

Report - City of Charles Sturt  
Full investigation - *Ombudsman Act 1972*

Complainant	Councillor Robert Randall
Council	City of Charles Sturt
Ombudsman reference	2015/05495
Date complaint received	15 July 2015
Issues	Whether council members declared and appropriately managed relevant interests when seeking approval of discretionary ward allowances for the financial years 2013-14 and 2014-15

#### Jurisdiction

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

While some of the matters are outside the 12 month time limit for the purposes of section 16(1) of the Ombudsman Act, I consider that it is appropriate in all of the circumstances to entertain the complaint in relation to those allegations.

#### Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the City of Charles Sturt (**the council**)
- seeking a response and further clarification and information from Cr Mick Harley
- seeking a response from Cr Edgar Agius
- considering the Ombudsman Act, the *Local Government Act 1999* (**the Local Government Act**), the council's Discretionary Ward Allowance Policy and the Code of Conduct for Council Members (**the Code of Conduct**)
- providing the council, the complainant and Crs Agius, Harley and T Wasylenko 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.<sup>1</sup> It is best summed up in the decision as follows:

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

## Response to my provisional report

In response to my provisional report the complainant stated that he accepted my provisional findings. The complainant commented:

- that his understanding was that the council is one of a few (if not the only council) that has a system in place that allows an elected member to sign off on a \$5000 grant to a community based group without any advice as to its suitability from staff
- the examples which he provided were to support his concerns about what he believes to be poor governance
- the complainant did not intend to single out council members for investigation
- the complainant hopes that the information in my report, along with the council's review of the Discretionary Ward Allowance (**DWA**) process will improve the way that the council manages community based applications in the future
- the complainant's personal opinion is that there are other mechanisms by which community groups can be granted ratepayer funds
- the complainant understands that the council will receive a report with recommendations for changes to the DWA process that will greatly improve the accountability of elected members as they disperse ratepayer's money.

Cr T Wasylenko's response included:

- that he did not submit DWAs 'on behalf of' White City Soccer Club
- that while he indicates whether he supports a DWA on the form, he has little involvement in the application itself
- acknowledgment of his support for White City Soccer Club along with many other clubs and sporting groups
- general comment on the use of the word 'perceived' in my provisional report

Cr Agius responded that he had no comment to make.

Neither Cr Harley nor the council provided a response to my provisional report.

## Background

1. The council has in place a DWA program (**the DWA program**). As part of the DWA program, each of the council's eight wards is allocated \$30,000 per annum to be used towards the program. The council as a whole makes the final decision on the merits of a DWA application.
2. The council has a policy in relation to the DWA program (**the DWA policy**). The DWA policy describes its purpose as:

To provide Council with discretionary funds to assist organisations and community groups to make a positive contribution to the community in response to identified opportunities. The establishment and operation of the Discretionary Ward Allowance (DWA) is derived from Council's powers under Section 137 of the Local Government Act 1999. This policy

<sup>1</sup> This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

<sup>2</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

formalises accountability in relation to expenditure of these funds, by establishing guidelines and application approval procedures.

3. The council also has an application form for DWA grants (**the application form**). The application form includes a 'Councillor Declaration' to be completed by both of the two council members representing each ward (**the declaration**). The declaration states:

#### **Declaration**

I declare that this application meets the requirements of the Council's Discretionary Ward Allowance Policy including the Council's Community Plan Outcomes.

In recommending this application I have not breached the Local Government Act and the Council's Code of Conduct in supporting this project.

