

**Report - City of Playford**  
**Full investigation - *Ombudsman Act 1972***

<b>Complainants</b>	<b>Mr Gary Clinton and Mr Anthony McGarrigan</b>
<b>Council member</b>	<b>Councillor Dino Musolino</b>
<b>Council</b>	<b>City of Playford</b>
<b>Ombudsman reference</b>	<b>2014/02542</b>
<b>Date complaint received</b>	<b>12 March 2014</b>
<b>Issues</b>	<b>Whether Cr Musolino breached the <i>Local Government Act 1999</i> and the Code of Conduct for Council Members</b>

### **Jurisdiction**

Two complaints were made to the council by Mr Gary Clinton and Mr Anthony McGarrigan.

The complaints alleged that Cr Musolino had breached clauses 2.2, 2.3, 2.4, 2.6, 2.7, 2.11, 2.12 and 2.14 of Part 2, and clause 3.4 of Part 3 of the Code of Conduct.

The council referred the complaints to the Local Government Governance Panel (**the LGGP**) for investigation. The LGGP considered the complaints and because they included a breach of Part 3 of the Code of Conduct, referred them back to the council so that they could be referred to me. Ms Symes, Governance and Project Officer at the City of Playford (**the council**), forwarded the complaints to me by email dated 12 March 2014.

The complaints allege a breach of Part 3 of the Code of Conduct for Council Members made pursuant to section 63 of the *Local Government Act 1999* (**the Code of Conduct**).<sup>1</sup> An act of a council member that may constitute grounds for complaint under the Local Government Act is taken to be an 'administrative act' for the purposes of the Ombudsman Act.<sup>2</sup>

As I am investigating the alleged breach of Part 3 of the Code of Conduct, I have not considered the alleged breaches of Part 2; these are matters that should be dealt with by the council.

### **Investigation**

My investigation has involved:

- assessing the information provided by the council
- considering the Local Government Act

<sup>1</sup> The Code of Conduct was gazetted on 29 August 2013.

<sup>2</sup> Section 263A(4) Local Government Act; section 3, Ombudsman Act.

- considering the Code of Conduct
- interviewing Cr Musolino
- providing the council and Cr Musolino with my provisional report for comment
- providing Mr Clinton and Mr McGarrigan with my provisional report for comment, and considering their responses in a revised provisional report
- providing the council and Cr Musolino with my revised provisional report for comment
- 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>3</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>4</sup>

### Response to my provisional report

I provided a provisional report to the council and Cr Musolino on 4 November 2014.

Cr Musolino advised my Office by telephone on 14 November 2014 that he would not be providing a response to my provisional report.

The council responded by telephone on 28 November 2014. The council requested that the name of the complainant be changed from Ms Kate Symes to Mr Gary Clinton and Mr Anthony McGarrigan. It advised that Ms Symes merely forwarded the complaint to my Office. The council advised that it had no further comments to make.

I provided the provisional report to Mr Clinton and Mr McGarrigan on 9 December 2014.

Mr Clinton provided a response to the provisional report by letter dated 12 December 2014. In his response, Mr Clinton disputed Cr Musolino's version of events. I took account of Mr Clinton's response and amended my report as I considered appropriate.

Mr McGarrigan provided a response to the provisional report by letter dated 14 December 2014. Mr McGarrigan submitted that a number of the comments made by Cr Musolino in his interview with my officers were 'not entirely an accurate account of the matter.' I took account of Mr McGarrigan's response and amended my report as I considered appropriate.

### Response to my revised provisional report

I provided a revised provisional report, incorporating revisions following Mr Clinton and Mr McGarrigan's responses to the provisional report, to the council and Cr Musolino on 14 January 2015.

<sup>3</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>4</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

Cr Musolino advised my Office by telephone on 29 January 2015 that he would not be providing a response to my revised provisional report.

The council advised my Office by telephone on 29 January 2015 that it would not be providing a response to my revised provisional report.

