



Report

Full investigation - *Ombudsman Act 1972*

Council member	Cr Rosalie Chirgwin
Council	Kangaroo Island Council
Ombudsman reference	2020/04017
Agency reference	L2020/1653
Date complaint received	21 August 2020
Issues	<ol style="list-style-type: none">1. Whether Cr Rosalie Chirgwin contravened section 74(1) of the Local Government Act and clause 3.13 of the Code of Conduct for Council Members by failing to declare and/or appropriately deal with a material conflict of interest in Agenda Item 6.5 during the meeting of the Kangaroo Island Finance Committee on 28 May 20202. Whether Cr Rosalie Chirgwin contravened section 74(1) of the Local Government Act and clause 3.13 of the Code of Conduct for Council Members by failing to declare and/or appropriately deal with a material conflict of interest in Agenda Item 18.8 during the meeting of the Kangaroo Island Council on 9 June 2020

Jurisdiction

The complaint concerns the conduct of Cr Rosalie Chirgwin, an elected member of the council. The council referred this matter to the Ombudsman in accordance with its Code of Conduct for Elected Council Members Procedure.

The complaint alleges breaches of Part 3 of the Code of Conduct for Council Members made pursuant to section 63 of the *Local Government Act 1999* (the Code).¹ 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 1972*.² Accordingly, this complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*. Having assessed the complaint, the Ombudsman considered it appropriate to investigate this matter.

¹ The Code of Conduct was gazetted on 29 August 2013.

² *Local Government Act 1999*, section 263A(4); *Ombudsman Act 1972*, section 3.

The complaint raises the following allegations:

- that Cr Chirgwin failed to declare a material conflict of interest in Agenda Item 6.5 during a meeting of the Kangaroo Island Finance Committee (**the Finance Committee**) on 28 May 2020
- that Cr Chirgwin failed to declare a material conflict of interest in Agenda Item 18.8 during a meeting of the Kangaroo Island Council on 9 June 2020
- that Cr Chirgwin failed to deal with an interest in Agenda Items 6.5 and 18.8 (whether giving rise to an actual or perceived conflict of interest) in a transparent and accountable way.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- requesting further information from the complainant
- considering the agenda and minutes concerning the Finance Committee's 28 May 2020 meeting
- considering the agenda and minutes concerning the council's 9 June 2020 ordinary meeting
- seeking a response from Cr Chirgwin
- considering relevant property ownership information
- considering:
 - the Local Government Act
 - the Code
 - the council's Code of Conduct for Elected Council Members Procedure
- providing the council and Cr Chirgwin with my provisional report for comment, and considering their responses
- preparing this report.

Standard of proof

The standard of proof applied in the 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.³ 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 ...⁴

Procedural fairness

The Acting Deputy Ombudsman provided a copy of his provisional report to the council and Cr Chirgwin on 17 December 2020 and requested that any responses be provided to this Office by 22 January 2021. On 18 December 2020 the council advised via email that it had no further comments.

³ 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.

⁴ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

Having received no response from Cr Chirgwin, on 27 January 2021 my Legal Officer contacted Cr Chirgwin via phone and left a message requesting a call back. On 28 January 2021 my Legal Officer again attempted to phone Cr Chirgwin and left a message requesting a call back. To date, Cr Chirgwin has made no contact with this Office.

On 2 March 2021 I provided a copy of the Acting Deputy Ombudsman's provisional report directly to the mayor of the council, requesting that any submissions be provided by 16 March 2021. No response was received.

In light of the above, neither the council nor Cr Chirgwin have persuaded me to alter the conclusions or recommendations put forward by the Acting Deputy Ombudsman in his provisional report.

Background

1. Cr Chirgwin is an elected member of the council and is a member of the now disbanded Finance Committee.
2. On 28 May 2020 the Finance Committee met, discussed and voted upon Agenda Item 6.5 relating to the debt management report. The meeting minutes reflect that Cr Chirgwin was present at this meeting.
3. The meeting minutes also reflect that prior to the Finance Committee discussing Agenda Item 6.5, a resolution was made under section 90(2) of the Local Government Act, the effect of which was to exclude the public from the chamber so as to facilitate a confidential discussion.
4. The Finance Committee then entered into a discussion [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] The motion was carried with seven votes in favour and one vote against; the minutes do not specify how each person voted.
5. [REDACTED]
[REDACTED]
[REDACTED]
6. Based on the number of attendees and the number of votes, it appears that Cr Chirgwin voted on Agenda Item 6.5.
7. On 9 June 2020 the council met, discussed and voted upon Agenda Item 18.8 relating to the minutes of the Finance Committee meeting on 28 May 2020. The meeting minutes reflect that Cr Chirgwin was present at this meeting.
8. The meeting minutes also reflect that prior to the council discussing Agenda Item 18.8, a resolution was made under section 90(2) of the Local Government Act, the effect of which was to exclude the public from the chamber so as to facilitate a confidential discussion.
9. The council then entered into a discussion as to whether it would endorse the abovementioned resolution of the Finance Committee. A motion was passed proposing to endorse the Finance Committee's resolution. The motion was carried.