4. The declaration includes a tick box for each ward council member to indicate whether the application is supported or not supported. The declaration also requires each ward council member to declare whether they have an interest in the matter in accordance with section 73 of the Local Government Act and, if so, to provide details of that interest.
5. The complainant approached my Office stating that he wished to draw attention to a practice that he believed 'lacked good governance'. The complainant stated:
  - he was concerned that an elected member could choose to assist community members and organizations to gain finance grants of \$5000 which would be granted subject to sign off by the Mayor and adoption (in bulk applications) by the council
  - a report recommending improvements to the DWA program was adopted by the council's Corporate Services Committee and presented to the council on 13 July 2015
  - at the 13 July 2015 meeting, a majority of council members voted against the recommended changes and opted to continue DWA distribution as they had always done.
6. The complainant was particularly concerned that the council member who moved the motion to maintain the existing processes, Cr Mick Harley, had a personal interest in maintaining the current system due to his involvement in an organisation called Findon Skid Kids Inc. (**Findon Skid Kids**), a non-profit organization. According to the complainant, Cr Harley had organized DWA grants of over \$30,000 in the past few years for Findon Skids and did not declare an interest when his DWA applications were presented to the council, and voted in support of those applications.
7. The complainant also noted that:
  - the council member who seconded the motion, Cr Tolley Wasylenko,<sup>3</sup> is well known for his support of the White City Soccer Club, demonstrated by DWA applications submitted on the Club's behalf
  - Cr Edgar Agius, who allegedly has strong links to the Maltese Community, has sought DWA approvals on behalf of the Maltese Community and not declared an interest.
8. Since initially approaching my Office, the complainant has further advised that a motion to review the DWA policy has been passed.

<sup>3</sup> I have used the full name 'Tolley Wasylenko' to distinguish him from Council Member Barbara Wasylenko.

9. In all of the circumstances, I considered it appropriate to investigate the granting of all DWAs for the last two years and, in particular, whether relevant conflicts of interest were declared when the relevant DWA applications were considered by the council.

### Relevant law/policies

10. Section 63 of the Local Government Act and Regulation 7 of the *Local Government (General) Regulations 2013* provide for the Code of Conduct; and compliance by council members is mandatory.

11. Section 66 of the Local Government Act provides:

Each member of a council must, on or within 60 days after 30 June in each year, submit to the chief executive officer an ordinary return in accordance with Schedule 3.

12. Clause 2 of Schedule 3 to the Local Government Act provides that a return must contain, inter alia:

if the member or a member of his or her family held an office whether as director or otherwise in any company or other body, corporate or unincorporate, during the return period—the name of the company or other body; ..

13. Clause 3 of Schedule 3 to the Local Government Act provides that a return must contain, inter alia:

any other substantial interest whether of a pecuniary nature or not of the member or of a person related to the member of which the member is aware and which he or she considers might appear to raise a material conflict between his or her private interest and the public duty that he or she has or may subsequently have as a member.

14. Section 69 of the Local Government Act provides:

A member of a council who submits a return under this Division and Schedule 3 that is to the knowledge of the member false or misleading in a material particular (whether by reason of information included in or omitted from the return) is guilty of an offence.

Maximum penalty: \$10 000.

15. Clause 3.1 of the Code of Conduct provides that council members must:

Act honestly at all times in the performance and discharge of their official functions and duties.

16. Clause 3.2 of the Code of Conduct provides that council members must:

Perform and discharge their official functions and duties with reasonable care and diligence at all times.

17. Clause 3.11 of the Code of Conduct provides:

Council members must lodge with the Council a complete and accurate primary return of their interests, and subsequent ordinary returns, as required by legislation.

18. 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).

- (2) 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.

19. 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.

20. Section 74(2) provides:

A member in making a disclosure under subsection (1) must provide full and accurate details of the relevant interest.

21. Section 74(3) provides:

A disclosure made under subsection (1) must be recorded in the minutes of the council (including details of the relevant interest).

22. 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.

23. Section 74(4a)(b) provides:

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;

24. Section 74(4a)(d) provides:

a member does not contravene this section if the interest was unknown to the member at the relevant time.

25. Section 74(4b) provides:

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.

