

## Report

### Full investigation - *Ombudsman Act 1972*

Complainant	Mayor Graham Philp
Council member	Cr Peter Charles
Council	City of Victor Harbor
Ombudsman reference	2016/04181
Date complaint received	2 May 2016
Issues	1. Whether Cr Charles had a material conflict of interest in item 16.1.2 at the council meeting on 26 April 2016

#### Jurisdiction

The complaint alleges 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>

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

#### Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from Cr Charles
- considering the *Local Government Act 1999* and the Code of Conduct
- providing Cr Charles and the council 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>3</sup>

<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.

<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.

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

In response to my provisional report Cr Charles in an email dated 31 August 2016 stated:

Your findings are generally final as far as I am able to ascertain experience shows me this. Whilst I may not agree with your findings I realise that you are simply interpreting the law. I accept that I am guilty again under the meaning of the act, and this is part two of the same complaint a touch of double jeopardy.

As for loss of reputation, I do not agree who knows my reputation, and for that matter who out in the electorate actually cares?

I shall not start anew attempting to defend myself, I have nothing further to say.

In a second email dated 1 September 2016, Cr Charles stated:

[T]here is really nothing to add from my side as I said I am technically guilty (according to the act). There is no way to dodge that fact!

I don't believe the spirit of the act was to capture small fish like I on small issues such as this No sheep stations here, still that's my view.

I asked for clarification addressing both the Mayor in the Chair and the CEO sitting beside him. I received a shrug of shoulders from CEO and an audible it's up to you from the mayor, this you have on stick.

I believe that when asked the CEO is bound to give legal advice so as he was non-committal I sat still.

I did not receive a gain nor loss any greater nor lesser than if I had left the room . My reputation is as it always has been (most of the electorate do not care either way)

The council responded by stating it was satisfied the matter had been investigated.

I have considered those responses, however, my view remains as set out in my provisional report.

### Background

1. On 3 June 2015 I received a complaint from the council's mayor alleging breaches of the Code of Conduct by Cr Charles and another councillor, Cr Marshall.
2. On 22 March 2016 I issued a report (**the report**) presenting findings that Cr Charles and Cr Marshall had breached the Code of Conduct. I made the following recommendations under section 25 of the Ombudsman Act:
  - (i) the council table this report at a council meeting which is open to the public within two ordinary meetings of the council following receipt of these recommendations
  - (ii) that the council reprimand Cr Marshall in relation to his disclosure of confidential information

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

- (iii) that the council reprimand Cr Charles in relation to his disclosure of confidential information
- (iv) Cr Marshall and Cr Charles attend training to be coordinated by the council on the requirements of the council's Records Management Policy
- (v) the council circulate to its elected members a copy of the Ombudsman's letter dated 7 January 2015 and a reminder of their obligations under the council's Records Management Policy.

Under the provisions of the Code of Conduct the report had to be provided to a public meeting of the council.

3. The agenda for the council meeting on 26 April 2016 included the report as item 16.1.2.
4. The minutes of the council meeting of 26 April 2016 record that Cr Charles was present at the meeting.
5. The minutes also record the following:

**16.1.2 Code of Conduct for Council Members**

*Mayor Philp declared that there may be a perceived conflict of interest as he had lodged the report against Cr Marshall and Cr Charles but remained in the Chair as the recommendation was simply to follow the Ombudsman's directions.*

*7.33pm Cr Marshall declared he had no interest in this matter and left the chambers (sic)*

OC2392016 Moved: Cr Pat Chigwidden

Seconded: Cr Carol Schofield

That Council -

Receive the Full Investigation Report provided by the Ombudsman dated 22 March 2016.