## Background

1. The complaint relates to an incident that occurred on Ridgeway Road, Virginia, on 4 February 2014.
2. The complainants are council officers. Mr Clinton is a Team Member in the council's Precinct Maintenance Urban unit, and Mr McGarrigan is a Team Member in the City Operations unit.
3. Following this incident the council conducted a work, health and safety incident investigation and produced a report titled 'City of Playford WHS Incident Investigation - Root Cause Analysis' (**the WHS Report**).<sup>5</sup> The report states that the investigation was to determine exactly what happened and to identify 'what, how and why this event occurred' and lists the root cause/s, which were then to 'be used to implement any changes necessary in order to prevent another similar failure.'<sup>6</sup> The investigation team included three staff members of the council. The investigation conducted interviews with employees involved in the incident.
4. On 15 September 2014 two of my officers interviewed Cr Musolino (**the interview**).
5. My understanding of what occurred on 4 February 2014 is informed by:
  - the council investigation's interviews of employees
  - the WHS Report
  - the interview
  - the complainants' responses to my provisional report.
6. On 4 February 2014 the complainants were tasked as part of routine maintenance to clean the silt that had built up in front of various piped entranceways and driveways on Ridgeway Road. I understand that at approximately 8am Mr Clinton and Mr McGarrigan were parked on Ridgeway Road discussing the programmed works for the day. Cr Musolino drove past slowly a few times. Cr Musolino then pulled up and approached the truck, opened the passenger door and spoke with Mr Clinton. Appendix D to the WHS Report is a copy of notes / statement from Mr Clinton; it records Mr Clinton's recollection of the conversation as follows:

Approximately 8am GC (Gary Clinton) and AM (Anthony McGarrigan) were parked on Ridgeway Rd Virginia both discussing programmed works for the day. When a silver ute drove slowly past a few times, it appeared as if the driver had some interest in what we were doing. AM got into the backhoe and began digging while I waited in the truck for enough material to be excavated to make a load. The silver ute returned and pulled up, the driver councillor Dino Musolino DM (unknown at the time) approached the truck and opened the passenger door, a conversation then followed.

D.M. How's it going Chief?

G.C. Good thanks, you?

D.M. I need a job.

<sup>5</sup> City of Playford, WHS incident Investigation - Root Cause Analysis (RCA) Precinct Maintenance Rural, Incidents Ridgeway Road Virginia, 04/02/2014.

<sup>6</sup> Ibid, p3.

G.C. What kind of job?

D.M. One like yours.

G.C. You never know you could get lucky one day.

D.M. Do you know who I am?

G.C. I have no idea who you are. Are you famous?

D.M. I'm a Councillor.

G.C. Oh yeah.

D.M. Will you be working on Martin Road at all?

G.C. No not on the work order for this week. Why?

D.M. I live in the last house on the right and don't want you to dig the drain like there, because my lawn ends at the road and there are some pipes that the council doesn't know are there.

G.C. Well if I see Martin Road on the work order I'll remember that.

D.M. I'll know, I'll see you there.

G.C. Ok, but you should call the council to see what work they have programmed, and discuss your requirements then if agreed they can modify our work order so that we will know.<sup>7</sup>

7. Cr Musolino then left and Mr Clinton and Mr McGarrigan continued with their duties.

8. Cr Musolino, in the interview, denied that he said 'do you know who I am?' and 'I'm a councillor', and stated:

I may have told him that at the end of the conversation. I'm not sure. I can't be 100% sure whether I did or I didn't. I may have but I'm not 100% sure that I did or I didn't.

...

I've been on council for 17 years and I don't wear my badge anywhere to say I'm a councillor and I don't promote myself as a councillor. So I'm surprised that he's made it 'I am'. I'm not about an 'I am'. I'm about obviously trying to achieve things that we need to have achieved; and I've never worn my councillor badge in the 17 years, I think, other than once when I was instructed to wear it.<sup>8</sup>

9. Mr Clinton, In his response to the provisional report states:

Firstly I wholly and fervently refute Mr Musolino's claim that he did not ask me if I knew who he was. I have no reason to say that he did if it were not true and I would swear to it. Further to this I would have had no reason to have replied "I have no idea who you are" to the question do you know who I am.

