



## Report

### Full investigation - *Ombudsman Act 1972*

Reporter	Anonymous
Council member	Councillor Jeff Hall
Council	Mid Murray Council
Ombudsman reference	2021/06422; 2021/07010
Council reference	9/PUB/CONDUCT/1
Date report received	29 October 2021; 23 November 2021
Issues	<ol style="list-style-type: none"><li>1. Whether Cr Hall breached clause 3.13 of the Code of Conduct for Council Members by failing to declare and manage a material conflict of interest in agenda item 7.1.2 at a council meeting on 12 October 2021</li><li>2. Whether Cr Hall breached clause 3.13 of the Code of Conduct for Council Members by failing to declare and manage a conflict of interest in item 7.1.3 at a council meeting on 12 October 2021</li></ol>

### Jurisdiction

On 29 October and 23 November 2021 respectively, the Office for Public Integrity (OPI) referred to my Office two reports about the alleged conduct of Mr Jeff Hall, a councillor of the Mid Murray Council (**the council**).

The reports alleged 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>

On 6 April 2022, I notified the relevant parties of my intention to investigate the allegations pertaining to Cr Hall's conduct pursuant to section 13(2) of the Ombudsman Act and section 263A of the Local Government Act.

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

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

I have had regard to whether Cr Hall's conduct constitutes misconduct in public administration as defined in section 4 of the Ombudsman Act being 'an intentional and serious contravention of a code of conduct by a public officer while acting in their capacity as a public officer that constitutes grounds for disciplinary action'. Based on the information obtained, I consider that Cr Hall's conduct does not meet the definition of 'misconduct' as it is now defined.

The original reports attracted the protections of the *Public Interest Disclosure Act 2018*. I do not consider it necessary to disclose the identity of the reporters for the purposes of my investigation.

## Investigation

My investigation has involved:

- assessing the information provided by the reporters
- seeking a response from Cr Hall
- seeking a response from the council's Chief Executive Officer (CEO), Mr Ben Scales
- seeking information from witnesses
- clarifying Cr Hall's response and seeking more particulars from him
- considering:
  - the Local Government Act
  - the Code of Conduct
  - the agenda and minutes of council meetings held on 9 February 2021, 13 July 2021, 10 August 2021, and 12 October 2021
  - a recording of the council meeting held on 12 October 2021
- providing Cr Hall, the council and the reporters with my provisional report for comment, and considering their responses
- preparing this report.

## Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.<sup>3</sup> 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>

## Procedural fairness

I provided a provisional report to Cr Hall, the council's Mayor, Dave Burgess, the Chief Executive Officer (CEO), Ben Scales and the two reporters.

In response to my provisional report, one reporter disagreed with my decision not to make recommendations in relation to Cr Hall's conduct. The reporter submitted:

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<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.

I agree with your findings and thank you for looking into the situation. I am disappointed about your proposal to not make recommendations. I feel this sends a message to Elected Members that doing the wrong thing in your last 12 months is ok. I do not believe the caretaker period should be taken into account and especially because Cr Hall has not nominated for the upcoming Local Government elections in November 2022 ... He could nominate in supplementary elections in his new Council area any time they come up and I am concerned a lesson may not be learnt if there are no recommendations. I understand that Council may make their own recommendations but I think it would be good for Council to have a recommendation from you to help guide them.

I am also concerned about the message that is being sent to the community with no recommendations from you ... I feel having no recommendations may sway the community to continue not to notify when behaviours are exhibited.<sup>5</sup>

While I have considered this response, I am not persuaded to alter my decision not to make recommendations in relation to this matter. I consider it sufficient that my final report be tabled at a public meeting of the council, reflecting my views in relation to Cr Hall's conduct.

Cr Hall responded to my provisional report, stating:

As described in my reply it was always my intention to present the wishers [sic] of the ratepayers that are/were participants in the Bowhill water supply, both those who had signed a temporary transferred agreement and those who were wishing to do so.

My intention was to present the history and acknowledge that any excess from our personal use would automatically support the Councils allocation.

I therefore thank you for your time and follow-up.<sup>6</sup>

Cr Hall's response does not lead me to alter the views set out in my provisional report.

None of the other parties provided a response to my provisional report.