**CARRIED**

OC2402016 Moved: Cr Moira Jenkins

Seconded: Cr Nicholas Hayles

That Council note the Ombudsman's findings that -

i) By disclosing confidential information Cr Marshall and Cr Charles have each breached clauses 3.2 and 3.3 of Part 3 of the Code of Conduct for Council Members (Misconduct) and have acted in a manner contrary to the law within the meaning of section 25 (1)(a) of the Ombudsman Act; and

ii) By failing to ensure that Council related communications are committed to corporate records, Cr Marshall and Cr Charles have each failed to comply with Council's Records Management Policy and in so doing, have acted in a manner that is wrong within the meaning of section 25 (1)(g) of the Ombudsman Act.

**CARRIED**

OC2412016 Moved: Cr Carol Schofield

Seconded: Cr Moira Jenkins

That Council -

Declare its disapproval and disappointment with each of Cr Marshall and Cr Charles for the disregard shown towards their obligations as an elected member, and Express in the strongest terms that such behavior (sic) must not be repeated.

**CARRIED**

OC2422016 Moved: Cr Pat Chigwidden

Seconded: Cr Carol Schofield

That Administration -

1. Arrange training for Cr Marshall and Cr Charles in their obligations under the Council's Records Management Policy and the State Records Act at the earliest opportunity and in any event no later than 3 months from the date of this resolution, and

2. Confirms by subsequent report to Council whether Cr Marshall and/or Cr Charles

have undertaken and completed the training as required by Council, and  
 3. Circulate to the elected members a copy of the Ombudsman's letter dated 7 January 2015 (as circulated twice previously) and a reminder of their obligations under Council's Records Management Policy.

### CARRIED

*7.41pm Cr Marshall re-entered the chambers and resumed his seat.*

6. On 20 May 2016 my Office approached Cr Charles about the allegations that he failed to disclose an interest in item 16.1.2 on 26 April 2016, and that he remained in the chamber while the matter was being discussed and voted in relation to it. He was invited to respond to the allegations.
7. On 6 June 2016 Cr Charles provided a response to the allegations as follows:

Dear Sir.

Thankyou once again for a time extension and the opportunity to address the concerns re my alleged conflict of interest. Ref 2016/04181.

#### Your questions

- I have not yet received Training regarding conflict of interest as such, however I have attended a workshop along with all other councillors in chambers.

I also have received much documentation on (sic) subject and recently more again on the new and somewhat confusing (even to legislators and legal minds) Perceived conflict of interest.

- Quick answer is No I do not believe I had any conflict of **any** of the three you mention regarding the report on April 26 2016.
- Had I believed I had any conflict of interest I would have left the meeting (I have no reason to waste your and my time answering these COC charges) I remained in the chamber as in my mind it was the correct thing to do. (face my accusers and take responsibility for my actions)
- At the outset of Item 16.1 The Mayor (chair ) declared a perceived conflict of interest due to him lodging the report (Hear on the recording on the City of VH web site) Mayor explained as the recommendations made in the Ombudsman's report would be followed he felt he could remain in the chair. *It would have been very easy for him to leave as your recommendations would have been followed in any event. I took my queue (sic) from the Mayor's actions and advice.*
- Councillor Marshall first addressed the chair and declared that he *"did not believe he had a conflict but did not wish to remain in chamber"* (this is on Council recording on City VH web site, 1.51minutes into item (sic).
- I was confident after hearing the Mayors (sic) comments and then the statement from Cr Marshall that I was correct in believing I did not have a conflict in particular the fact that I was quite at ease with the findings of the report myself (*I was Not in conflict with the report*) You have already noted in your letter that I may have raised the question of should stay or go and that is correct. As a further measure of safely (sic) I asked the Mayor and the CEO who are at a distance of one and two meters (sic) from my position in the chamber "should I leave the chamber?" I did not have my microphone on and I cannot be heard but the Mayors (sic) reply is clear "It's up to you" The CEO did not reply. ( I was asking for advice to confirm my analysis of the situation and I expected accurate information ) I took the advice at face value that it was ok and/or optional whether I stayed or went no penalty.

**So in conclusion, in my own words this is how I saw the situation then and now.**

Cr Marshall left the chamber with no conflict but was not about to listen to the conversation.

The Mayor remained with a confessed conflict but felt he could continue to preside regardless, hear recording.

