

Report
Full investigation - *Ombudsman Act 1972*

Council member	Mayor John Trainer
Council	City of West Torrens
Ombudsman reference	2017/03918
Date complaint received	12 April 2017
Issues	Whether Mayor Trainer failed to declare a material conflict of interest as required by section 74 of the <i>Local Government Act 1999</i> in breach of clause 3.13 of the Code of Conduct for Council Members.

Jurisdiction

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

Investigation

My investigation has involved:

- considering self-reported information submitted by Mayor John Trainer
- considering the *Ombudsman Act 1972* (**the Ombudsman Act**), *Local Government Act 1999* (**Local Government Act**) and the Code of Conduct for Council Members (**the Code of Conduct**)
- preparing a provisional report and providing it to Mayor Trainer and the Deputy Mayor, Cr Arthur Mangos 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.¹ It is best summed up in the decision as follows:

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

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

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

Response to my provisional report

Neither Mayor Trainer nor Cr Mangos provided a response to my provisional report.

Background

1. On 12 April 2017 Mayor Trainer self-reported to my Office a failure to declare a material conflict of interest for the purposes of section 74 of the Local Government Act a council meeting on 4 April 2017 (**the meeting**).
2. During the meeting the council considered and voted on Agenda Item 17.2, which included a recommendation that council:
 - ...
 2. Endorses the participation of the Mayor, Chief Executive Officer and Program Leader Partnerships to participate in the State Government delegation to Shandong in May 2017 to support businesses from within the City of West Torrens who have registered an interest in China and to officiate the Letter of Intent prepared for Weifang City, People's Republic of China, as the first step in establishing a Friendly Cooperative Relationship Agreement.
3. Mayor Trainer has acknowledged that he had a conflict of interest in that he stood to gain 'a direct personal and financial benefit from the outcome of the consideration of the matter.' Mayor Trainer also acknowledged that he did not declare a conflict of interest in the recommendation and that he failed to vacate the chamber during discussion and voting.
4. In his letter to my Office dated 11 April 2017, Mayor Trainer submitted a detailed summary as to how and why he failed to declare a material interest. I have set out the relevant excerpts of those submissions below:

...I had a momentary lapse in concentration in presiding over the meeting at the time, a lapse I will explain further on in this report, and I inadvertently failed to declare my interest, and failed to leave the Council chamber when the discussion in relation to item 17.2 commenced.

Albeit my actions were inadvertent and unintentional, I understand that those actions are contrary to the requirements under section 74 of the LG Act. For this reason I now write to notify you of my error and to make you aware that I acknowledge and understand my mistake.

...as you will note from the Council Minutes, as soon as this inadvertent lapse was raised with me, I immediately vacated the Chair for the express purposes of the Council reconsidering the motion.

Whilst the Council did intend to reconsider the Agenda item in my absence, it was subsequently advised by its governance staff that as Council had made a decision in relation to the matter, my error could not be retrospectively corrected in the manner proposed.

Despite my failure to declare a material interest at the relevant time, it is important to note that as the Presiding Member, I did not vote on the motion on this occasion. Of course, whilst I do have casting vote in the event a motion is tied, I was not required to exercise my casting vote for this item.

Accordingly, I submit that it is unlikely that the Council resolution would have altered, had I exited the chamber in accordance with section 74 of the LG Act, at the time the discussion in relation to Agenda item 17.2 commenced.

However, I do not resile from the position that however mistaken and unintended, my failure to declare my material conflict of interest at the relevant time has contravened section 74 of the LG Act.

...In relation to my understanding of the conflict of interest provisions...I confirm that I completed 'Council Member Mandatory Training - Module 2 - Legal Responsibilities' in December 2014 and, along with the Elected Member body, undertook training in relation to the amended conflict of interest provisions as amended by the Local Government (Accountability and Governance) Amendment Bill 2015, on 4 February 2016.