26. 'Non-profit association' is defined in section 74 as:

"non-profit association" means a body (whether corporate or unincorporate)–

(a) that does not have as its principal object or one of its principal objects the carrying on of a trade or the making of a profit; and

(b) that is so constituted that its profits (if any) must be applied towards the purposes for which it is established and may not be distributed to its [members](#),

and includes the LGA.

27. Section 3(1) of the *Associations Incorporation Act 1985* relevantly defines an officer as:

**officer** of an incorporated association means–

- (a) any person who–
    - (i) occupies or acts in a position of–
      - (A) a member of the committee of the association; or
      - (B) the secretary, treasurer or public officer of the association; or
    - (ii) is concerned, or takes part, in the management of the affairs of the association,
- by whatever name called and whether or not validly appointed to occupy or duly authorised to act in the position;..

28. The DWA policy relevantly provides:

- Projects are to be consistent with:
  - the Community Plan Outcomes and Objectives of the City;
  - relevant legislation;
  - the key criteria identified below; and
  - Council's Policies.

- Projects must not breach the requirements of the 'conflict of interest' provisions as detailed under Section 73 and 74 of the Local Government Act 1999. It is important that all Council members are aware of these requirements and declare details of any Conflict of Interest on the DWA application form when considering the DWA application if such a potential conflict exists.
- If a conflict of interest exists, the Council member may still support the application by signing the application form, and is obliged to declare an interest and leave the chamber for the duration of the item's consideration. The full application will be appended to the DWA report so that Council can consider the application in full knowledge of the complete circumstances pertaining to the application. The application should not be approved by Council unless the Conflict of Interest declaration is signed by the ward members supporting the application.
- ...
- The DWA application should be prepared by the applicants and/or recipients of the funding, and all supporting paperwork (including where relevant invoices, ABNs, quotes) must be provided for the application to be processed and referred to the Chief Executive Officer. Ward Councillors or staff may provide advice to applicants on the completion of the application form and suitability of projects.
- ...
- Where the DWA application is prepared by the Ward Councillor on behalf of the applicant, the Council member shall indicate that on the application. The application will be appended to the report for Council consideration. Where at all possible, Ward Councillors should refrain from preparing/filling out DWA Application Forms.
- ...
- All applications are to be reviewed by the Chief Executive Officer or his delegate and referred to Council with a recommendation for consideration after the application has been supported by both Ward Councillors.
- If both Ward Councillors cannot support a project, the application may be referred to the Council for consideration. The report to Council shall note that the application is only supported by a single Ward Councillor and the full application shall be appended to the report.
- ...
- In order to determine what the powers, functions and duties of the Council are, regard must be had to Sections 7 and 8 of the Local Government Act 1999, which set out the functions and objectives of the Council. This is an important additional criteria in identifying the suitability of projects under the DWA scheme.

**Whether council members declared and appropriately managed relevant interests when seeking approval of discretionary ward allowances for the financial years 2013-14 and 2014**

29. The council provided my investigation with:

- a spreadsheet detailing all DWAs presented to the council in 2013/2014 including:
  - comments on whether the relevant member has declared an interest at the time of supporting the DWA
  - comments on whether any member declared an interest at the council meeting at which the relevant DWA was considered
  - how any conflict was addressed by the member
- a spreadsheet detailing all DWAs presented to the council in 2014/2015 including:

- comments on whether the relevant member has declared any interest at the time of supporting the DWA
  - comments on whether any member declared an interest at the council meeting at which the relevant DWA was considered
  - how any conflict was addressed by the member
  - a copy of all council members' Register of Interest for 2013/2014
  - a copy of all council members' Register of Interest for 2014/2015.
30. The council also provided detailed comments in relation to council members Harley, Agius and Tolley Wasylenko (in response to my request) and the DWA program generally.
31. On the information provided, I have not found any evidence of error on the part of Cr Tolley Wasylenko for the relevant period. In particular, I note that he appropriately declared interests in the Lions Club of Charles Sturt on 26 August 2013 and 13 April 2015, and the Woodville Glengarry Tennis Club on 13 April 2015.<sup>4</sup> There were no DWAs on behalf of the White City Soccer Club during the relevant period. On that basis, I do not consider it necessary to specifically address the allegations involving him in further detail.
32. As noted earlier, Cr Tolley Wasylenko has also clarified that while he generally supports White City Soccer Club along with many other clubs and sporting groups, he has not submitted applications on behalf of the Club.
33. I address the respective financial years separately below.

