

Report

Full investigation - *Ombudsman Act 1972*

Complainant	Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>
Agency	City of Holdfast Bay
Ombudsman reference	2013/05605
Date complaint received	4 June 2013
Issues	<ol style="list-style-type: none">1. Whether Councillor Fisk breached the conflict of interest provisions of the <i>Local Government Act 1999</i>.2. Whether Councillor Fisk breached confidentiality by forwarding a council email to a member of the public.

Jurisdiction

The original complaint attracted the protections of the *Whistleblowers Protection Act 1993*.

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

Under the definition of 'administrative act' in section 3 of the Ombudsman Act, my jurisdiction extends to investigating 'an act relating to a matter of administration on the part of a person engaged in the work of ... an agency'. This provides the jurisdictional basis for me to investigate whether an elected member of a council breached the conflict of interest obligations pursuant to the provisions of the *Local Government Act 1999*.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking and considering a response from Cr Bob Fisk
- seeking and considering information from the City of Holdfast Bay
- considering sections 73 and 74 of the Local Government Act
- considering the District Court of SA decisions of *Petrovski v Pain* [2013] SADC 6 and *Petrovski v Dolling* [2013] SADC 27
- considering the City of Holdfast Bay, Elected Member Code of Conduct, issued 22 November 2011
- preparing a provisional report
- providing the council and the complainant with my provisional report for comment, and considering their responses
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.¹ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...²

Response to my provisional report

In response to my provisional report, Cr Fisk commented, in summary, that:

- he represents the Glenelg Ward of the City of Holdfast Bay
- the Glenelg Ward consists of 5,906 rateable properties of which approximately 170 are marina berths in the Patawalonga
- he considers that it is misleading to consider the entire 20,133 rateable properties in the council, when he directly represents only less than 6,000 of those
- he considers that 170 marina berths out of 6,000 rateable properties constitutes 'a substantial proportion of the ratepayers, electors or residents of the area or a ward or some other substantial class of persons' within the meaning of section 73(1) of the Local Government Act
- he considers that he does not have a conflict of interest as the benefit or detriment would be enjoyed or suffered by 'some other substantial class of persons' within the meaning of section 73(1) of the Local Government Act
- the narrow interpretation he considers that I have taken of 'substantial' could lead to councils facing difficulties in maintaining 'an operating quorum to transact essential business', particularly in relation to sporting clubs or associations
- he disagrees with my interpretation of the purpose of the 'matter' in the 4th motion of the 27 November 2012 council meeting. He considers that the purpose of the matter was to regulate the use of the waterway for safety, security and environmental reasons.

I have considered Cr Fisk's response but I have not amended my views in response to it.

The mayor of the council provided a response to my provisional report by letter dated 6 August 2013. I have considered the mayor's response but I have not amended my views in response to it.

Background

1. Cr Bob Fisk is an elected member of the City of Holdfast Bay (**the council**).
2. The complaint alleged that Cr Fisk voted in relation to three decisions about the Patawalonga Marina (**the marina**), and that he may have had a conflict of interest due to:

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

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

1. his boat ownership,
 2. his association with Mr Chris Carter, and
 3. his association with Mr Derek Randall.
3. Mr Carter is a boat dealer and chairman of the Marina Association (**the MA**).
 4. Mr Randall is a director of the company Goodna Pty Ltd (**Goodna**) and runs the business Glenelg Marine and Scuba (**the dive shop**). Goodna leases the slipway and land on which the dive shop is sited from the council.
 5. The council owns the Patawalonga basin and the associated lock gates, which allow the boats to get from the lake to the sea. Parts of this area are leased to the MA, which in turn sub leases the berths to 170 individual berth holders. Berth holders pay council rates and a maintenance levy, which is applied to the maintenance of the lock gates.
 6. Cr Fisk has told my investigation that he owns a vessel which he moors in a berth he rents from the MA.
 7. It is alleged that Cr Fisk has been the driver of successful moves to reduce the maintenance levy applied to the marina berths, and that these reductions result in adding to the costs of ordinary ratepayers. Specifically, it is alleged that Cr Fisk failed to declare a conflict of interest under section 73 of the Local Government Act and breached section 74 of the Act as follows:
 - at the council meeting on 27 November 2012 when the council considered item 14.3 - 'Amendment to the Regional Open Space and Business Facility Community Land Management Plans (Report No: 478/12)'
 - at the council meeting on 9 April 2013 when the council considered item 14.2 - 'Lease to Goodna Pty Ltd over Portion of the Patawalonga (Report No: 126/13)'
 - at the council meeting on 28 May 2013 when the council considered item 11.1 - 'Maintenance Levy for Patawalonga Marina - Councillor Fisk (Report No: 178/13)'.
 8. At the council meeting on 27 November 2012 the council considered item 14.3 - 'Amendment to the Regional Open Space and Business Facility Community Land Management Plans.' I consider that the purpose of the motion, which was moved by Cr Fisk, was to annexe the community waterway for the exclusive use of the marina berth holders. The motion also included the granting of a new lease to Goodna. The minutes record:

Motion

...

4. That Council pursuant to section 197 of the Local Government Act 1999, amend the Community Land Management Plan for 'Business Facilities' to specifically include the areas marked 'B' in Attachment 4.
5. That a new lease for a period of 10 years from 18 May 2011, with an option to renew for five years thereafter be granted to Goodna Pty Ltd over portion of the land comprised in Certificate of title Volume 5798 Folio 64, marked 'AA' and 'NN' in GRO Plan 255 of 2000.

Moved Councillor Fisk, Seconded Councillor Patton

Amendment**C271112/739**

...

4. That Council pursuant to section 197 of the Local Government Act 1999, amend the Community Land Management Plan for 'Regional Open Space to specifically include the areas marked 'B' in Attachment 4.
5. That a new lease for a period of 10 years from 18 May 2011, with an option to renew for five years thereafter be granted to Goodna Pty Ltd over portion of the land comprised in Certificate of title Volume 5798 Folio 64, marked 'AA' and 'NN' in GRO Plan 255 of 2000.

Moved Councillor Looker, Seconded Councillor Clancy

The amendment on being put was

Carried

The motion, as amended was

Carried**Division called**

A division was called

Those voting for: Councillors Patton, Dixon, Bouchee, Patterson, Looker, Clancy, Donaldson, Lonie, Roe and Huckstepp (10)

Those voting against: Councillor Fisk (1).

His Worship the Mayor declared the motion

Carried

9. At the council meeting on 9 April 2013 the council considered item 14.2 - 'Lease to Goodna Pty Ltd over Portion of the Patawalonga.' Cr Fisk moved a motion to extend the lease granted to Goodna Pty Ltd. The minutes record:

14.2 Lease to Goodna Pty Ltd over Portion of the Patawalonga (Report No: 126/13)**Summary**

This report seeks to extend the term of the lease to Goodna Pty Ltd over portion of the Patawalonga so that it expires on 31 December 2022 instead of 17 May 2021. The option to extend for 5 years would be retained but it would commence on 1 January 2023 instead of 18 May 2021.

Motion**C090413/907**

That the expiration dated of the initial term of the lease to Goodna Pty Ltd over portion of the land comprised in Certificate of Title Volume 5798 folio 64, marked 'AA' and 'NN' in GRO Plan 255 of 2000 be amended from 17 May 2021 to 31 December 2022.

Moved Councillor Fisk, Seconded Councillor Looker

Carried

10. At the council meeting on 28 May 2013 the council considered item 11.1 - 'Maintenance Levy for Patawalonga Marina - Councillor Fisk.' Cr Fisk put forward a motion to further reduce the maintenance levy on the marina berths and voted in favour of the motion. The minutes record:

11.1 Maintenance Levy for Patawalonga Marina - Councillor Fisk (Report No: 178/13)**Motion****C280513/928**

The special maintenance levy for the Patawalonga marina Berth holders be set at 75% of the current maintenance levy (which is \$65,500) from the 2013/2014

financial year. This would equate to a total income from the marina berth holders (which is the total of the Minimum rate plus the Maintenance Levy) being reduced by only 8.2% for this year.