## Background

1. Around 2006,<sup>7</sup> the council took on management of the Bowhill Reticulated Water Supply System (the Bowhill water supply) to approximately 140 shacks as part of a redevelopment of the area. The council purchased an additional 30 megalitres (ML) of permanent water to cover the expected demand. Each property connected to the water supply was entitled to use 120 kilolitres (KL) of water from the Bowhill water supply, and any excess water used over the 120KL (allocated annually) was charged an additional fee.
2. In June 2013, the council considered a request from property owners at Bowhill to transfer their personal domestic water licence allocation (500KL) to the council, for the purpose of offsetting any excess water usage. The council agreed to accept the transfer of water licence allocations from property owners at Bowhill connected to the Bowhill water supply, provided that the transfer of water entitlements was at no cost to the council and the transfer was undertaken by the owner of the water licence. At that time, it was reported that approximately 30 Bowhill shack owners would be eligible to participate in the scheme.

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<sup>5</sup> Email from reporter to the Ombudsman, 21 September 2022.

<sup>6</sup> Email from Cr Hall to the Ombudsman, 26 September 2022.

<sup>7</sup> Background to the scheme taken directly from council agendas 9 February 2021 and 10 August 2021.

3. According to the council, 8 property owners completed an 'Instrument Linking/delinking Supply Arrangement Notification River Murray Prescribed Watercourse' form which was countersigned and lodged by the council with the Department of Environment and Water (DEW). The transfer arrangement allowed the 8 Bowhill property owners to source their 500KL water allocation through the Bowhill water supply, providing the owners with a total of 620KL per annum. If the property owners did not use the allocated 620KL, 'the Council would be at an advantage'.
4. Cr Hall was one of 8 property owners who engaged in the scheme.
5. Cr Hall was also an elected member of the council in June 2013 and moved the motion to support the scheme. He is therefore aware of what the scheme entailed and its history.
6. In 2021, the council's administration re-examined the scheme and identified there was no policy, procedure, or other documentation formalising the transfer arrangements as previously intended. It also discovered that DEW had no record of the 8 water licence transfers being completed and therefore the council was not in possession of the transferred water allocations (4ML of water). This meant that the council had, in fact, received no benefit from the scheme, while the 8 property owners had been provided with an additional 500KL of water each year from the Bowhill water supply.
7. On the basis that none of the water transfer allocations appeared to have occurred, and its current view that the scheme was 'not a core activity of Council', the council considered whether it was now an appropriate time to cease the scheme or alternatively, formalise a new procedure for the scheme.
8. The report noted that if the scheme were to continue there would be a 'considerable administration [sic] burden (as council would need to reconcile their water allocation to the transfers ... and pumping costs of the scheme would increase substantially due to the increase of individual allowances to 620 Kilolitres'.
9. Council administration prepared a report to elected members for a council meeting to be held on 9 February 2021, under agenda item 7.1.6. The report outlined the history of the Bowhill Water Supply Scheme, as reflected above, and recommended that elected members receive the report and either:
  - cease the practice of accepting the transfer of water licence allocations from property owners at Bowhill, or
  - not accept the transfer of any water allocations until it considered a further report outlining a procedure and recommended cost that would be charged to property owners for the administration and risks associated with the scheme.<sup>8</sup>
10. On 5 February 2021, prior to council meeting, Cr Hall contacted the council's Manager Strategy, Innovation & Governance by telephone to speak about agenda item 7.1.6. Cr Hall was reportedly concerned the council would not have the relevant background to the scheme and he wanted to participate in discussion before the elected members voted on the matter.
11. In response to my investigation, the Manager Strategy, Innovation & Governance told my Office that she verbally advised Cr Hall at this time that he would have a material conflict of interest in the matter. Specifically, because he was an owner at Bowhill who received a benefit from the arrangement, and he may gain a benefit or suffer a loss, depending on how the council decided to proceed with the arrangement. The Manager

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<sup>8</sup> Mid Murray Council, Meeting Agenda, 9 February 2021, 25.

Strategy, Innovation & Governance states she provided this same advice to Cr Hall in person on 8 February 2021.