### 2013/2014

#### **26 August 2013**

34. On 26 August 2013 the council unanimously approved the DWA applications before it 'en bloc'. Those DWA applications included an application for funding for an upgrade to floodlights by Mr Harley as the founder and manager of Findon Skid Kids. Mr Harley did not use his council title or his council email address on the application. Findon Skid Kids is a not for profit organisation.
35. The relevant ward council members supporting the DWA were Cr Ienco and Cr Coppola, both of whom indicated on the application form that they did not have a relevant interest. There is no suggestion that either of those council members had an interest that should have been declared.
36. Item 6 of the minutes for the meeting states:
- Declaration of Interest
- Councillor Harley declared an interest to Item 6.148 due to his membership with the Findon Skid Kids and remained in the meeting.
37. Based on the minutes, it can be inferred that Cr Harley voted on the DWA approval.
38. Cr Harley appropriately declared his interest for the purposes of section 74(1) of the Local Government Act. That interest was appropriately recorded in the minutes as required by section 74(3). On the basis that Findon Skid Kids is a non-profit association, the effect of section 74(4b) is that Cr Harley was entitled to remain in the meeting and vote, given that section 74(4) did not apply.

<sup>4</sup> See Item 6.148 of the Minutes of Council Meeting 26 August 2013 and Item 6.65 of the Minutes of Council Meeting 13 April 2015.

## Opinion

39. In light of the above, I do not consider that Cr Harley breached the Local Government Act in relation to the Findon Skid Kids' DWA application considered by the council on 26 August 2013. I do not consider that there was an administrative error for the purposes of section 25 of the Ombudsman Act.

### *23 September 2013*

40. On 23 September 2013 the council unanimously approved the DWA applications before it 'en bloc'. Those DWA applications included an application for funding for an industrial oven made by Mr Briffa, General Secretary of the Maltese Guild of SA.
41. The relevant ward council members for the purposes of supporting the DWA application were Cr Agius and Cr Harley. According to the information provided by the council, neither council member declared that they had an interest in the DWA application on the application itself. There is no suggestion that Cr Harley had an interest that should have been declared.
42. Cr Agius did, however, declare an interest during the meeting. Item 6 of the minutes for the meeting states:

#### **Declaration of Interest**

Councillor Agius disclosed an interest in Item 6.166 due to him being the President of the Maltese Community Council and remained in the meeting.

43. According to the information provided by the council, Cr Agius remained in the meeting on the basis that the Maltese Community Council was a not for profit organisation.
44. While the DWA policy requires a council member to declare their interest on the DWA form when supporting a DWA application, and Cr Agius appears not to have done so, I note that he appropriately declared his interest for the purposes of section 74(1) of the Local Government Act in the meeting. That interest was appropriately recorded in the minutes as required by section 74(3). On the basis that the Maltese Community Council Inc is a non-profit association, the effect of section 74(4b) is that Cr Agius was entitled to remain in the meeting and vote, given that section 74(4) did not apply.

## Opinion

45. In light of the above, my view is that Cr Agius did not contravene the Local Government Act in relation to Mr Briffa's DWA application considered by the council on 23 September 2013. I do not consider that there was an administrative error for the purposes of section 25 of the Ombudsman Act.