Moved Councillor Fisk, Seconded Councillor Patton

Carried

11. The complaint also alleges that Cr Fisk breached confidentiality by forwarding an internal council email to Mr Carter.
12. On 3 April 2013 Mr Carter sent the following email to the council's chief executive officer:

Dear Justin,

I write on behalf of the "Patawalonga" marinas and in my capacity as Chairman of Holdfast Quays Marina Association.

I am aware of Cr Tim Looker's public blog and his recent email to the budget committee participants. [my emphasis]

I believe Cr Looker's comments are factually incorrect, based on misinformation and effectively amount to false and misleading conduct and are considered slanderous.

...

13. On 4 April 2013 Cr Looker sent the following email to all elected members:

I have had an email from Chris Carter of the Marina in which amongst other things he tells me he has a copy of my internal email to councillors.

This is of serious concern for a number of reasons. Firstly internal correspondence is about information and discussion and whilst I write every email knowing it may end up in public, I do so trusting that intended recipients do the right thing. The red writing below makes it clear that I do not authorise distribution. Such actions breed mistrust.

Secondly I regard that as a breach of the Local Government Act where it forbids misuses of information gained through the position of Councillor.

A very low and unethical act indeed but not unexpected.

Tim Looker
Councillor City of Holdfast Bay

This e-mail is from Cr Tim Looker OAM of the City of Holdfast Bay. The contents of this email are confidential and intended only for the named recipient of this e-mail. They are not to be distributed to any other party, reproduced, disclosed or distributed without the express permission of the author. Council related emails are retained under the State Records Act. If you have received this e-mail in error, please reply to me immediately and delete the document.

Conflict of interest provisions of the Local Government Act

14. Section 73 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).

15. 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.

16. 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.

Issue 1 - Whether Cr Fisk breached the conflict of interest provisions of the Local Government Act

17. The complaint alleges that Cr Fisk breached section 74 by failing to declare an interest and by remaining in the room, moving motions and voting on the matters at the council meetings on 27 November 2012, 9 April 2013 and 28 May 2013.
18. What lies for my decision is whether Cr Fisk was conflicted in relation to the relevant decisions above. I must first be satisfied that Cr Fisk had an 'interest in a matter' in relation to each of the decisions within the meaning of section 73(1). That is, I must be satisfied that by participating in the council's voting as he did, Cr Fisk 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 coastal area, or with some other substantial class of persons.
19. In the recent case of *Petrovski v Dolling*,³ 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'.⁴ The disclosure requirement in section 74 is confined to disclosure of the type of interest in a matter described in section 73.
20. 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

³ *Petrovski v Dolling* [2013] SADC 27 (5 March 2013).

⁴ *Ibid*, [41].

resolution.⁵ 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.

21. The outcome of the *Dolling* decision must be confined to its particular facts.

Opinion - the 4th motion of item 14.3 at the 27 November 2012 council meeting

22. I am of the view that the 4th motion of the 27 November 2012 council meeting gave rise to a section 73(1) interest on the part of Cr Fisk. I consider that the 'matter' for the purposes of the section was increasing the area available for the exclusive use of boats in the marina. I consider that by amending the Community Land Management Plan to facilitate this, Cr Fisk had a reasonable expectation of receiving a non-pecuniary benefit due to his lease of a berth in the marina.

23. Cr Fisk disagrees with my interpretation of the purpose of the 'matter' in the 4th motion of the 27 November 2012 council meeting. In his response to my provisional report, Cr Fisk wrote:

I believe that your statement is a misinterpretation of the facts. The intent was to enable the Council to regulate the use of the waterway for safety, security and environmental reasons.

On at least one occasion a canoe paddler entered into the part of the Patawolonga lake (where the marina is situated) that is subject to violent currents when the sluice gates are opened and was nearly dragged through the gates and out to sea.

Further, canoeists frequently paddle on the Lake at night without lights which poses a further safety concern. In addition vandalism has occurred within the marina which is only accessible from the water and at least one boat has sunk. Such vandalism poses significant pollution risks from escape of fuel oil etc.

24. I remain of the view that the 'matter' for the purposes of the section was increasing the area available for the exclusive use of boats in the marina. As such, I remain of the view that Cr Fisk had an interest in the matter.
25. Councillor Fisk has denied that he had an interest in the matter because any benefit or detriment he might receive or suffer '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.' In this respect, Cr Fisk says:

In all cases I have been representing a class of the ratepayer from the Ward I was elected to represent.

