

## Report

### Full investigation - *Ombudsman Act 1972*

Complainant	Councillor Paul Koch
Council member	Councillor Jim Vallelonga
Council	Town of Gawler
Ombudsman reference	2017/03162
Date complaint received	23 March 2017
Issues	Whether Councillor Jim Vallelonga breached the conflict of interest provisions of the Local Government Act and clause 3.13 of the Code of Conduct for Council Members in relation to agenda item 8.5 at the council meeting on 28 February 2017

### 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 legislative scheme envisages that complaints in relation to Part 3 of the Code of Conduct (misconduct) be directed to my Office or the Office for Public Integrity for investigation.

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

Cr Paul Koch made a complaint to my Office about a potential breach of Part 3 of the Code of Conduct by Cr Jim Vallelonga in accordance with his obligation as a council member to do so under clause 2.15 of the Code of Conduct. A failure by the council member to report an alleged or suspected breach of Part 3 may in itself represent a breach of Part 3 (Behavioural Code).

### Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from Cr Jim Vallelonga
- seeking a further response from Cr Jim Vallelonga
- seeking a response from the council's Mayor
- seeking a response from the council
- considering the:
  - *Local Government Act 1999*

<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.

- *Local Government (Procedures at Meetings) Regulations 2013 (Meeting Regulations)*
- *Local Government (General) Regulations 2013 (Local Government Regulations)*
- Code of Conduct for Council Members (**Code of Conduct**)
- Declaration of Interest form for Cr Vallelonga dated 28 February 2017 (**Declaration Form**)
- Council Members' Register of Interests dated 23 January 2017 (**Register of Interests**)
- Cr Vallelonga's Form 4 - Register of members' interest for 2 and 28 July 2016 and 23 January 2017
- the council's Code of Conduct for Elected Council Members - Procedure
- Council Member Training & Development Policy 2014
- the council's register for 2015/16 Elected Member Training (**member training register**)
- the council's Meeting Procedure Code of Practice (**Meeting Procedure**)
- minutes for the council meeting on 28 February 2017
- Local Government Association Conflict of Interest Guidelines
- considering the responses to my provisional report in preparation of my final 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

In response to my provisional report Cr Vallelonga advised my Office that he would make no comment.

The council did not provide a response to my provisional report.

Councillor Koch responded to my provisional report and those points relevant to my consideration and findings are:

- that my Final Report should acknowledge that his complaint to my Office was made in order to comply with clauses 2.15 and 2.16 of the Code of Conduct
- that I did not take into account that Cr Vallelonga made the declaration of a conflict of interest only after prompting by the council Mayor and that Cr Vallelonga made no attempt prior to the meeting to fill out a conflict of interest form
- that the minutes for the council meeting did not record Cr Vallelonga's conflict of interest statement
- that Cr Vallelonga failed to prepare properly for the meeting

<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 Vallelonga has an interest in other businesses in the vicinity of the project that will be impacted by the project design and construction works
- that I did not analyse the issue of bias in decision making as required under clause 3.13 of the Code of Conduct
- that the construction works would have a short term impact upon Café Nova and therefore a finding of a material conflict of interest should have been made
- that as a long standing business operator, Cr Vallelonga attended many council meetings during which development matters were discussed therefore placing greater gravitas upon those comments he made about the project at the council meeting
- that I failed to mention that at the council meeting in August 2017, when discussing the project, Cr Vallelonga declared a material conflict of interest
- that I should amend my finding in relation to the ‘substantial proportion’ test and remove ‘on balance’.

I comment on these matters as follows:

- I have noted Cr Koch’s obligation to make this complaint to my Office in this final report
- I acknowledge that Cr Vallelonga declared his conflict of interest after prompting by the Mayor
- it is appropriate for Cr Koch to raise with the council his concerns about the council minutes failing to record Cr Vallelonga’s conflict of interest
- while Cr Koch has asserted that Cr Vallelonga failed to properly prepare for the meeting, there is insufficient evidence to establish this, and in any event, it has no relevance to whether he had a conflict of interest
- I agree with Cr Koch’s assertion that Cr Vallelonga’s long term proprietorship of Café Nova and knowledge about the project through the Gawler Town Centre Design Framework studies during 2015-16 was sufficient for him to be aware that he had a conflict of interest for agenda item 8.5 prior to the council meeting. However, this does not affect my finding of Cr Vallelonga having a conflict interest or require me to change my recommendation
- as discussed in my report, I have considered the Register of Interests and Cr Vallelonga’s registrable interests relevant to the project and whilst I have had regard to those interests, in my view, Café Nova is the most significant interest having been identified as a Tier 1 interest
- my investigation acknowledged that Cr Vallelonga declared a material conflict of interest at the council meeting on 22 August 2017 for agenda item 8.9 “Murray Street Upgrade” and left the room. Whilst I have noted the declaration, I did not consider that this in itself, establishes that Cr Vallelonga had a material conflict of interest in relation to agenda item 8.5 at the 28 February 2017 council meeting.

I have carefully considered Cr Koch’s response and where appropriate, my report has been amended accordingly.

## Background

1. Cr Jim Vallelonga is an elected member of the Town of Gawler (**the council**).
2. The complaint to my Office was made by Cr Paul Koch. According to Cr Koch his complaint was made in the following regard:

I wish to lodge a formal complaint under Part 3 (Clause 3.13) of the Code of Conduct for Council elected members [sic] involving the conduct of Cr Jim Vallelonga, a Councillor for the Town of Gawler.

As an elected Member if I witness what I understand to be a breach of Part 3 of the Code I am required to report it, Part 2, 2.15 and 2.16.

3. In his complaint, Cr Koch raised the following matters in relation to a potential breach of the Code of Conduct by Cr Jim Vallelonga:
  - at the council meeting on 28 February 2017 elected members considered agenda item 8.5; the proposed road and traffic changes to the southern end of Murray Street Gawler, including the removal of the left turning slip lane assisting traffic to turn into Murray St South
  - prior to discussing agenda item 8.5, the Mayor clearly expressed to Cr Vallelonga that it was his responsibility to declare if he had a conflict of interest
  - attachment 1 to agenda 8.5 listed those businesses that were considered as key stakeholders ranging from Tier 1 to 4, that would be affected by the option presented to elected members
  - Café Nova is listed as a Tier 1 business
  - Cr Vallelonga is the owner of Café Nova and has interest in land nearby to Café Nova
  - Cr Vallelonga has recently received development approval to construct a motel near Café Nova
  - after 'some time, and prompting' by the Mayor, Cr Vallelonga completed the Declaration Form and declared a perceived conflict of interest
  - Cr Vallelonga remained in the meeting and participated in discussions around the options for the southern end of Murray Street and was heard to have said 'this is a detriment to our business'
  - Cr Vallelonga moved a motion for deferral of the matter (agenda item 8.5) to a future Council Meeting. This motion was passed.
  - Cr Koch believed Cr Vallelonga had a material conflict interest as set out in section 73 of the Local Government Act
  - on 16 March 2017 the Bunyip Newspaper reported that Cr Vallelonga owned a business on Murray Street and that at the council meeting on 28 February 2017 Cr Vallelonga opposed the 'Murray Street upgrades because of their detrimental impact on local businesses'
  - Cr Koch believes that given his stated concern to protect the interests of his own business Cr Vallelonga was in breach of clause 3.13 of the Code of Conduct by failing to be committed to making decisions without bias and in the best interests of the whole community.
  
4. Prior to considering the motion in agenda item 8.5 at the council meeting on 28 February 2017 (**the council meeting**) Cr Vallelonga completed the council's Declaration of Interest and declared that:
  - he did not consider he had a Material Conflict of Interest
  - he had a Perceived Conflict of Interest
  - in describing the nature of his interest (direct or indirect and personal or pecuniary) stated that 'I own a business in that area therefore it may be a Perception of a conflict of Interest. However this issue covers a lot of businesses in this area.'
  - he would deal with the actual or perceived conflict of interest by remaining in the meeting.
  