10. The meeting minutes do not indicate that any council members abstained from voting. Accordingly, it is presumed that Cr Chirgwin voted on Agenda Item 18.8.

Complaint to my Office

11. The complaint referred to this Office alleged:

...that Councillor Chirgwin had failed to declare a conflict of interest in a Council discussion of an item which made reference to her property being, potentially, sold for non-payment of rates.

It was alleged that:

- on 28 May 2020 at a Finance Committee meeting Councillor Chirgwin remained in the meeting room, participated in a discussion and voted upon item 6.5 relating to the debt management report; and
- on 9 June 2020 at an ordinary Council meeting Councillor Chirgwin remained in the meeting room, participated in a discussion and voted upon item 18.8 relating to the presentation of the Finance Committee meeting minutes to the ordinary Council meeting.

It would appear, at least at face value, that Councillor Chirgwin may have had a material conflict of interest in the matter, as defined at section 73(1) of the *Local Government Act 1999* (LG Act).

Response from Cr Chirgwin

12. On 4 September 2020 the Ombudsman wrote to Cr Chirgwin seeking a response to the complaint this Office had received. The Ombudsman's letter was transmitted via email to Cr Chirgwin's email address as provided on the council's website. Not having received a response, a Legal Officer sent a follow up email on 30 September 2020 and attempted to call Cr Chirgwin via the home phone number provided on the council website. The phone number had been disconnected. The Legal Officer then obtained a mobile phone number for Cr Chirgwin from the council and was able to make contact.
13. In a phone call on 21 October 2020 the Legal Officer enquired whether Cr Chirgwin had received the Ombudsman's letter dated 4 September 2020. Cr Chirgwin advised that the letter had not been received as she does not have internet access or a regularly checked email address. The Legal Officer obtained a postal address in order to re-send my letter in hard copy.
14. On 13 November 2020 Cr Chirgwin contacted the Legal Officer via phone call and confirmed that the Ombudsman's letter had been received and, despite the Legal Officer advising that the due date to provide submissions had already lapsed, declined to indicate if and when a response would be sent.
15. On 23 November 2020 the Legal Officer contacted Cr Chirgwin to enquire whether a response had been sent. A message was left on Cr Chirgwin's voicemail requesting a call back. To date, Cr Chirgwin has not returned that call or provided any further submissions to this Office.

Relevant law

Sections 73 and 74 of the Local Government Act concern material conflicts of interest, relevantly providing:

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.

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.

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.

Clause 3.13 of Part 3 of the Code provides:

3.13 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 Rosalie Chirgwin contravened section 74(1) of the Local Government Act and clause 3.13 of the Code of Conduct for Council Members by failing to declare and/or appropriately deal with a material conflict of interest in Agenda Item 6.5 during the meeting of the Kangaroo Island Finance Committee on 28 May 2020

16. In the circumstances, and in accordance with section 73(1) of the Local Government Act, I must identify whether Cr Chirgwin would gain a benefit, or suffer a loss, depending on the outcome of the consideration of Agenda Item 6.5 at the meeting of the Finance Committee on 28 May 2020.
17. On 15 October 2020 the council provided [REDACTED]
[REDACTED]
[REDACTED]
18. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
19. [REDACTED]
[REDACTED]
[REDACTED]
20. Given the options that were available to the Finance Committee in its consideration of Agenda Item 6.5, it is clear to me that Cr Chirgwin would have gained a benefit, or suffered a loss, depending on the outcome of that consideration. Additionally, that benefit or loss would not have been enjoyed or suffered in common with all or a substantial proportion of the ratepayers, electors or residents of the council area.⁵
21. I therefore consider that Cr Chirgwin had a material conflict of interest in Agenda Item 6.5, [REDACTED]
- Clause 3.13 of the Code requires that council members make decisions without bias and comply with the relevant conflict of interest provisions of the Local Government Act.
23. Section 74(1) of the Local Government Act provides that, if a member of a council has a material conflict of interest in a matter to be discussed at a meeting, the member must inform the meeting of their material conflict of interest and leave the meeting room for the duration of the discussion and any subsequent vote.
24. The minutes of the meeting reflect that Cr Chirgwin was present at the 28 May 2020 Finance Committee meeting and that at no time during the discussion of Agenda Item 6.5 did she declare a conflict of interest or leave the meeting room. The minutes further reflect that Cr Chirgwin appears to have voted on Agenda Item 6.5.
25. Based on the evidence before me, and absent any submissions from Cr Chirgwin, it is my view that Cr Chirgwin contravened her obligations under section 74(1) of the Local Government Act and clause 3.13 of the Code during the Finance Committee meeting on 28 May 2020 by failing to declare and/or appropriately deal with a material conflict of interest in Agenda Item 6.5.

⁵ *Local Government Act 1999*, section 73(2)(a).