10. Later that day Cr Musolino returned to where Mr McGarrigan was working on Ridgeway Rd and approached him.

<sup>7</sup> City of Playford, WHS incident Investigation - Root Cause Analysis (RCA) Precinct Maintenance Rural, Incidents Ridgeway Road Virginia, 04/02/2014, p23.

<sup>8</sup> Office of South Australian Ombudsman, Record of Interview Transcript, p7.

11. Appendix E to the WHS Report is a transcription of an audio recording of Mr Brenton Hall (Service Coordinator, Precinct Maintenance Rural) interviewing Mr McGarrigan about the events; it records Mr McGarrigan's recollection of what happened next:

**Tony:** Well on or about 2.30 on the day I was approached by a guy in a silver ute which I now believe was Dino.

**Brenton:** Musolino

**Tony:** Musolino

**Brenton:** Yep Musolino yep

**Tony:** I didn't know anything ah identifying him as such, and ah he tooted the horn for me to stop doing what I was doing which I did, turned off the back hoe, ah and he's talking to me from the car and he's telling me not to keep doing what I am doing and I said "mate if you have a problem with what I'm doing cleaning the drain here, ya going to have to talk to the council". So with that he replied, I'm going to call them right now and then he sped off down the road. So I waited a few minutes and thought to myself well I don't know if the guy will come back or not so I'll ring Brenton.

**Brenton:** Yep

**Tony:** got the answering machine and then I then rang Ian Mason and ah got hold of him and told him what happened and he said "no there the works for that road had been scoped, you've got your paperwork", "you know what you are doing", "carry on", which I proceeded to do ah and just when I was setting up the machine to change direction to clean in between the open drain, ah Dino Musolino pulled up again and he said to me "I told you not to do that" and I said "listen mate", because he hadn't identified himself or anything.<sup>9</sup>

12. After Mr McGarrigan telephoned Mr Ian Mason (Quality Coordinator, Precinct Maintenance Rural) to seek his direction Mr McGarrigan continued working as instructed.

13. At approximately 2:45pm Cr Musolino again returned to where Mr McGarrigan was working on a backhoe and asked him to stop work. Mr Clinton was not present. The WHS Report states:

Further conversation occurred where Cr Musolino called out to Anthony McGarrigan (Anthony McGarrigan didn't catch exactly what he had said). Anthony McGarrigan replied "well mate, I'm doing what the Council's paying me to do." Anthony McGarrigan stated that he is going to continue on with the work, it's been ok'd and that he has been in touch with his Manager. Anthony McGarrigan clarified with Cr Musolino that his coordinator is Ian Mason and that he has been given the go ahead to continue work. Anthony McGarrigan said to Cr Musolino that he will need to contact the council himself. Cr Musolino told Anthony McGarrigan that he was waiting for a call back.<sup>10</sup>

14. Mr McGarrigan, in his response to the provisional report, stated that Cr Musolino did not ask him to stop work, but rather he 'told him' to stop work.

15. The WHS Report states that 'Cr Musolino referenced damaged stormwater pipes and that he has asked Council to replace them, because his delivery trucks are driving over them when they are damaged, and he doesn't want the swale drain which leads into the concrete pipes, deepened.'<sup>11</sup>

<sup>9</sup> City of Playford, WHS incident Investigation - Root Cause Analysis (RCA) Precinct Maintenance Rural, Incidents Ridgeway Road Virginia, 04/02/2014, p24.

<sup>10</sup> Ibid, p6.

<sup>11</sup> Ibid, p21.