5. I note from the council's Form 4 Register of members interests Ordinary returns dated 23 January 2017 that Cr Vallelonga declared the following 'registrable interests':
  - an income source or had employment with:  
Café Nova Vallelonga Int Pty Ltd trust shares [sic]
  
  - his (or his family) have an interest in the following properties on Murray Street:  
13 Murray St. gawler [sic]

15 Murray St gawler [sic]  
17-19 Murray St gawler [sic].

6. The purpose of the report was to update the council on the project in respect of:
- outcomes of the community consultation process for Murray Street Upgrade Stage 6 concept plans
  - discussions with the Department of Planning Transport and Infrastructure (DPTI) regarding the Adelaide Road and Twelfth Street Intersection
  - concept design and project details, including the Gawler Mill Inn Bridge upgrade for endorsement to finalise the detailed design
  - the next steps associated with the project.
7. Agenda item 8.5 referred to 10 attachments under separate cover. In his complaint, Cr Koch referred to the attachments 8.3-8.9 and states as follows:

The attachment to the agenda item (ref. 20-02-2017 Council Agenda Attachments item 8.3 to item 9, listed those businesses that were consider [sic] to be key stakeholders, ranging from Tier 1 to 4, that would be affected by this option. These businesses were provided with written correspondence plus a follow up phone call regarding a briefing and an opportunity to provide feedback. Café Nova is listed as a Tier 1 business..Cr Vallelonga is an owner of Café Nova. Cr Vallelonga also has an ownership interest in land immediately south of Café Nova which Cr Vallelonga has fairly recently received development approval to construct a motel.

8. The community consultation period for the project was from 26 September 2016 until 7 October 2016. The Consultation Report states as follows:

#### **2.2 Consultation program of activities**

Stakeholders were identified prior to the consultation period and divided into four overarching stakeholder groups. The project team determined the level of consultation to be undertaken with each group based on their influence and interest in the project. The four groups are outlined below.

- Tier 1: Those directly affected by the project who will be actively managed and incorporated in the consultation process.

Café Nova and for all other businesses were listed as Tier 1 Stakeholders.

9. At agenda item 8.5 of the council meeting, the council was required to consider a report entitled 'Murray Street Upgrade Stage 6 update' prepared by Mr Angelo Lanzilli, Senior Projects Manager for the council. Mr Lanzilli recommended as follows:
10. The motion in agenda item 8.5 , as originally stated in the agenda, is as follows:

That Council:

1. Notes the Murray Street Upgrade Stage 6 Update Report.
2. Receives the Engagement Report summarising the community and stakeholder consultation undertaken for the concept design for the Murray Street Upgrade Stage 6 Project.
3. Endorses the updated Concept Design for the Murray Street Upgrade Stage 6 Project for the purpose of finalising the detailed design and completing the detailed cost estimate.
4. Endorses the concept proposals for the decorative lighting to the Gawler Mill Inn Bridge to permit further detailed design for the decorative lighting and detailed cost estimates to be established.

5. Notes that a further report will be presented to the Council to present the detailed cost estimate prior to the procurement of the construction contract for the Murray Street Upgrade Stage 6 Project.

11. I note that at the council meeting Cr Vallelonga moved to defer agenda item 8.5 (CC15/927) as follows:

That the matter be deferred to a future council meeting following a council workshop, subject to the following matters being investigated:

1. Retention of the Tenth Street slip lane.
2. Preserving the left turn from Murray Street into Murray Street South.
3. Preserving the left turn travelling North along Murray Street South.
4. Review of balustrade material options.
5. Review of the position of the pedestrian crossings within any proposed changes.
6. Review of the speed limit of the affected area.

The minutes of the meeting show that this motion was carried.

12. My Officer sought from the council information about previous stage updates to council and whether Cr Vallelonga was present at those meetings. Mr Henry Inat, Chief Executive Officer of the council, advised my Officer that while the matter was considered at two previous meetings, Cr Vallelonga was only in attendance at the meeting on 28 February 2017.
13. In his response to my Office, Cr Vallelonga expressed his views as to the allegation that it was only after the Mayor raised the issue of a conflict of interest and only after some time and prompting that he declared a perceived conflict of interest:

The mayor did not promote [sic] me, I raised the matter myself when I said "I don't know whether [sic] I have conflict of interest because I own the property in Murray st south. "The only thing both the Mayor & the CEO said in response was that they can't advise me one way or the other, It's my personal choice.