I believe I have no conflict in representing the marina berth holders because the parenthesis in Section 73(1) means that, as defined, I am a member of a substantial class of ratepayers and therefore no conflict exists.⁶

26. I have previously expressed my concern in other investigations about the degree of clarity in this provision. While it is clearly intended to relate to interests held in common with a substantial proportion of sections of the community, it can often be difficult to determine how many people must share the interest before it can apply.

⁵ Ibid, [34].

⁶ Letter to my office dated 19 June 2013.

27. The Macquarie Dictionary includes the following in its definition of 'substantial':

Of ample or considerable amount ...⁷

28. The Local Government Association of South Australia (**the LGA**) has acknowledged the difficulty in determining how many people must share the interest before the provision can apply:

At the extreme ends of the continuum, it is clear when a benefit or detriment will be enjoyed or suffered in common with a substantial proportion of prescribed person or class of persons.

...

However, between the extremes, there are many shades of grey, and Part A Summary and Examples explores this issue further. However, as general advice:

- there is no 'golden or magical number' or 'golden percentage' of persons which constitute 'substantial class' of persons; and
- it will always be a question of fact depending on the circumstances - for example, a Court may consider that a lower threshold number of persons may be more appropriate in a small rural area compared to an area in metropolitan Adelaide.⁸

29. I note that the LGA also recommends that elected members take a conservative approach when dealing with conflict of interest matters:

If an affected person remains unsure about whether or not a conflict exists after considering all the issues, it is recommended that in the interests of probity, the affected person disclose the interest and take the necessary action⁹.

30. I also note that at a council meeting on 12 October 2010 Cr Fisk council considered an item about a request for a review under section 270 of the Local Government Act from Mr Carter about a decision on the rating of the marina. The minutes record that 'Councillor Fisk declared an interest in this matter, as he has an interest in the Marina and left the chamber.'

31. The council has a population of about 36,000 residents. There are 20,133 rateable properties, including the 170 marina berths.¹⁰ I do not consider that this constitutes 'a substantial proportion of the ratepayers, electors or residents of the area or a ward or some other substantial class of persons' within the meaning of section 73(1).

32. In his response to my provisional report Cr Fisk says that he represents the Glenelg Ward of the City of Holdfast Bay. He advises that the Glenelg Ward consists of 5,906 rateable properties of which approximately 170 are marina berths in the Patawalonga. he considers that it is misleading to consider the entire 20,133 rateable properties in the council, when he directly represents only less than 6,000 of those. He considers that 170 marina berths out of 6,000 rateable properties constitutes 'a substantial proportion of the ratepayers, electors or residents of the area or a ward or some other substantial class of persons' within the meaning of section 73(1) of the Local Government Act.

33. I agree with Cr Fisk's view that the number of marina berth holders within the ward that he represents, rather than the total number of ratepayers within the council, should be considered. I have done so but this does not change my view. I calculate that the number of marina berth holders equates to approximately 1/35 or 2.8% of the ratepayers within the ward he represents. This can not, on any interpretation, be

⁷ The Macquarie Dictionary, Third Edition, 1999.

⁸ Local Government Association of South Australia, Conflict of Interest Provisions - Guidelines and Examples, updated October 2010, p11.

⁹ Ibid, p11

¹⁰ Information provided by email from the council dated 17 July 2013.

considered as an 'ample or considerable'¹¹ amount. I do not consider that this equates to a 'a substantial proportion of ratepayers' within the meaning of section 73(1) of the Local Government Act.