16. The WHS Report states that Cr Musolino then drove his ute in front of the backhoe so that Mr McGarrigan could not move it forward. Mr McGarrigan, in his interview said ‘...as I started up the machine and went to move forward he smoked up the tyres on his car and like a lunatic drove it in front of the back hoe so that I could not proceed forward.’<sup>12</sup> Cr Musolino then got out of his ute to approach Mr McGarrigan. Mr McGarrigan reversed the backhoe away from Cr Musolino. Cr Musolino followed him for a few steps and then went into the adjacent property.
17. Mr McGarrigan took down the ute’s registration number and took some photos of it. Mr McGarrigan says that Cr Musolino saw him doing this, and that ‘he come running out the house, his whole demeanour and everything, body language was aggressive towards me.’<sup>13</sup> Mr McGarrigan drove to the end of the road and phoned the police. He then telephoned Mr Mason. He says that he was starting to feel a bit ‘funny’.<sup>14</sup> Mr Mason was with Mr Paul Lockwood (Specialist, Precinct Maintenance Urban) at the time that he received the phone call from Mr McGarrigan. Mr Lockwood’s statement in the WHS Report, includes:

On the day in question I was in the atco hut with Ian Mason when he received a phone call from Tony McGarrigan. At the conclusion of the phone call Ian was in an excited state and said that Tony was in some sort of trouble on Ridgeway Rd at Virginia, he wasn’t exactly sure what the problem was as Tony was hard to understand because of the state he was in. I jumped in a vehicle with Ian to head out to meet up with Tony on site. On the way I contacted Gary Clinton who was working with Tony to see if he knew what was going on. He was off site dumping a load of soil when I spoke to him and wasn’t aware of any problems with Tony at that time. I told Gary that something was happening on Ridgeway Rd as Tony had called and was in a very distressed state, I then asked Gary if he could get back on site asap to help Tony as Ian and I were still some time away from arriving.<sup>15</sup>

18. Following the phone call from Mr McGarrigan, Mr Mason telephoned Mr Hall who also immediately drove to the site of the incident.
19. Cr Musolino, in the interview, recalled the events as follows:
- Q. So then you went back later in the afternoon?
- A. I didn’t go back, I live and work, so I’m up and down. So the sound of you saying I went back is like I went with a purpose. I didn’t go with a purpose. I was just travelling up and down. I did watch them doing the works that they were doing during the course of the day. When they got to my driveway - and I didn’t even think they were going to go anywhere near our driveway because it didn’t, in my opinion, it didn’t need any works and there was conversation in relation to the driveways that needed some attention with Andy Slager in relation to improving it; because the semi drops off the side and that needed to be extended and it was causing damage to my semitrailer wheels. So I didn’t even think to raise that with him up the road because I didn’t think the works was going to take place because they had other work scheduled to do those repairs. And when I did see him there digging a hole where it was going to cause me more grief, I just asked him to wait until I got somebody with the right authority to speak to him so he didn’t continue. And his response to me was what agitated me. This is what I did wrong. I will admit to what I did wrong, I did lunge the vehicle forward. His backhoe was down so I didn’t endanger him or myself. The backhoe was down when we were having the conversation. The response was I don’t pay his wages. I moved the vehicle forward so he couldn’t continue to do that job and I went - I didn’t have any more conversation with him and I went in the office waiting until I got hold of somebody

<sup>12</sup> Ibid, p25.

<sup>13</sup> Ibid, p27.

<sup>14</sup> Ibid, p26.

<sup>15</sup> Ibid, p29.

from Playford to explain to them what just occurred. I then got hold of them. I went back out to say that I had got in touch with somebody. He didn't want to come anywhere near me. He had moved the (unclear) up the road. He is the front-end loader driver.

Q. Mr McGarrigan?

A. Yeah, I don't know his name but the front-end loader driver. And I tried to get his attention and he just kept moving. So I just went back into my office and said well, you know, the situation is now diffused, he's gone, que sera sera. Up until the police arrived.

...

So you can imagine there's one side and then there's the other side. So I asked him to stop, just give me a couple of minutes to go home while I get somebody that can give him the instruction because I can't give him the instruction. I acknowledged that with him. I said "I know I can't give you - even though I'm a councillor I cannot give you an instruction as a councillor" but I said "I'm a resident and you're working in front of my property and I'm just asking you just to wait please". I went home. I was less than two minutes. I come straight back and he had reversed, turned the front-end loader around using the backhoe and he was scratching out in front of the other pipe. And he had his bucket down because when I approached him, I said "You know I asked you to wait" and he said "You don't pay my wages". So then I placed my vehicle in a lunge, I did lunge it forward but his backhoe was down, turned it off and I went into my office. The next thing I went back out to him when I actually got somebody that could talk to him, that he wasn't interested. I said "fine". I left and I went back inside my office. And then the police came.