I REFUTE the assertion made by Cr Koch that the Mayor urged me anytime to complete the form.

The thought of a possible perceived conflict of interest only popped [sic] into my head when we were discussing the changes to a slip lane that brings traffic passed my premises. I only mentioned it, Perhaps natively [sic], simply because my premisses [sic] front Murray st south.

I thought it may be a perceived a conflict of interest because I own the property on Murray st south.

I was completely open & honest in asking the question in council meeting & by completing the form as I did in order to be transparent & accountable as required In section 75a of local government act 1999 [sic].

14. In her response to the complainant's allegations, the Mayor has confirmed with my Office that:
  - she had expressed to Cr Vallelonga that it was his responsibility to declare if he had a conflict of interest
  - in response to discussions about the effect of the left turn slip lane, Cr Vallelonga stated "I believe this is a detriment to our business".
15. On 16 March 2017 The Bunyip newspaper reported the following in relation to the council meeting on 28 February 2017.

Gawler councillor Jim Vallelonga was at the centre of a conflict of interest drama at council's last meeting, after opposing Murray Street road upgrades because of their impact on local businesses.

[Cr] Vallelonga, who owns Café Nova, which is located on Murray Street's southern extension, declared a "perceived conflict of interest" at the beginning of the debate, as a landholder affected by the issues.

"I'm speaking on behalf of other people, too, so I'd like to speak about this," he said.

"I believe this is a detriment to our business," he said.

16. Cr Vallelonga confirmed with my Office that during discussions about agenda item 8.5, he said as was reported in the Bunyip newspaper on 16 March 2017 that "I believe this is a detriment to our business". Cr Vallelonga advised my Office that he agreed with this following passage which was later reported in that Bunyip newspaper article:

Fellow elected members looked past the comment, with [Cr] Beverley Gidman describing it as a "faux pas" and [Cr] Kevin Fischer saying Cr Vallelonga meant to say the "businesses in our area".

### Relevant law

17. Section 73(1) 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 employee 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 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.

18. 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.

19. Section 75 of the Local Government Act defines the circumstances in which an elected member has an actual or perceived conflict of interest in a matter as follows:

**75—Actual and perceived conflicts of interest**

- (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.

- (3) A member of a council will not be regarded as having a conflict of interest in a matter to be discussed at a meeting of the council—

- (a) by reason only of—

- (i) an engagement with a community group, sporting club or similar organisation undertaken by the member in his or her capacity as a member; or
- (ii) membership of a political party; or
- (iii) membership of a community group, sporting club or similar organisation (if the member is not an office holder for the group, club or organisation); or
- (iv) the member having been a student of a particular school or his or her involvement with a school as parent of a student at the school; or
- (v) a nomination or appointment as a member of a board of a corporation or other association, if the member was nominated for appointment by a council; or

- (b) in prescribed circumstances.

- (4) A member of a council will not be taken, for the purposes of this Subdivision, to have a conflict of interest in a matter to be discussed at a meeting of the council if the relevant member's interest in the matter is held in common with all or a substantial proportion of the ratepayers, electors or residents of the council area.

20. Section 75A of the Local Government Act sets out what an elected member is required to do if they have an actual or perceived conflict of interest:

**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.
- (3) If a quorum at a meeting cannot be formed because a member of a council proposes to exclude himself or herself from the meeting in order to comply with subsection (1), the member will not be taken to have contravened subsection (1) by participating (including by voting, for example) in the meeting in relation to the matter if the attendance of the member, together with any other required number of members, forms a quorum for the meeting.
- (4) If a member of a council discloses an actual or perceived 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) the manner in which the member dealt with the actual or perceived conflict of interest;
  - (d) if the member voted on the matter, the manner in which he or she voted;
  - (e) the manner in which the majority of persons who were entitled to vote at the meeting voted on the matter.
- (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.
- (6) This section does not apply to a matter of ordinary business of the council of kind prescribed by regulation for the purposes of this section.