Opinion

In light of the above, my view is that Cr Chirgwin breached the provisions of section 74(1) of the Local Government Act and clause 3.13 of Part 3 of the Code of Conduct. In this way, Cr Chirgwin appears to have acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

To remedy this error, I make recommendations under section 25(2) of the Ombudsman Act, as detailed in Recommendations One, Two and Three at the end of this Report.

Whether Cr Rosalie Chirgwin contravened section 74(1) of the Local Government Act and clause 3.13 of the Code of Conduct for Council Members by failing to declare and/or appropriately deal with a material conflict of interest in Agenda Item 18.8 during the meeting of the Kangaroo Island Council on 9 June 2020

26. At the Finance Committee meeting on 28 May 2020, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
27. [REDACTED]
[REDACTED]
[REDACTED]
28. At the council meeting on 9 June 2020 the council discussed and voted on whether to endorse the above resolution of the Finance Committee.
29. In my view Cr Chirgwin obtained a benefit from the resolution of the Finance Committee in that no penalty or debt recovery process was imposed for the late or non-payment of rates on the two properties that she jointly owned.
30. It therefore follows that Cr Chirgwin would also obtain a benefit if the council were to endorse the resolution of the Finance Committee.
31. Had the council alternatively resolved not to endorse the Finance Committee's resolution and [REDACTED]
[REDACTED]
[REDACTED]
32. The benefit or loss would not have been enjoyed or suffered in common with all or a substantial proportion of the ratepayers, electors or residents of the council area.⁶
33. I am therefore again satisfied that Cr Chirgwin had a material conflict of interest in Agenda Item 18.8, [REDACTED]
34. Clause 3.13 of the Code requires that council members make decisions without bias and comply with the relevant conflict of interest provisions of the Local Government Act.
35. Section 74(1) of the Local Government Act provides that, if a member of a council has a material conflict of interest in a matter to be discussed at a meeting, the member must inform the meeting of their material conflict of interest and leave the meeting room for the duration of the discussion and any subsequent vote.
36. The minutes of the meeting reflect that Cr Chirgwin was present at the 9 June 2020 council meeting and that at no time during the discussion of Agenda Item 18.8, did she declare a conflict of interest or leave the meeting room. Additionally, the meeting minutes do not indicate that Cr Chirgwin abstained from voting.
37. Based on the evidence before me, and absent any submissions from Cr Chirgwin, it is my view that Cr Chirgwin contravened her obligation under section 74(1) of the Local Government Act during the council meeting on 9 June 2020.

⁶ Local Government Act 1999, section 73(2)(a).

Opinion

In light of the above, my view is that Cr Chirgwin breached the provisions of section 74(1) of the Local Government Act and clause 3.13 of Part 3 of the Code of Conduct. In this way, Cr Chirgwin appears to have acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

To remedy this error, I make recommendations under section 25(2) of the Ombudsman Act, as detailed in Recommendations One, Two and Three at the end of this Report.

Summary and Recommendations

In light of the above, it is my view that:

- Cr Chirgwin breached section 74(1) of the Local Government Act and clause 3.13 of the Code of Conduct for Council Members by failing to declare and appropriately deal with a material conflict of interest in Agenda Item 6.5 during the meeting of the Kangaroo Island Finance Committee on 28 May 2020
- Cr Chirgwin contravened section 74(1) of the Local Government Act and clause 3.13 of the Code of Conduct for Council Members by failing to declare and appropriately deal with a material conflict of interest in Agenda Item 18.8 during the meeting of the Kangaroo Island Council on 9 June 2020

To remedy these errors, I make the following recommendations under section 25(2) of the Ombudsman Act:

Recommendation One

That the council reprimand Cr Chirgwin for failing to declare and appropriately deal with a material conflict of interest in Agenda Item 6.5 during the meeting of the Kangaroo Island Finance Committee on 28 May 2020 and in Agenda Item 18.8 during the meeting of the Kangaroo Island Council on 9 June 2020.

Recommendation Two

That the council require Cr Chirgwin to issue a public apology for failing to declare and appropriately deal with a material conflict of interest in Agenda Item 6.5 during the meeting of the Kangaroo Island Finance Committee on 28 May 2020 and in Agenda Item 18.8 during the meeting of the Kangaroo Island Council on 9 June 2020.

Recommendation Three

That the council require Cr Chirgwin to attend training about to the conflict of interest provisions under the Local Government Act and Code of Conduct for Council Members.

Final comment

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.

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by 3 June 2021 on what steps have been taken to give effect to my recommendations above, including:

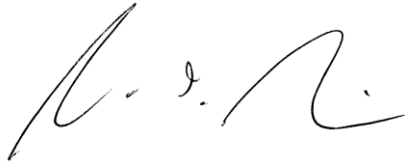
- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

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 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 South Australian Civil and Administrative Tribunal.

I have also sent a copy of my report to the Minister for Planning and Local Government as required by section 25(3) of the *Ombudsman Act 1972*.

A handwritten signature in black ink, appearing to read 'W. Lines', with a stylized flourish at the end.

Wayne Lines
SA OMBUDSMAN

23 March 2021