and the other external Board members have clearly been impacted by a less than satisfactory process for resolving this matter within the Council. But his concerns about this process are not in themselves sufficient to sustain a Code of Conduct breach.

61. I reiterate that I am required to be persuaded, to the standard of proof established by *Briginshaw*, that an independent observer might reasonably apprehend that Cr Palk might not have been open to persuasion in relation to the relevant matters. In view of the serious nature of the allegation made (being the possibly unlawful behaviour of Cr Palk) and the gravity of the consequences flowing from it (being the possible illegality of the council's decision), I am not satisfied to the standard required by *Briginshaw* that Cr Palk acted with apprehended bias in reaching her position on the selection decision.

Opinion

In light of my conclusions outlined above, I consider that Cr Palk did not act with apprehended bias. Accordingly, my final view is that the council did not act in a way which was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

Whether the council failed to make appropriate arrangements to protect the integrity of the interview and selection process

62. In his letter of complaint to me, the complainant criticises the actions of the probity auditor appointed by the council to oversee the selection panel's deliberations. He notes the comment in the probity auditor's report that:

I was advised on the 15th of August council has no outstanding code of conduct matters against elected members.

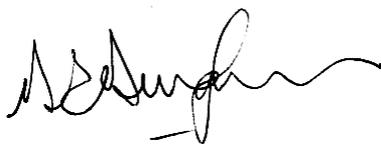
63. The complainant notes that in the probity auditor's report 'there is no mention of the conflict of interest that [the complainant believes] existed as a result of a motion moved by Cr Lemon on the 13th August 2013 and passed unanimously by the council including Cr Piggot (sic)'. This is a reference to Motion C9347, by which the council resolved to receive the LGGP report, and to take no further action in relation to the complainant's

complaint against the four elected members. The full text of this motion is set out above.

64. I have considered the entirety of the council's actions in appointing the probity auditor, and the actions of the probity auditor. I can see no administrative error in those actions.
65. I consider that in light of the concerns expressed by the complainant about the possibility of a conflict of interest arising from Crs Palk and Osterstock, and the CEO's participation in the selection process, the council acted prudently and properly in appointing the probity auditor to oversee the actions of the selection panel. I have no reason to believe that the appointment of Powell and Co as the probity auditor was not an appropriate appointment.
66. Further, I consider that the probity process outlined in the probity auditor's report to the council was reasonable in the circumstances. I consider also that the opinions expressed by the probity auditor in that report were reasonably open to him. In particular, in my view it was open to him to conclude that Cr Palk's alleged conflict of interest had been 'effectively managed'. He commented that:
- I was satisfied that based on evidence demonstrated throughout the process and now that the code of conduct had been lifted, the perceived conflict of interest had been effectively managed and the interviews should proceed as planned.
67. I consider that this conclusion was reasonably open to the probity auditor, notwithstanding that as outlined above, I have reached a different view about whether Cr Palk's perceived conflict of interest was effectively managed.
68. In my view it is curious that the probity auditor described the code of conduct as having been 'lifted'. Whilst the investigation of the complaint alleging a breach of the code had been completed, this does not of course address the fact that the complaint had been lodged; and that notwithstanding the completion of the investigation there may have been some residual ill-feeling between the complainant and Cr Palk, such as would warrant a conclusion that Cr Palk may have been biased against the complainant. I note also that the probity auditor's report makes no reference to any perception of apprehended bias, and in my view it should have considered this issue.
69. Nonetheless, I do not consider that this apparent omission from the probity auditor's report warrants a finding of administrative error on the part of the council. In my view it was not unreasonable for the council to rely on the probity auditor's report in satisfying itself that the selection process had been properly conducted.

Opinion

In light of my conclusions outlined above, my final view is that in making arrangements to protect the integrity of the interview and selection process the council did not act in a way which was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.



Richard Bingham
SA OMBUDSMAN

27 November 2013