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

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

**Whether Councillor Jim Vallelonga breached the conflict of interest provisions of the Local Government Act and clause 3.13 of the Code of Conduct for Council Members in relation to agenda item 8.5 at the council meeting on 28 February 2017**

22. In his complaint, Cr Koch alleges that Cr Vallelonga, because of his interest in Café Nova and land on Murray Street had:

...a material conflict of interest as set out in section 73 of the Local Government Act given that his business interests would be disadvantaged if Council officers recommendation was approved...

Cr Koch also stated

I also consider Cr Vallelonga was in breach of the obligation under [Code of Conduct] clause 3.13 to be "committed to making decisions without bias and in the best interests of the whole community" given his stated concerns to protect the interests of his own business.

23. In my assessment of the complaint, I have considered not only the issue of whether Cr Vallelonga had a material conflict of interest as alleged, but also whether he had an actual or perceived conflict of interest and if so, whether any such interest was appropriately dealt with.

*Section 73 - Material conflict of interest*

24. At the council meeting under agenda item 8.5, council members were asked to endorse the Concept Plan in the Murray Street Upgrade Stage 6 which included:

- removal of the short left turn deceleration lane from Murray Street into Murray Street South
- the separation of the left turn out of Tenth Street and deceleration lane from Bridge Street (for the left turn into Julian Terrace).

25. During discussions about agenda item 8.5 it was alleged that while 'providing commentary on the effect of removing the left turn slip lane' Cr Vallelonga stated, "I believe this is a detriment to our business". Thereafter Cr Vallelonga moved a motion and council members resolved to defer agenda item 8.5 to a future Council meeting pending a council workshop and further investigation. Relevant to the complaint, I note that the amended motion includes proposed investigation of:

- retention of the Tenth Street slip lane
- preserving the left turn from Murray Street into Murray Street South
- preserving the left turn travelling North along Murray Street South.

26. It does not appear to be in dispute that Cr Vallelonga owns properties and has a business on or near to Murray Street. In that regard, I note that he declared those interests in his Ordinary Return to the council, and also declared a perceived conflict of interest on the basis that he 'owned a business in the area'.

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27. I now need to determine whether Cr Vallelonga would, directly or indirectly, gain a benefit or suffer a loss (whether of a personal or pecuniary nature) dependent upon the outcome of the consideration of agenda item 8.5 both in the original and amended form.
28. I note that the legislative changes to the conflict of interest provisions of the Local Government Act omitted the words 'a reasonable expectation' and the current provisions provide the test as being only whether the council member 'would' receive a benefit or suffer a detriment of the type described in section 73(1). Speculation about the consequences of the matter being decided in a particular manner is not sufficient.
29. The use of the word 'would' under section 73(1) indicates that there must be more than a strong possibility, and that it is necessary to establish a clear link between the effects of the member's vote and subsequently obtaining a benefit or suffering a loss.
30. Therefore, in determining whether there was a benefit or loss, I have given consideration to the following:
- Cr Vallelonga's business and property interests are in the immediate location of the project works (ie Murray Street South)
  - Cr Vallelonga received development approval by the council for construction of a motel alongside Café Nova at Murray Street South
  - Cr Vallelonga's expressed concerns about a specific aspect of the project (ie the removal of the left slip lane) that he states will be a detriment to business at Murray Street South
  - whether it is likely that Cr Vallelonga's business interest would be negatively impacted if the slip lane was removed.
31. In considering whether Cr Vallelonga would suffer a loss, I have considered the potential outcomes of the agenda item which would have been to either:
- effectively remove the slip lane (if the Concept Plan was endorsed); or
  - retain the slip lane for the time being (if the Concept Plan was rejected or otherwise deferred).
32. To satisfy myself that the outcome for agenda item 8.5 as moved by Cr Vallelonga would, as alleged, result in a loss, I sought from the council information about the project and in particular whether or not a project impact statement (or similar) that outlined the possible impacts upon Tier 1 businesses and residents in the vicinity of the project during the construction and finalisation stages. In response, the council advised that the answer to that question was no.
33. The GHD Report states that Cr Vallelonga's business (Café Nova) located on Murray Street, is classified as a Tier 1 stakeholder. Tier 1 stakeholders are considered to be those that are:
- owner/occupiers, tenants and landowners whose property directly fronts or adjoins the property
  - directly affected by the project
  - who will be actively managed and incorporated in the consultation process.
34. I note that in the Summary of Community & Stakeholder Consultation section of the GHD Report, Café Nova was included in briefings about the project including opportunities in 2016 (prior to the council meeting) for key stakeholders to provide feedback via direct email and mail about the concept design for Murray Street. I further note from the GHD Report, that whilst the other seven Tier 1 businesses on Murray Street provided general support for the project, Café Nova did not provide any feedback.