### *9 December 2013*

46. On 9 December 2013 the council unanimously approved the DWA applications before it 'en bloc'. Those DWA applications included an application for funding for a bass drum and PA system for the Maltese Queen of Victories Band made by Ms Spiteri, President.
47. The relevant ward council members for the purposes of supporting the DWA application were Cr Agius and Cr Harley. According to the information provided by the council, neither council member declared that they had an interest in the DWA application on the application itself. There is no suggestion that Cr Harley had an interest that should have been declared.

48. Cr Agius did, however, declare an interest during the meeting. Item 6 of the minutes for the meeting states:

**Declaration of Interest**

Councillor Agius disclosed an interest in Item 9.40 due to being the President of the Maltese Community Council of SA Inc. and left the meeting at 9.40 pm.

49. While Cr Agius appears not to have declared an interest on his form supporting the DWA application, I note that he appropriately declared his interest for the purposes of section 74(1) of the Local Government Act in the meeting. That interest was appropriately recorded in the minutes as required by section 74(3). I also note that Cr Agius left the meeting at 9.40pm and returned at 9.47pm after the voting on DWA applications had occurred.

**Opinion**

50. In light of the above, my view is that Cr Agius did not contravene the Local Government Act in relation to Ms Spiteri's DWA application. I do not consider that there was an administrative error for the purposes of section 25 of the Ombudsman Act.

**2014/2015**

***23 February 2015***

51. On 23 February 2015 the council unanimously approved the DWA applications before it 'en bloc'. Those DWA applications included an application for funding for roof sheeting for the Maltese Guild of SA made by Mr Briffa.
52. The relevant ward council members for the purposes of supporting the DWA application were Cr Agius and Cr Harley. According to the information provided by the council, neither council member declared that they had an interest in the DWA application on the application itself. There is no suggestion that Cr Harley had an interest that should have been declared.
53. Cr Agius did not declare an interest during the meeting and, according to the minutes, voted on the DWA approval.
54. I sought clarification from Cr Agius as to whether he considered that he had a relevant interest that should have been declared given that he had previously declared an interest in the Maltese Guild of SA as President of the Maltese Community Council Inc.
55. Cr Agius responded to my investigation that:
- in September 2013 Cr Agius was President of the Maltese Community Council of SA Incorporated (**the MCC**)
  - the MCC membership is made of up of all the community leaders of the Maltese community clubs and organisations including not for profit organisations like the Maltese Guild of SA
  - in September 2013, the Maltese Guild of SA was an affiliated member of the MCC
  - on that basis, Cr Agius understood that it was his duty to declare a possible conflict regardless of the fact that the Maltese Guild of SA is a not for profit organisation
  - Cr Agius remains President of the MCC and was President at the time of the 23 February 2015 meeting
  - Cr Agius did not declare a possible conflict on the basis that the Maltese Guild of SA was no longer an affiliated member of the MCC at that stage

- on that basis, Cr Agius considered the Maltese Guild of SA a separate entity and on that basis he treated it as no different from any other multicultural organisation that applies for a DWA.
56. I accept Cr Agius' explanation in that regard. That said, given Cr Agius's previous involvement with the Maltese Community Council, I simply note that there was a possibility for a perceived conflict of interest to arise. In those circumstances, I simply comment that it would have been prudent for Cr Agius to at least raise and explain the issue to the council.
57. In all of the circumstances, however, I consider that it was reasonably open to Cr Agius to determine that he did not have an interest in the Maltese Guild of SA's DWA that needed to be declared for the purposes of section 74(1).

### Opinion

58. In light of the above, my view is that Cr Agius did not breach section 74(1) of the Local Government Act. I do not consider that there was an administrative error for the purposes of section 25 of the Ombudsman Act.