...I consider that I have an adequate awareness of those provisions, from both personally declaring conflicts at past Council meetings, as well as from having presided over Council meetings at which other Elected Members have declared relevant interests, and I have a comprehensive understanding of the reason for the legislation.

...On this occasion, I was distracted by the complexities of chairing the meeting while concentrating on answering questions about the merits of the Shandong delegation and in particular the benefits for local West Torrens businesses that had been generated by the 2016 delegation. I had only the week before returned from leave and after researching as much as was practical into what council business had transpired in my absence, I had concentrated for this particular April 4 agenda item on the content of the administration's report (in anticipation of questioning) rather than the actual resolution itself.

It is important to note that I had been most reluctant to be part of the 2016 delegation. At the advanced age of 74, I always dread being away from my similarly aged wife for even a day interstate, let alone being away for more than a week on the other side of the globe. But I had agreed to participate in 2016 out of a sense of duty, being persuaded that the success of the business delegation in China required the presence of someone with Mayoral status.

I continued to make my reluctance on this issue abundantly clear to staff and to elected members for some time over 2016 and 2017. But this year I was even more reluctant to take part in the delegation, having experienced the arduous tediousness of the previous year's delegation, and with the likelihood in 2017 of missing events of importance to me that were occurring here in Adelaide.

Prior to the April 4 meeting I had fruitless discussions with my CEO and my PA about minimizing my participation. Fruitless, because it was felt necessary for diplomatic purposes that I be present to sign some ceremonial documentation with the Mayor of Weifang.

We subsequently came to the conclusion that this time I could actually delegate that task to the Deputy Mayor without causing offence, because the 2017 signing ceremony would only be at the level of a Letter of Intent, in preparation for the West Torrens Mayor being present in 2018 to sign a more formal Friendly Cooperative Relationship Agreement. It was also possible the 2018 signing event might be held here in West Torrens, with a visiting Weifang delegation.

However, those other diplomatic arrangements for next month had not been fully explored at the time of the April 4 meeting, and the details of the program and the exact dates in May for which the 2017 delegation would be away were still undetermined.

Not having adequately looked at the wording of the four-part resolution, I somehow had labored under the incorrect assumption that the resolution merely agreed in principle to the 2017 delegation occurring and that the details of the dates and participants and the exact budget would be determined later.

I was totally wrong in that assumption, though it is significant that apparently neither the staff nor any of the other elected members observed there was a potential for a conflict of interest until one councilor raised a question after the decision had already been unanimously supported by all councilors, with no vote being cast by me.

I again stress that on this occasion I was distracted and that this was an inadvertent failure on my behalf. I had no intention of deriving a benefit from remaining in the Chamber at the time the matter was discussed. Indeed, I envisaged participation in the delegation as being the very opposite of a benefit.

I can also say that this incident has reaffirmed for me the importance of being more vigilant in the future.

Relevant law

5. Section 63 of the Local Government Act provides:

63—Code of conduct for members

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

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

Conflict of interest

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.

7. Section 73 of the Local Government Act defines the circumstances in which an elected member has a material conflict of interest in a matter as follows:

73—Material conflicts of interest

- (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.
- (3) A member of a Council who is a member, officer or employee of an agency or instrumentality of the Crown, will be regarded as having a material conflict of interest in a matter before the Council if the matter directly concerns that agency or instrumentality but otherwise will not be regarded as having an interest in a matter by virtue of being a member, officer or employee of the agency or instrumentality.
- (4) In this section—
 - agency or instrumentality of the Crown* includes—
 - (a) an administrative unit of the Public Service;
 - (b) a body corporate comprised of, or including or having a governing body comprised of or including, a Minister or Ministers of the Crown or a person or persons appointed by the Governor or a Minister or other agency or instrumentality of the Crown.