35. Although Cr Vallelonga expressed the view that removal of the left turn slip lane would be a detriment to his business I am not satisfied that there is sufficient evidence of either a loss or benefit to Cr Vallelonga that would result from the upgrade. It appears then that Cr Vallelonga's comment was speculative rather than based on any concrete information. At most, the outcome of the consideration of item 8.5 could have resulted in a benefit or loss to Cr Vallelonga. This is not enough to conclude that he had a material conflict of interest for the purposes of section 73(1) of the Local Government Act.
36. In his response, Cr Koch stated that he considers that the short term impacts to Cafe Nova during the construction phase are sufficient for me to make a finding of a material conflict of interest. Whilst my findings relate to the impact of the removal or retention of the left slip lane, I consider that those reasons discussed above apply equally to the likely impacts during the construction phase.
37. My view remains that Cr Vallelonga did not have a material conflict of interest in agenda item 8.5 at the council meeting.

*Section 75A(1)(a) - Actual conflict of interest*

38. The second issue to consider is whether Cr Vallelonga had an actual conflict of interest in relation to agenda item 8.5 for the purposes of section 75 of the Local Government Act; and if so, whether he breached section 75A of the Local Government Act.
39. An actual conflict of interest under section 75A(1)(a) exists where there is a conflict between:
- a council member's interest (wherever direct or indirect personal or pecuniary); and
  - the public interest
- that might lead to a decision that is contrary to the public interest.

*Did Cr Vallelonga have an interest?*

40. I consider that to establish an actual conflict of interest it is sufficient that Cr Vallelonga would be 'likely' to, as opposed to 'would', suffer a loss or gain a benefit from the outcome of the motion.
41. A potential outcome of the motion as originally drafted was that the updated Concept Design from the Murray Street Upgrade Project be endorsed (that is a concept design which included the removal of the left slip lane). A potential outcome of Cr Vallelonga's own motion was that endorsement of that concept design be deferred and that retention of the left slip lane be further investigated.
42. In considering whether Cr Vallelonga had a relevant interest in item 8.5 or Cr Vallelonga's own motion, I have turned my mind to the potential impact of the project upon Cr Vallelonga's business Café Nova.
43. While the council has advised my Office that it has not prepared a business impact statement, the council has, however, as part of its Community Engagement, targeted those businesses and residents it expects will be directly affected by the project.

44. The GHD Report states as follows:

We understand that construction impacts such as noise and traffic restrictions can have an impact of businesses and residents. Prior to, and during construction, we will be working with the community to ensure these impacts are managed and you are kept informed about the project's construction progress.

45. While the GHD Report does not provide details about traffic volumes, the project scope information states that traffic restrictions during construction would likely impact business, and that the removal of the left slip lane would remove direct traffic access into Murray Street South.

46. I have also had regard to Cr Vallelonga's comments at the council meeting about detriment to business.

47. In all of the circumstances. I am satisfied that Cr Vallelonga had an indirect pecuniary interest in agenda item 8.5 given that the removal of the slip lane, as well as the construction works associated with it, could reduce the number of customers frequenting Café Nova which could in turn impact on Café Nova's income.

*Was the 'substantial proportion' test in section 75(4) of the Local Government Act met?*

48. While I note that Cr Vallelonga has asserted that his comments about detriment to business were made in his capacity as a council member and that he was acting on behalf of ratepayers, I am not satisfied that the pecuniary interests of a few business holders are necessarily shared in common with the road users of the whole council area. I also note that Cr Vallelonga has not provided any evidence that he had received submissions from other ratepayers in that regard. I also note that, according to the GHD report, the other seven Tier 1 businesses on Murray Street provided general support for the project (while Café Nova did not provide any feedback).

49. On balance, I am not satisfied that the 'substantial proportion' test in section 75(4) of the Local Government Act was met.