I broached the Mayor and CEO as to their opinion and was told "Please yourself" This taken with the fact that 3 directors and 6 councillors gave no indication that I should leave or that they were uncomfortable with my remaining confirmed to me all was legally correct.

Regarding the votes that were conducted by the Mayor who had a conflict of interest, the recording will show that I did vote, because I have always been told that whilst sitting at my seat in the chamber I must vote.

Significantly on each and every occasion a vote was taken I voted in favour of the Ombudsman's recommendations (reprimands and training)

My vote was No different at any time to all other members in the chamber.

My vote was accepted and counted by the Mayor and at no time did the CEO suggest that there was anything untoward by way of improper process or procedure in the chamber and/or my voting conduct.

I believed it was my responsibility to remain to take my medicine as it were. I was of the opinion that the recommendations were fair and reasonable. I knew they would be followed to the letter and I voted for all the recommendations.

I am now extremely concerned that after publicly acknowledging in the chambers (sic). My error and giving an assurance that this will never happen again and also by remaining in chamber showing remorse, also fully accepting responsibility for my conduct. (Audio recording verifies my apology) That I now find myself being reported for another breach of COC when I believe my conduct was exemplary. Historical investigation of the frequent COCs being lodged with respect to operation of the City of Victor Harbor Council may indicate that I am a member of a divided and dysfunctional council.

I wish to be advised please as to whether (sic) a COC may have been lodged against the Mayor who remained in chambers and conducted proceedings against me and who was directly the complainant of the original COC and now may be either directly or indirectly involved in this new complaint I am now answering. I request you consider if the Mayor has followed correct protocol and procedure also.

Thankyou again for the extended time to complete my report to you.

Cr Peter Charles.

## Relevant law

8. Section 62 of the Local Government Act provides *inter alia*:

- (1) A member of a council must at all times act honestly in the performance and discharge of official functions and duties.

9. Section 73 of the Local Government Act provides *inter alia*:

- (1) Subject to this section, for the purposes of this Subdivision, a member of a council has a **material conflict of interest** in a matter to be discussed at a meeting of the council if any of the following persons would gain a benefit, or suffer a loss, (whether directly or indirectly and whether of a personal or pecuniary nature) depending on the outcome of the consideration of the matter at the meeting:
  - (a) the member;
  - (b) a relative of the member;
  - (c) a body corporate of which the member is a director or a member of the governing body;
  - (d) a proprietary company in which the member is a shareholder;

- (e) a beneficiary under a trust or an object of a discretionary trust of which the member is a trustee;
  - (f) a partner of the member;
  - (g) the employer or an employee of the member;
  - (h) 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;
  - (i) a person of a prescribed class.
- (2) A member of a council will not be taken to have a material conflict of interest in a matter to be discussed at a meeting of the council—
- (a) if the relevant benefit or loss would be enjoyed or suffered in common with all or a substantial proportion of the ratepayers, electors or residents of the council area; or
  - (b) on account of an interest under subsection (1) of a relative of the member, other than the member's spouse or domestic partner, if the member does not know, and could not reasonably be expected to know, of the interest.

10. Section 74 of the Local Government Act provides *inter alia*:

- (1) If a member of a council has a material conflict of interest in a matter to be discussed at a meeting of the council, the member must—
- (a) inform the meeting of the member's material conflict of interest in the matter; and
  - (b) leave the meeting room (including any area set aside for the public) such that the member cannot view or hear any discussion or voting at the meeting, and stay out of the meeting room while the matter is being discussed and voted on.
- Maximum penalty:
- (a) if the member votes on the matter with an intention to gain a benefit, or avoid a loss, for the member or another person—\$15 000 or 4 years imprisonment; or
  - (b) in any other case—\$5 000.
- (2) However, a member of the council does not contravene subsection (1) by taking part in the meeting, or being in the chamber where the meeting is being conducted, if the member—
- (a) has been granted an approval under subsection (3); and
  - (b) is complying with the conditions of the approval.
- (3) The Minister may grant an approval in writing to a member of the council to take part in the meeting, or to be in the chamber where the meeting is being conducted, if—
- (a) because of the number of members subject to the obligation under this section, conduct of the meeting would be obstructed if the approval were not given; or
  - (b) it appears to the Minister to be in the interests of the council's community and area.