8. Section 74 of the Local Government Act sets out what an elected member is required to do if they have a material conflict of interest:

74—Dealing with material conflicts of interest

- (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.
- (4) The Minister may grant an approval under subsection (3) subject to any conditions determined by the Minister.
- (5) If a member of a Council discloses a material conflict of interest in a matter to be discussed at a meeting of the Council, the following details must be recorded in the minutes of the meeting and on a website determined by the chief executive officer:
 - (a) the member's name;
 - (b) the nature of the interest, as described by the member;

- (c) if the member took part in the meeting, or was in the chamber during the meeting, under an approval under subsection (3), the fact that the member took part in the meeting, or was in the chamber during the meeting (as the case requires).
- (6) This section does not apply to a matter of ordinary business of the Council of a kind prescribed by regulation for the purposes of this section.

Whether Mayor Trainer failed to declare a material conflict of interest for the purposes of section 74 of the *Local Government Act 1999* in breach of clause 3.13 of the Code of Conduct for Council Members.

Section 73 - Material conflicts of interest

9. A material conflict of interest, as defined by section 73(1) of the Local Government Act, exists where a person or entity listed in section 73(1)(a)-(i) would gain a benefit or suffer a loss (whether directly or indirectly, pecuniary or non-pecuniary) depending on the outcome of the consideration of the matter by the elected member.
10. As Mayor Trainer stood to gain a direct pecuniary and non-pecuniary benefit by way of receiving a trip to China that was paid for by the council, I am persuaded that he had a material conflict of interest.
11. My view that Mayor Trainer stood to receive a benefit, depending on the outcome of the vote on the recommendation, is not affected by his submission that he had reservations about the delegation. Ultimately, he received a benefit of considerable monetary and experiential value.
12. I must now consider whether Mayor Trainer appropriately dealt with the material conflict of interest in accordance with section 74 of the Local Government Act.

Section 74 - Dealing with material conflicts of interest

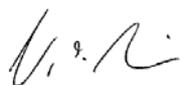
13. In order to deal with a material conflict of interest, council members must:
- inform the meeting of the member's material conflict of interest in the matter
 - leave the meeting room (including any area set aside for the public) such that the member cannot view or hear any discussion or voting at the meeting, and stay out of the meeting room while the matter is being discussed and voted on.
14. Mayor Trainer submitted that he did not declare a material conflict of interest, as it had not occurred to him that he had a conflict:
- ...until one councilor raised a question after the decision had already been unanimously supported by all councilors, with no vote being cast by me.
15. Therefore, I am of the view that Mayor Trainer did not inform the meeting of the material conflict of interest in accordance with section 74(1)(a) of the Local Government Act.
16. In light of the information above, as submitted by Mayor Trainer, I am also of the view that he failed to leave the meeting room whilst the matter was discussed and voted on, as is required under section 74(1)(b) of the Local Government Act.
17. By way of comment, it appears that Mayor Trainer attempted to remedy the situation as soon as it was drawn to his attention. It is to his credit that he also took the initiative to self-report the matter to my Office.

Opinion and Recommendation

18. In light of the above, I consider that Mayor Trainer failed to comply with the requirements of section 74 of the Local Government Act and therefore breached clause 3.13 of the Code of Conduct. As a breach of the Code of Conduct is a breach of section 63(2) of the Local Government Act, I consider that Mayor Trainer acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.
19. To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council require Mayor Trainer to issue a public apology to the council within two ordinary meetings of the council after receiving this report, for failing to appropriately deal with a conflict of interest at the meeting of 4 April 2017.

Final comment

20. In accordance with Part 3 of the Code of Conduct for Council Members, this report must be provided to a public meeting of the Council within two ordinary meetings of the Council receiving my report.
21. In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by **11 September 2017** on what steps have been taken to give effect to my recommendation/s above; and, if no such steps have been taken, the reason(s) for the inaction.
22. 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.
23. As Mayor Trainer is both the subject of a finding of misconduct and the principal officer to whom the misconduct must be reported in accordance with section 18(5) of the Ombudsman Act, I have sent a copy of this report to the Deputy Mayor.
24. I have also sent a copy of my report to the Minister for Local Government as required by section 25(3) of the *Ombudsman Act 1972*.



Wayne Lines
SA OMBUDSMAN

11 October 2017