*Did Cr Vallelonga's interest conflict with the public interest?*

50. According to the Local Government Act, the word 'conflict' is given its ordinary meaning and as such, it must be demonstrated that there is an active disagreement (variance) between the two interests; it does not mean that the interests cannot differ.

51. While I acknowledge that elected members may hold differing views on certain matters before the council, they must approach those matters with an open mind, exercise discretion and act in a transparent manner when voting for or against those matters.

52. With regards to whether Cr Vallelonga's own interests conflicted with the public interest, I must firstly determine what the public's interest in this matter is.

53. The Concept Plan in relation to the Murray Street Upgrade (including the slip lane removal) was intended to address the interests of traffic users and pedestrian safety in the local community as a whole rather than the commercial interests of one or more individual business owners in the area.

54. In my view, the specific public interest in this matter was that decisions about road upgrades were made on a genuine, unbiased basis, taking into account all relevant community interests. While an impact on local business may be a relevant community interest, that interest is narrower than the general road use concerns of the whole community. In that sense I am satisfied that there was a conflict between Cr Vallelonga's narrow interest and the broader community interest.
55. It is possible that Cr Vallelonga's narrower business interest might lead to a decision contrary to the public interest if it meant that a decision was made without taking into account and properly weighing broader road use considerations.
56. On that basis, I am satisfied that Cr Vallelonga had an actual conflict of interest in relation to agenda item 8.5 at the council meeting within the meaning of section 75A(1)(a) of the Local Government Act.

*Section 75A(1)(b) - Perceived conflict of interest*

57. My view is that Cr Vallelonga had an actual conflict of interest. For completeness, I have also considered whether he had a perceived conflict of interest.
58. Pursuant to section 75A(1)(b) of the Local Government Act, a perceived conflict of interest arises where a council member could be reasonably taken, from the perspective of an impartial, fair-minded person to have a conflict of interest in the matter.
59. In my view, the following facts would be imputed to the impartial, fair-minded person:
  - that Cr Vallelonga owned Café Nova
  - details of the Concept plan and consultation (including that Café Nova was listed as a Tier 1 business)
  - the council conducted a community and stakeholder engagement process during 26 September 2016 to 17 October 2016, including holding Community Information Sessions and direct contact with affected stakeholders about the project and placing public notices in the local newspaper the Bunyip
  - that endorsement of the Concept Plan would result in the removal of the left slip lane, which in turn would remove direct traffic access into Murray Street South.
60. I consider that an impartial, fair-minded person who was apprised of those facts could reasonably take Cr Vallelonga to have had an actual conflict of interest in the matter. I consider, therefore, that Cr Vallelonga had a perceived conflict of interest for the purposes of section 75A(1)(b) of the Local Government Act.
61. That view is supported by the fact that Cr Vallelonga himself declared a perceived conflict of interest in agenda item 8.5.
62. Therefore, I must now turn my mind to whether Cr Vallelonga appropriately dealt with his actual or perceived conflict of interest in accordance with section 75A of the Local Government Act.

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*Section 75A- Dealing with an actual or perceived conflict of interest*

63. Section 75A(1) requires a council member who has an actual or perceived conflict of interest in a matter to be discussed at a meeting of a council, to deal with that conflict of interest in a transparent and accountable way.
64. If a council member has an actual or perceived conflict of interest in a matter before the council, it is not necessarily the case that they must be excluded from participating in discussion and voting on that item. Section 75A(5) of the Local Government Act provides that, to avoid doubt, non-participation is not the only way in which a member of the council can appropriately deal with an actual or perceived conflict of interest that member may have in a matter to be discussed at the council meeting.
65. Whether or not participating in a meeting will be consistent with a council member's obligation to deal with their interest in a transparent and accountable way will depend on the particular circumstances and need to be assessed by the relevant council member on a case by case basis.
66. Section 75A(2) of the Local Government Act requires that:
- 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.
67. I consider that satisfying these requirements does not in itself completely discharge the obligation of a council member to deal with the actual or perceived conflict of interest in a transparent and accountable way. A member with an actual or perceived conflict of interest must consider whether there are additional steps they must take in order to ensure transparency and accountability.
68. Cr Vallelonga declared a perceived conflict of interest for agenda item 8.5 on the basis that he owns a business in the area of the proposed project and stated that he intended to deal with the perceived conflict of interest by remaining in the meeting when the matter was being discussed and thereafter vote on the matter. Therefore, it could be said that on the face of it, Cr Vallelonga met his obligations under section 75A(2) of the Local Government Act.
69. I have considered, however, whether Cr Vallelonga should have taken additional steps in order to deal with that declaration in a 'transparent and accountable' manner.
70. In his submission to my Office, Cr Vallelonga stated that:
- The thought of a possible conflict of interest only popped [sic] into my head when we were discussing the changes to a slip lane that brings traffic passed [sic] my premises. I only mentioned it, Perhaps natively [sic], simply because my premises front [sic] Murray st south.
- I thought it may be a perceived conflict of interest because I own the property on Murray st south.
- I was completely open and honest in asking the question in council meeting & by completing the form as I did in order to be transparent & accountable as required by section 75a of the local government act 1999 [sic].