...

Q. And on what authority were you asking him to wait?

A. Only as a resident. Not because I was a councillor, and I made that clear. It was because I was a resident. He's working in front of my property and the works that he was doing could have caused more damage to my vehicles using that entrance.

Q. So when you asked him to wait, had you identified yourself as a councillor?

A. I did say to him, I approached him with politeness, I just said I know he knew who I was, there was no doubt about that. He's saying he doesn't. I've been there 17 years, he know who I was. And I said "I know I'm a councillor and I have no authority as a councillor" - I made that very clear to him - "to ask you to stop as a councillor but I will contact a manager that has the authority to ask you to stop. Just wait please." I went home, I come back. He had turned the machine around while I wasn't there. So he just continued about his business and the justification for him to continue about his business was that he was told that I don't pay his wages.

...in fairness, I wasn't acting as an elected member on that day. I was acting as a resident and it's my right to. I believe it's my right to, like any other resident, to approach council workers when work is being undertaken near their property, or adjoining their property. I think I'm no different than anybody else even though I'm an elected member. And I did not act as an elected member because I'm well aware, after 17 years of being on local government, that there's a specific way that I need to conduct myself as an elected member.

...

And I only approached the backhoe operator when he was working in front of my property. And I did open with "I am the elected member, however I have no authority in instructing you under my capacity as the elected member" and I said "but I will make a call as a resident to get somebody who can listen to what I have to say and ask you, instruct you" - my words were "instruct you whether you should continue or not".<sup>16</sup>

<sup>16</sup> Office of South Australian Ombudsman, Record of Interview Transcript, p8.

20. Mr McGarrigan, in his response to the provisional report, states:

Cr Musolino admits to being agitated by my comments and claims to have lunged his vehicle forward when he actually drove into the drain in front of the backhoe to prevent it doing anymore [sic] work. He claims to have not endangered anyone's life yet driving in front of the moving backhoe which I was driving was endangering both of us.

Cr Musolino was aggressive in his communication and was not polite as he claims. It shouldn't matter that Cr Musolino is a councillor as his conduct as a resident was also questionable. None of the conversation took place ... as per his statement [above].

As the report states, I was treated at the Lyell McEwin Emergency Department as a I was suffering with chest pains, anxiety and had trouble breathing as a result of Cr Musolino's actions. I felt threatened by his behaviour due to his aggressive approach both driving his vehicle towards me and his threatening demeanour.

21. Mr Clinton, in his response to the provisional report, states:

...if Mr. Musolino acted as he states, in a polite manner, I'm sure that Mr McGarrigan would have had no need to stay away from Mr Musolino, call the police or end up so affected by the confrontation that he required an ambulance and a stay in hospital.

22. When Mr Mason and Mr Lockwood arrived at the site they found Mr McGarrigan in a distressed state in Mr Hall's vehicle. They administered first aid, but his condition continued to deteriorate. At 3.43pm Mr Mason called an ambulance for Mr McGarrigan. The police and the ambulance arrived and Mr McGarrigan was transported to the Lyell McEwin Hospital. The police spoke to Cr Musolino on the property.

23. Mr McGarrigan was treated at the Lyell McEwin Hospital Emergency Department and was discharged at approximately 1am on Wednesday 5 February 2014.