### *27 January 2015*

59. On 27 January 2015 the council unanimously approved the DWA applications before it 'en bloc'. Those DWA applications included an application by Cr Harley as the 'Founder and Manager' of Findon Skid Kids for the supply and installation of a solar panel. Cr Harley did not use his council title or his council email address on the application.
60. The relevant ward members for the purposes of supporting the DWA application were Cr Turelli and Cr Sykes. There is no suggestion that either of those council members had an interest that should have been declared.
61. Cr Harley did not declare an interest during the meeting. Based on the minutes, it can be inferred that Cr Harley remained in the meeting and voted on the DWA approval (which is not in itself a breach, given that the Findon Skid Kids is a non-profit organisation).
62. My investigation sought clarification from Cr Harley as to whether he had a relevant interest that should have been declared.
63. Cr Harley has described his position at Findon Skid Kids as 'Founder and Manager (which includes Secretary and Treasurer)'. Cr Harley has confirmed that he is a member of the governing committee of the club and noted that all members are volunteers.<sup>5</sup>
64. Cr Harley responded to my investigation:

When I was elected in 2006 I queried the then Mayor (Mayor Anderson) and the CEO of the time if I had to declare an interest in my Ordinary Return and a conflict of interest when an application for a DWA was submitted by the Findon Skid Kids Inc. I was advised that it was up to me but not necessary as it is a youth Club and is a non profit organisation and I am a volunteer and do not receive any financial benefit.

Section 4b states that subsection 4 does not apply in a case where the interest of the member arises because the Member is a member of a non-profit association. I am a volunteer and do not receive any financial benefit.

<sup>5</sup> Email from Cr Mick Harley to Steven Strelan dated 13 November 2015.

If it is required to be included on the Return I will amend my Return as soon as possible to comply.

In relation to the DWA of Jan 27<sup>th</sup> 2015 the club is situated in the Findon Ward (I am Beverly Ward) and there is no provision on the application form for the applicant to declare an interest. (Only the 2 Findon Ward Councillors.)

The DWA was for Solar Panels to be installed on the clubs [sic] Council owned building so therefore becomes Council property so I was under the impression that it was not necessary to declare an interest.

In September of this year a DWA was submitted by the Findon Skid Kids for trophies to cover the City of Charles Sturt Open Championship. Mayor Evans advised me (after she completed the compulsory Elected Member Training) that I should declare an interest and leave the Chamber which I did.

I recently completed the Council Members Induction: Post Election 2014 (Mandatory Training) on October 23<sup>rd</sup> which was conducted by Norman Waterhouse Lawyers. At this training session I asked the question re Findon Skid Kids and it was confirmed that I should declare a Conflict of Interest and leave the Chamber.

Thanks to the Compulsory Training the situation has been clarified and I am now finally fully aware of my obligations.

I believe that I have complied with the requirements under the Local Government Act and Code of Conduct.

65. In my view, Cr Harley had an interest in Findon Skid Kids that he should have declared at the 27 January meeting.
66. I find that Cr Harley was (and remains) closely associated with Findon Skid Kids for the purposes of section 73(2)(a) of the Local Government Act. Findon Skid Kids is an incorporated association and Cr Harley is a member of its governing committee. Findon Skid Kids would receive or have a reasonable expectation of receiving a direct pecuniary benefit or suffering a direct pecuniary detriment depending on how the DWA application was decided.
67. I have considered whether, in light of the incorrect advice provided to Cr Harley in 2006 and Cr Harley's explanation that the solar panels were for a council owned building, it could be said that Cr Harley's interest was 'unknown' to him at the time. If so, section 74(4a)(d) would provide an exemption from the obligations to declare an interest. I consider that the factual circumstances were well known to Cr Harley at the relevant time even if he may not have appreciated that it amounted to an 'interest'. I also note that Cr Harley had declared an interest in Findon Skid Kids on 26 August 2013.
68. I find that Cr Harley contravened:
  - section 74(1) of the Local Government Act by failing to declare his interest
  - section 62(2) of the Local Government Act and clause 3.2 of the Code of Conduct by failing to perform and discharge his official functions and duties with reasonable care and diligence
  - section 63 of the Local Government Act by failing to comply with clause 3.2 of the Code of Conduct.