I note that in the complaint, Cr Koch alleges that Cr Vallelonga only declared a conflict interest for agenda item 8.5 when prompted by the Mayor. Cr Vallelonga's response to the allegation was that he was not prompted by the Mayor to declare a conflict of interest. Regardless, as pointed out in the Mayor's submission to my Office, it was Cr Vallelonga's responsibility to declare and appropriately address his conflict of interest.

71. While it is apparent that it was Cr Vallelonga's belief that his declaration of a perceived conflict of interest was sufficient to meet the requirements of section 75A(2), given the circumstances, I do not consider that he took sufficient steps to ensure transparency and accountability.
72. While it may have been appropriate for Cr Vallelonga to participate in the discussion and set out in detail his views and the views of any other ratepayers who may have made submissions to him on the issue, in the circumstances, I consider that the transparent and accountable approach in this matter would to have been to abstain from voting, let alone moving his own motion (which appears to have been motivated by business interests). At the very least he should have informed the council as to why he thought he should remain in the meeting.
73. In his response, Cr Koch sought from me an analysis of the question of bias in accordance clause 3.13 of the Code of Conduct. For those reasons outlined in this report, I consider a finding of an actual or perceived conflict of interest is sufficient for the purposes of establishing a breach of Clause 3.13. I note that I do not have sufficient evidence before me to be satisfied to the relevant standard of proof that Cr Vallelonga acted in a biased manner.
74. My view remains that at the council meeting, Cr Vallelonga had an actual and perceived conflict of interest in agenda item 8.5 and therefore breached section 75A(2) of the Local Government Act by failing to act in a transparent and accountable manner as required by section 75A(1) of the Local Government Act.
75. In failing to comply with the conflict of interest provisions under the Local Government Act, it is therefore also my view that Cr Vallelonga breached Clause 3.13 of the Code of Conduct.

### **Opinion and Recommendation**

76. In light of the above, my final view is that Cr Vallelonga breached the provisions of section 75A of the Local Government Act and Clause 3.13 of Part 3 of the Code of Conduct, and thereby acted in a manner that was unlawful within the meaning of section 25(1)(a) of the Ombudsman Act.
77. To remedy this error, I recommend under section 25(2) of the Ombudsman Act and section 263B(1)(b) of the Local Government Act that the council require Cr Vallelonga to:
  1. issue a public apology to the Council within two ordinary meetings of the council after receiving this report, for failing to appropriately deal with the conflict of interest at the meeting of 28 February 2017
  2. undertake training in relation to conflicts of interest.

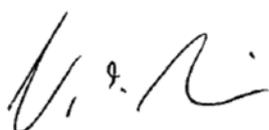
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## Final comment

78. 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.
79. In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by 4 June 2018 on what steps have been taken to give effect to my recommendation/s 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.

80. 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 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.
81. As required by section 18(5) of the *Ombudsman Act 1972*, a copy of my report has been sent to the Principal Member of the Council.
82. I have also sent a copy of my report to the Minister for Transport, Infrastructure and Local Government as required by section 25(3) of the *Ombudsman Act 1972*.



Wayne Lines  
**SA OMBUDSMAN**

10 April 2018