24. Following the incident Mr Hall completed two incident reports - one in relation to Mr Clinton and one in relation to Mr McGarrigan. Mr McGarrigan's incident report gives the following 'brief description of injury':

Tony was shaking and visibly distressed. At about 3:43 Tony complained of chest pains and breathing difficulty. An ambulance was called. Tony [sic] admitted to Lyell McEwin Hospital on 4.2.14.<sup>17</sup>

25. The WHS Report states that the investigation found the following:

#### FINDINGS AND ROOT CAUSE

Based on the investigation conducted and information provided to date, for the Ridgeway Road, Virginia incident 04/02/2014, the investigation team has determined several findings regarding this event:

1. The works on site, followed correct action with regards to works being undertaken, communication with their service coordinator and process during and following an incident.
2. Cr Musolino's behaviour in trying to influence the works being undertaken may be inappropriate.
3. Cr Musolino's behaviour and actions towards the workers in both incidents may be inappropriate.

<sup>17</sup> City of Playford, WHS incident Investigation - Root Cause Analysis (RCA) Precinct Maintenance Rural, Incidents Ridgeway Road Virginia, 04/02/2014, p17.

Based on the above findings the investigative team is alleging that the root cause for the Ridgeway Road Incident was external interference to works being undertaken by City of Playford workers.<sup>18</sup>

## Legislation

26. Section 62 of the Local Government Act provides:

### 62 – General duties

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

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

27. Section 63 of the Local Government Act provides:

### 63 – Code of conduct for council members

- (1) The Governor may, by regulation, prescribe a code of conduct to be observed by the members of all council.
- (2) Council members must observe the code of conduct.

28. Clause 3.4 of the Code of Conduct is:

### 3. Misconduct

Council members must:

...

- 3.4 Not exercise or perform, or purport to exercise or perform, a power, duty or function that he or she is not authorised to exercise or perform.

## Whether Cr Musolino breached the Local Government Act and the Code of Conduct for Council Members

29. The complainants alleged that Cr Musolino breached clauses 2.2, 2.3, 2.4, 2.6, 2.7, 2.11, 2.12, 2.14 and 3.4 of the Code of Conduct. I have considered only whether Cr Musolino breached clause 3.4 of the Code of Conduct.

30. I note that the introduction to the Code of Conduct provides:

Council members must comply with the provisions of this Code **in carrying out their functions as public officials**. It is the personal responsibility of Council members to ensure that they are familiar with, and comply with, the standards in the Code at all times. [my emphasis]

<sup>18</sup> Ibid, p9.

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31. Similarly, sections 62(1) and (2) of the Local Government Act only apply when council members are acting in the performance and discharge of official functions and duties.
32. Based on the evidence before me, I am satisfied that Cr Musolino was not carrying out his function as a public official at the time of the incident; he was acting in a personal capacity as a resident/property owner. I consider that this is the case irrespective of whether Cr Musolino declared himself to be a council member or not. As such, I am of the view that neither the Code of Conduct or sections 62(1) or 62(2) of the Local Government Act apply in these circumstances. In my view, this highlights a failing in the Code of Conduct. I consider that public officers should always act in a manner so as not to compromise the reputation or integrity of the office they hold.
33. I have also considered section 62(4) of the Local Government Act, which provides that a council member must not make improper use of his or her position as a member of the council to gain, directly or indirectly, an advantage for himself or for another person or to cause detriment to the council.
34. The evidence as to whether Cr Musolino identified himself as a council member and, as such, attempted to use his position as a member of council to gain an advantage for himself, is contradictory. Cr Musolino says that he did identify himself as a council member, but that he made it clear that he was acting as a resident and not as a council member. Mr McGarrigan has said that he did not know that Cr Musolino was a member of council until after the incident. Mr Clinton said that Cr Musolino did tell him that he was a council member.
35. Mr Clinton submits, in his response to the provisional report:
- ...Mr Musolino in interview firstly denies what he had said, then contradicts himself by saying to varying degrees that he was not sure, and then said that he may or might not have.
- Mr Musolino later states that he does not promote himself as a councillor, yet admits later in interview that during his conversation with Mr McGarrigan he mentioned that he was indeed a councillor / resident. This in fact was stated at least twice, so when Mr Musolino said Mr McGarrigan must have known him, and if no influence was intended then why mention being a councillor at all.
- ... He had still for whatever reason declared that he was. Then when he had asked me not to commence works outside of his home on Martin Road, if I should go there, and later in the day when he stopped Mr McGarrigan from competing his duties I believe that Mr Musolino did compromise his reputation as a councillor by acting in the manner which he did, especially after ignoring instructions to contact council first thing on that morning, a procedure that he should have already known, after 17 years in office. Had he done this the whole situation would have been avoided.
36. Whilst I favour Mr Clinton's recollection of the events, being that Cr Musolino identified himself as a council member to him, I do not consider that there is sufficient evidence to establish that Cr Musolino made improper use of his position as a member of the council to gain, directly or indirectly, an advantage for himself at this time, given that Cr Musolino left when Mr Clinton told him to ring the council to discuss the proposed works. In order to be satisfied that Cr Musolino had made improper use of his position as a member of the council to gain, directly or indirectly, an advantage for himself, I would need evidence to the standard required by the Briginshaw test set out above, under the heading 'Standard of Proof'.
37. In relation to the later incident with Mr McGarrigan, given that Mr McGarrigan was not aware that Cr Musolino was a council member until after the incident, I am unable to