11. Section 75 of the Local Government Act provides *inter alia*:

- (1) In this Subdivision—
- actual conflict of interest***—see section 75A(1)(a);

*conflict of interest*—see subsections (2) and (3);

*perceived conflict of interest*—see section 75A(1)(b).

- (2) For the purposes of this Subdivision but subject to this section, a *conflict of interest* is a conflict between—
- (a) a member of a council's interests (whether direct or indirect personal or pecuniary); and
  - (b) the public interest,
- that might lead to a decision that is contrary to the public interest.

12. Section 75A of the Local Government Act provides *inter alia*:

**75A—Dealing with actual and perceived conflicts of interest**

- (1) If, in relation to a matter to be discussed at a meeting of a council, a member of the council—
- (a) has a conflict of interest in the matter (an *actual conflict of interest*); or
  - (b) could reasonably be taken, from the perspective of an impartial, fair-minded person, to have a conflict of interest in the matter (a *perceived conflict of interest*),
- the member must deal with the actual or perceived conflict of interest in a transparent and accountable way.
- (2) Without limiting subsection (1), the member must inform the meeting of—
- (a) the member's interest in the matter; and
  - (b) if the member proposes to participate in the meeting in relation to the matter, how the member intends to deal with the actual or perceived conflict of interest.
- ...
- (5) To avoid doubt, it is declared that non-participation in a meeting of a council is not the only way in which a member of the council may appropriately deal in a transparent and accountable way with an actual or perceived conflict of interest of the member in a matter to be discussed at the meeting.

13. Clause 3.13 of Part 3 of the Code of Conduct provides:

Council members must be committed to making decisions without bias and in the best interests of the whole community and comply with the relevant conflict of interest provisions of the Local Government Act 1999.

**Whether Cr Charles had a material conflict of interest in item 16.1.2 at the council meeting on 26 April 2016**

14. The general but fundamental principle is that a person in public office should not allow a conflict to exist between personal interest and public duty.
15. First, I must be satisfied that Cr Charles had a material interest in a matter in relation to item 16.1.2, within the meaning of section 73(1) of the Local Government Act. That is, I must be satisfied that he would receive a benefit or suffer a detriment of the type described in section 73(1). That is, either a direct or indirect personal or pecuniary benefit or detriment. Such benefit or detriment should not be shared with all or a substantial proportion of ratepayers, electors or residents of the council area.

16. The primary purpose of item 16.1.2 was to have the report of the investigation including recommendations, put before the council meeting. The report was the outcome of my investigation of a complaint made by the mayor on behalf of the council. The council report accompanying item 16.1.2 in essence, recommended that the council meeting adopt the recommendations. The report made five recommendations namely:
- (i) the council table this report at a council meeting which is open to the public within two ordinary meetings of the council following receipt of these recommendations
  - (ii) that the council reprimand Cr Marshall in relation to his disclosure of confidential information
  - (iii) that the council reprimand Cr Charles in relation to his disclosure of confidential information
  - (iv) Cr Marshall and Cr Charles attend training to be coordinated by the council on the requirements of the council's Records Management Policy
  - (v) the council circulate to its elected members a copy of the Ombudsman's letter dated 7 January 2015 and a reminder of their obligations under the council's Records Management Policy.
17. Of the five recommendations made I consider that (i), (iii) and (iv) directly affected Cr Charles.
18. I am mindful that recommendations made under section 25 of the Ombudsman Act are not legally binding on the council.
19. The decision of the SA District Court in *Petrovski v Dolling*<sup>5</sup> emphasised that the legislation is confined to the type of interest referred to in section 73 and 'not to conflicts of interests at large'.<sup>6</sup> Although the court considered the section before it was amended<sup>7</sup>, I consider its remarks are apposite.
20. The Court held that the question of whether a council's resolution gives rise to a section 73(1) interest, must be determined by a consideration of the actual terms of the resolution.<sup>8</sup> In addition, the test is whether the council 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. Cr Charles has stated that he turned his mind as to whether he had a conflict of interest. He refers to an unrecorded discussion with the mayor during the meeting which resulted in the mayor stating that Cr Charles must make the decision for himself.<sup>9</sup> As a matter of the application of the law, only the council member can decide if he or she has an interest for the purpose of the Local Government Act. A member could request clarification on the relevant provisions from council staff but ultimately, the decision rests with the council member. I am advised that on 8 February 2016, Cr Charles attended training in relation to the new conflict of interest provisions of the Local Government Act.
22. Cr Charles has also submitted that he followed the lead of the mayor who had earlier stated that he could be perceived as having an interest in that he was the (nominal) complainant in the complaint the subject of the report. The mayor concluded that he should remain in the chamber as the purpose of item 16.1.2 was for the council to 'follow the Ombudsman's directions'. As I have stated above, recommendations made under the Ombudsman Act are not binding but, having regard to the purpose of the report, the advice to the council meeting that it accept the report, and the provisions of