34. Cr Fisk has further submitted that he has relied on the last part of section 73(1), being 'some other substantial class of persons' as he interprets this 'to be less of a comparative measure and refers to a class of persons that is not by definition trivial in number.' He has not explained what 'other substantial class of persons' he is referring to and I cannot think of a class of person that could apply in this situation above that of the marina berth ratepayers.
35. As such, I consider that Cr Fisk had an interest in the matter under section 73(1) of the Act that he was required to disclose under section 74(1) of the Act. He was then required to adhere to section 74(4) of the Act, which he did not do. Consequently, my final view is that his action was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

Opinion - the 5th motion of item 14.3 at the 27 November 2012 council meeting

36. At the council meeting on 27 November 2012 item 14.3 also considered the granting of a new lease to Goodna.
37. In response to the allegations Cr Fisk said:

I supported the recommendation of administration as it was a tidy up of a lease to give the lessee a full 10 year plus 5 year lease. The previous lease motion had the lease backdated by 2 years and had the effect of granting an 8 by 5 year lease which was not what was intended.¹²
38. I understand that during debate about this item Cr Fisk argued that the lease term granted to Goodna should be further extended.
39. Cr Fisk would only have an interest in this item under the Local Government Act if the nature of the relationship between Cr Fisk and Goodna was such as to require him to declare an interest. Under section 73(1) of the Local Government Act, he would have an interest in the item being considered by the council if:
 - either he or a person with whom he is closely associated would, if the matter were decided in a particular manner, receive or have a reasonable expectation of receiving a direct or indirect pecuniary benefit, or suffer (or have a reasonable expectation of suffering) a direct or indirect pecuniary detriment; or
 - either he or a person with whom he is closely associated would, if the matter were decided in a particular manner, obtain or have a reasonable expectation of obtaining a non pecuniary benefit, or suffer (or have a reasonable expectation of suffering) a non pecuniary detriment.
40. I have no evidence that Cr Fisk would have received, or would have had a reasonable expectation of receiving or suffering a benefit or detriment from the council's decision about the granting of the lease to Goodna. However, Goodna clearly would have received or suffered, or would have had a reasonable expectation of receiving or suffering, a benefit or detriment from the council's decision about the granting of the lease. As such, in this case, the first question is whether Goodna was 'a person closely associated' with Cr Fisk under the Act.

¹¹ The Macquarie Dictionary, Third Edition, 1999.

¹² Letter to my office dated 19 June 2013.

41. Cr Fisk told my investigation that he has a close relationship with Mr Randall, as follows:

I have known Mr Derek Randall for close to 30 years after meeting through Scuba Diving. My wife and Mr Randall's late wife were close friends, and we have associated with mutual friends socially over many years. I have made myself available to discuss local government matters with Mr Randall and have on a number of occasions assisted him negotiate Council red tape, in the same way as I would for any ratepayer of the Glenelg Ward, in fact for any ratepayer within the City of Holdfast Bay.

42. Section 73(2) of the Act defines the circumstances in which a person is 'closely associated' with a member of a 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.
43. I have no evidence that Goodna is 'closely associated' with Cr Fisk for the purposes of sections 73(1) and 73(2). As such, Cr Fisk did not have a conflict of interest under the Act in relation to the decision about the granting of the lease to Goodna. However, it appears that Cr Fisk and Mr Randall have a long-term friendship and that this could be perceived as creating a conflict of interest for Cr Fisk.

Perceived conflict of interest

44. 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.
45. I note the comments of the South Australian District Court in the decision of *Petrovski v Pain*¹³ 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.

¹³ *Petrovski v Pain* [2013] SADC 6, [52].

46. I note also that the LGA's Conflict of Interest 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.¹⁴

47. 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.
48. 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.¹⁵
49. In light of this, my final view is that while Cr Fisk's actions in relation to the motion to grant Goodna a new lease were not in breach of the Local Government Act, his 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.

Opinion - item 14.2 at the 9 April 2013 council meeting

50. At the council meeting on 9 April 2013 the council considered item 14.2 - 'Lease to Goodna Pty Ltd over Portion of the Patawalonga'. This item sought to extend the term of the lease to Goodna.
51. For the reasons stated above, my final view is that while Cr Fisk's actions in relation to the motion to extend the lease to Goodna were not in breach of the Local Government Act, his 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.