find that Cr Musolino made improper use of his position as a council member to attempt to make Mr McGarrigan do as he asked in relation to the work outside his property. Had Mr Clinton been present at this time, I may have been able to reach a different conclusion, given that Cr Musolino had earlier told him that he was a council member.

38. Mr McGarrigan, in his response to the provisional report, states:

Regardless of whether Cr Musolino was acting as a resident or a councillor, his behaviour and actions were inappropriate and he needs to be held accountable for bullying, harassing and disrespecting my position as a Council worker. If Cr Musolino is not in breach of the Local Government Act or Code of Conduct as a councillor, surely his behaviour if only acting as a resident, needs to be further investigated by the attending police. After all, I was threatened enough to call the police and deemed to be unfit to continue working. As you know as advised by previous statements provided to you, this resulted in me going to hospital in an ambulance. I found this situation to be extremely stressful and totally unacceptable. I expect as a public officer that my health, safety and wellbeing in my workplace takes precedence over the position of any offending person within the public sector.

39. I have no reason to disbelieve Mr McGarrigan or Mr Clinton's versions of events and have sympathy for Mr McGarrigan and the stress he suffered as a result of the incident. However, I am not able to establish, to the necessary standard of proof, that Cr Musolino:

- was acting in the capacity of a council member on 4 February 2014, or
- acted in breach of section 62(4) of the Local Government Act.

40. I comment that it is unfortunate that I am unable to assess Cr Musolino's conduct on 4 February 2014 against the acceptable behavioural standards set by the Code of Conduct and the Local Government Act. In my view, council members, as public officers, should be required to act in a reasonable manner at all times, whether they are acting in their capacity as a council member or not.

## Opinion

In light of the above, my final view is that Cr Musolino did not breach the Local Government Act or the Code of Conduct, and did not act in a manner that was unlawful within the meaning of section 25(1)(a) of the Ombudsman Act.

## Final comment

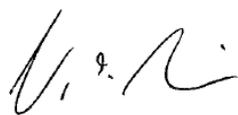
The Ombudsman Act imposes certain obligations<sup>19</sup> on my Office and others, including complainants, officers and members in the council, to keep information about my investigation confidential. However, if I consider that disclosure of that information is in the public interest, then I may authorise or require its disclosure.

In my opinion, there is a public interest in disclosure of my final reports under the Ombudsman Act. Therefore, I authorise disclosure of the final report by the council and require that it present the final report to a public meeting of the council within two ordinary meetings of the council following the receipt of the final report.

I request that the council report to the Ombudsman that it has done so.

<sup>19</sup> *Ombudsman Act 1972*, section 26.

In the event that it does not present the final report to a public meeting of the council within two ordinary meetings of the council following the receipt of the final report, reason(s) for the inaction should be provided to the Ombudsman.

A handwritten signature in black ink, appearing to read 'W. Lines', written in a cursive style.

Wayne Lines  
**SA OMBUDSMAN**

30 January 2015