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<sup>5</sup> [2013] SADC (5 March 2013).

<sup>6</sup> *Ibid*, [41].

<sup>7</sup> section 73 amended on 31 March 2016

<sup>8</sup> *Ibid*, [34].

<sup>9</sup> Confirmed by the Mayor in a telephone conversation with my Officer on 19 May 2016.

section 75A(2) of the Local Government Act, I consider that the mayor dealt with the perceived conflict of interest in an appropriate way.

23. In my view, Cr Charles had a material conflict of interest in item 16.1.2 and failed to disclose the interest. In the council considering the report in a public meeting and adopting the recommendations in it, my view is that Cr Charles would suffer a direct loss of a personal nature i.e. a loss of reputation and public embarrassment. He would be publicly identified in the report and further, he would be reprimanded by the council and would have to attend training on the requirements of the council's Records Management Policy.
24. Section 74 provides direction in the event a council member has a material conflict of interest. Section 74(1)(b) requires that after informing the meeting of a material conflict of interest the member must leave the chamber and not be able to hear any discussion of the matter and how the meeting votes.
25. Cr Charles has admitted that he remained in the chamber and voted in relation to item 16.1.2 and in favour of adopting the recommendations. This does not alter my view that Cr Charles would suffer a direct loss of a personal nature.
26. In my view, the vote cast by Cr Charles was not critical to the acceptance of the report by the council. In that regard I note the penalty set out in section 74(1) if a member votes on a matter with an intention to gain a benefit or avoid a loss. In the circumstances, my view is that Cr Charles did not exhibit such an intention.
27. Nonetheless, I consider that Cr Charles has failed to understand his fundamental obligations as a council member in regards to declaring an interest.

## Conclusion

In light of the above, I consider that by failing to disclose a material conflict of interest in relation to item 16.1.2 on 26 April 2016, Cr Charles breached the provisions of section 62 of the Local Government Act and clause 3.13 of Part 3 of the Code of Conduct. In so doing he acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

## Recommendation

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council make arrangements for Cr Charles to attend training on the conflict of interest provisions of the Local Government Act.

## Final comment

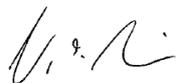
In accordance with section 25(4) of the Ombudsman Act the council should report to the Ombudsman by **7 October 2016** on what steps have been taken to give effect to the recommendation above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.

Pursuant to section 263B(2) of the Local Government Act, if a council member fails to comply with a council requirement made as a result of an Ombudsman recommendation such as

that/those above, the council member will be taken to have failed to comply with Chapter 5 Part 4 of the Local Government Act. In this event, the council is to ensure that a complaint is lodged against the member in the District Court.



Wayne Lines  
**SA OMBUDSMAN**

13 September 2016