## Opinion

69. In light of the above, my view is that by failing to declare his interest at the 27 January meeting, Cr Harley acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

### *Register of interests*

70. Cr Harley declared Findon Skid Kids at item 2 of his primary return lodged in 2006. Cr Harley did not, however, declare Findon Skid Kids in his ordinary returns for either of the years 2014 or 2015.
71. Item 2 of both the primary and ordinary return form requires the following details:
- State the name of any company or other body, corporate or unincorporate, in which you held, or a member of your family held, any office during the return period whether as director or otherwise.
72. As Treasurer, Secretary and Committee Member of Findon Skid Kids, Cr Harley was an officer for the purposes of section 3(1) of the *Associations Incorporation Act 1985*.
73. As outlined above, Cr Harley asserted that he received what was in my view incorrect advice in 2006 as to whether he had an interest to declare. Cr Harley also referred to 'section 4b'. I understand that to be a reference to section 74(4b) of the Local Government Act. Section 74(4b) is not, however, relevant to the issue of whether a person is required to include a particular interest in their primary or ordinary returns. In fact, section 74(4b) presupposes that an interest in a non-profit organisation is a relevant interest for the purposes of the Local Government Act.
74. Regardless, it was ultimately Cr Harley's responsibility to ensure that he had complied with his obligations under the Local Government Act and the Code of Conduct.
75. I find that Cr Harley had an interest that should have been declared on his ordinary returns in 2014 and 2015.
76. I have considered whether Cr Harley was knowingly false or misleading for the purposes of section 69 of the Local Government Act. Given his explanation in relation to the advice he received and his open involvement with Findon Skid Kids, I do not find that he contravened section 69.
77. I find that Cr Harley contravened:
- section 66 of the Local Government Act and clause 3.11 of the Code of Conduct by failing to submit an ordinary return in accordance with Schedule 3 of the Local Government Act
  - section 62(2) of the Local Government Act and clause 3.2 of the Code of Conduct by failing to perform and discharge his official functions and duties with reasonable care and diligence
  - section 63 of the Local Government Act by failing to comply with clause 3.2 and clause 3.11 of the Code of Conduct.

## Opinion

78. In light of the above, my view is that by failing to include his interest in Findon Skid Kids on his ordinary returns for 2014 and 2015, Cr Harley acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

## Conclusion

In light of the above, I consider that:

- Cr Harley acted in a manner that was contrary to law within the meaning of section 25(1) of the Ombudsman Act by:
  - failing to declare his interest in the Findon Skid Kids at the council meeting on 27 January 2015
  - failing to declare his interest in the Findon Skid Kids on his ordinary returns for the years 2014 and 2015.

I note that Cr Harley has recently undertaken compulsory training at which his involvement with Findon Skid Kids was specifically addressed. Cr Harley's response to my investigation indicates that he now understands his obligations in relation to declaring interests. In light of that, I have decided not to make any recommendations.

## Final comments

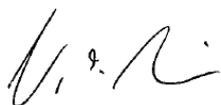
I intend to report the above breaches to the principal officer of the council, Mayor Evans, as required by section 18(5) of the Ombudsman Act.

I intend to send a copy of the final report to the Minister for Local Government as required by section 25(3) of the Ombudsman Act.

In accordance with Part 3 of the Code of Conduct, the final report must be provided to a public meeting of the council, within two ordinary meetings of the council receiving my report and I request that the council confirm that this report has been tabled within that timeframe.

I simply note that issues in relation to the register of interests were raised generally in my predecessor's report into the St Clair land swap.<sup>6</sup>

I also note that the council is in the process of reviewing the DWA policy. In those circumstances, I do not consider it necessary to comment or make any recommendations in relation to the policy itself at this stage.



Wayne Lines  
**SA OMBUDSMAN**

15 December 2015

---

<sup>6</sup> Investigation into the City of Charles Sturt - Final Report, November 2011