Opinion - item 11.1 at the 28 May 2013 council meeting

52. At the council meeting on 28 May 2013 the council considered item 11.1 - 'Maintenance Levy for Patawalonga Marina - Councillor Fisk.' Cr Fisk put forward a motion to reduce the maintenance levy on the marina berths and voted in favour of the motion.
53. I am of the view that item 11.1 of the 28 May 2013 council meeting gave rise to a section 73(1) interest on the part of Cr Fisk. The passing of the motion had the effect of reducing the maintenance levy payable by boat owners who used berths at the marina, such as Cr Fisk. As such, he would receive a direct pecuniary benefit within the meaning of section 73(1).
54. Cr Fisk submitted that he did not have an interest because the benefit or detriment 'would be enjoyed or suffered in common with all or a substantial proportion of the ratepayers, electors or residents of the area or a ward or some other substantial class of persons.' In this respect, Cr Fisk says:

¹⁴ Local Government Association of South Australia, Conflict of Interest Provisions – Guidelines and Examples, March 2007, updated October 2010, p15.

¹⁵ <http://ombudsman.sa.gov.au/publications/reports>

I moved the motion on notice above and spoke to the motion to enable this substantial class of ratepayers to be treated consistently with other sporting groups by the City of Holdfast Bay.¹⁶

55. As outlined above, given that there are approximately 6,000 rateable properties in the ward which Cr Fisk represents, including the 170 marina berths, I do not consider that such benefit would be shared with all or a substantial proportion of ratepayers, electors, residents or some other substantial class of persons. As such, I consider that Cr Fisk had an interest in the matter under section 73(1) of the Act that he was required to disclose under section 74(1) of the Act. He was then required to adhere to section 74(4) of the Act, which he did not do. Consequently, my final view is that Cr Fisk acted contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

Issue 2 - Whether Councillor Fisk breached confidentiality by forwarding an email to a member of the public

56. It is alleged that Cr Fisk breached confidentiality in that he forwarded an internal council email from Cr Looker to elected members, to Mr Carter.
57. It appears that Mr Carter had seen Cr Looker's email to the council's budget committee about the issue, as he states this in his 3 April 2013 email to the council's chief executive officer. However, there is no evidence before me to suggest that the email was forwarded to Mr Carter by Cr Fisk.
58. In his letter dated 19 June 2013, Cr Fisk told my investigation that the allegation was 'false'.
59. In response to a request from my investigation, the council examined its email records in relation to Cr Fisk and provided the following response:
- Our mail archiver shows that Bob [Fisk] has sent 101 emails this year and none to Chris Carter's address.
- We capture all emails and conversations within the @holdfast.sa.gov.au email address.
- What we can't capture is if the email content has been copied and sent via webmail or other means.
60. I have no reason to disbelieve Cr Fisk; and therefore, it is unnecessary for me to determine whether Cr Fisk had an obligation to keep Cr Looker's email confidential. I consider that there is insufficient public interest to warrant further investigation of this allegation.

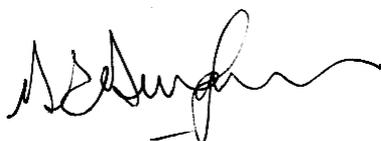
Opinion

61. My final view is that, having regard to the circumstances of the case, continuing to investigate this issue is unnecessary or unjustifiable within the meaning of section 17(2)(d) of the Ombudsman Act.

¹⁶ Letter to my office dated 19 June 2013

Final opinion

62. In summary, my final opinion is that:
- in relation to the 4th motion of item 14.3 at the 27 November 2012 council meeting, Cr Fisk acted contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act
 - in relation to the 5th motion of item 14.3 at the 27 November 2012 council meeting, Cr Fisk did not have a conflict of interest under the Local Government Act
 - in relation to the 5th motion of item 14.3 at the 27 November 2012 council meeting, Cr Fisk's 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
 - in relation to item 14.2 at the 9 April 2013 council meeting, Cr Fisk's 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
 - in relation to item 11.1 at the 28 May 2013 council meeting, Cr Fisk acted contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.
63. In accordance with my obligation under section 18(5) of the Ombudsman Act I report Cr Fisk's failure to declare conflicts of interest to the mayor.
64. I make the following recommendations under section 25(2) of the Ombudsman Act:
- that the Local Government Act be amended to address perceived conflicts of interest on the part of elected members
 - that Cr Fisk receive further training in elected member conflict of interest.



Richard Bingham
SA OMBUDSMAN

22 August 2013