12. At the council meeting on 9 February 2021, Cr Hall declared a material conflict of interest in item 7.1.6 on the basis that 'he is a water licence holder'.<sup>9</sup> He left the council Chamber while the item was discussed and voted on.
13. During the council's deliberation of the matter, Cr Steven Hennessy reportedly said Cr Hall had contacted him by telephone and that:

[Cr Hall] said he would like to discuss the matter further, which because he has a conflict of interest he can't do in an ordinary council meeting, he asked for it to be held over so that we can have a workshop for want of a better term, at the next meeting and vote on in April so it's not going to hold it up long it just gives us a chance to get a bit more information.<sup>10</sup>
14. The council passed a motion that, 'item 7.1.6 Bowhill Water Entitlements be adjourned until after Council facilitates a workshop on the matter to discuss the LMA [Land Management Agreement] over the subject land'.
15. On 9 March 2021, the council held an informal gathering to discuss the scheme. Cr Hall was present at and reportedly participated in discussion at the informal gathering.
16. A witness to the investigation states that the council's position on the scheme shifted at the informal gathering. At the conclusion of the informal gathering, the elected members requested a report be prepared which considered the implementation of a procedure and set conditions that would allow Bowhill property owners connected to the Bowhill water supply to transfer their personal domestic water license allocation to the council (i.e. effectively recommence the scheme).
17. Council administration prepared and presented a report to elected members at a council meeting on 13 July 2021, under agenda item 7.1.7. The report outlined a proposed procedure that would place an onus on Bowhill property landowners to lodge requisite documentation to partake in the scheme and included:
  - an administration fee of \$100 to the council to cover ten years of council administration fees (that is, \$10 per year)
  - a fee to lodge a form with DEW for water transfer allocation to occur for up to 10 years (currently \$471)
  - an ongoing requirement for property owners to pay a landscape levy for licence holders of water allocations (current minimum \$200).
18. The report recommended that elected members authorise council administration to implement the proposed procedure and for the council's fees and charges register to be amended to include the \$100 application fee to cover the council's administrative burden.
19. The report also outlined the advantage for Bowhill property owners who engaged in the scheme, namely:
  - the property owners would no longer be required to purchase and run/maintain a pump

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<sup>9</sup> Mid Murray Council, Minutes of meeting, 9 February 2021, 21081.

<sup>10</sup> Mid Murray Council, Meeting, 9 February 2021.

- the property owners would not need to install an approved meter and perform quarterly meter readings to DEW or purchase water on the market if they exceeded their water allocation.
20. Cr Hall declared a material conflict of interest in item 7.1.7 on the basis that 'he is a Bowhill land owner and has direct involvement in the water transfer scheme'.<sup>11</sup> He left the council Chamber while the item was discussed and voted on. However, this resulted in a lack of quorum, and the item was deferred to a subsequent meeting when a quorum would be present.<sup>12</sup>
  21. The matter was reconsidered at a council meeting on 10 August 2021 at agenda item 7.1.3. Cr Hall declared a material conflict of interest in item 7.1.3 on the basis that 'he is a Bowhill land owner and has direct involvement in the water transfer scheme'.<sup>13</sup> He left the council Chamber while the item was discussed and voted on. When declaring this interest, Cr Hall reportedly stated 'I should say that before I leave the room, I'm more than happy to answer questions, because I obviously know a lot more about it than anyone else'.
  22. The council passed a motion that 'Item 7.1.3 Transfer of Bowhill Water Entitlements be adjourned to enable the matter to be workshopped'.
  23. On 14 September 2021, the council held an informal gathering to discuss the scheme. Cr Hall was present at and reportedly participated in discussion at the informal gathering.

#### **Council meeting on 12 October 2021**

##### *Agenda item 7.1.2*

24. Council administration prepared and presented a report about the scheme to elected members at a council meeting on 12 October 2021, under agenda item 7.1.2.
25. Among other things, the report highlighted risks to the council in continuing with the scheme including 'scrutiny for exceeding allocations' and 'significant fines' if the council was found to not be compliant with State level water allocation requirements.
26. The report outlined a proposed procedure, should the scheme continue, that would place an onus on Bowhill property landowners to appropriately transfer their permanent water allocations to the council (up to 142 sites). The report noted that if the transfers were to occur, there would be a 'considerable administrative burden as Council would need to reconcile [its] water allocation to the transfers, as the property owners have failed to ensure that the transfer of the allocations were still current'.
27. The report recommended that the elected members vote to either:
  - cease the practice of accepting the transfer of water licence allocations from participants in the Bowhill Water Supply Scheme, which would 'reduce risk to Council' (option 1); or
  - authorise council staff to formalise an 'appropriate procedure' that would allow participants in the Bowhill Water Supply Scheme to transfer their personal domestic water licence allocation to the council for the purpose of off-setting excess water usage (option 2).

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<sup>11</sup> Mid Murray Council, Minutes of meeting, 13 July 2021, 21159.

<sup>12</sup> Mid Murray Council, Minutes of meeting, 13 July 2021, motion 21159/1.

<sup>13</sup> Mid Murray Council, Minutes of meeting, 10 August 2021, 21175.

28. The proposed procedure outlined in the report included a requirement that property owners lodge an application for the transfer of their water licence allocation with the council and pay an administration fee of \$100, as well as pay an additional landscape levy (a minimum \$200).
29. Cr Hall declared an actual conflict of interest in item 7.1.2 on the basis that 'he is a Bowhill landowner and has direct involvement in the water transfer scheme'. He remained in the council Chamber while the item was discussed but did not vote on the item. Cr Hall stated 'I have the same [interest] as 152 other people, basically a shareholder. I hold a clear and actual interest, however I will stay and not vote'.
30. Cr Kirsty MacGregor moved a motion (21206/1), seconded by Cr Simone Bailey, to receive council's report and to cease the practice of accepting the transfer of water licence allocations from property owners connected to the Bowhill water supply (option 1).
31. During debate of this motion, Cr Hall requested to speak to the matter. Cr Hall spoke for several minutes during which time he indicated that he favoured option 2 of council's report; Cr Hall subsequently proposed a third recommendation for the council to consider. As this was not formally put in a motion, I do not consider it necessary to reflect the commentary made by Cr Hall leading to his recommendation.
32. After debating the motion, it was passed by a majority vote, as follows:  
That:
  1. The Transfer of Bowhill Water Entitlements report be received.
  2. Council ceases the practice of accepting the transfer of water licence allocations from participants in the Bowhill Water Supply Scheme.
33. Cr Hall called for a division. Following this, the Mayor declared the motion carried.
34. It is alleged that Cr Hall failed to appropriately declare and manage a material conflict of interest in agenda item 7.1.2 by:
  - declaring an actual conflict of interest in item 7.1.2, instead of a material conflict of interest
  - remaining in the council Chamber while the matter was deliberated
  - speaking to the motion, providing his views on accepting a different motion, proposing an alternative option, and calling for a Division.

*Agenda item 7.1.3*

35. At its meeting on 12 October 2021, the council also considered agenda item 7.1.3, a report titled 'Bowhill Supply Scheme Enhancement Option'.
36. The report reflected that the council was likely to have approximately 59ML of excess water entitlements once the council had completed a commitment to purchase 186ML to cover water usage associated with the Mannum Waters marina evaporation. The report sought for the council to consider options in relation to repurposing the excess water, including whether to sell the water on the temporary water market, or to provide the additional water to the participants in the Bowhill Water Supply Scheme (if the proposed scheme under item 7.1.2 was adopted by the council). Scheme participants would be requested to pay the equivalent rate that would be on the temporary water market.

37. The report noted that 'Council should be maximising the return on assets'.
38. The report presented elected members with the option of having a further report prepared by council administration, setting out pricing options for the Bowhill Water Supply Scheme in 2022/23 which would incorporate the possible usage of the projected 59ML excess water allocation.
39. Cr Hall did not declare any conflict of interest in relation to agenda item 7.1.3 and remained in the council Chamber.
40. On consideration of this agenda item, the council's CEO initially stated that the item appeared to 'be moot', based on the previous motion passed related to agenda item 7.1.2. However, Mr Clive Hempel, the council's Director, Corporate and Financial Services said that the council could still consider the report. Mr Hempel noted Cr Hall's comments during deliberation of agenda item 7.1.2 and stated that the council could still look at enhancing the Bowhill water supply.
41. Cr Hall subsequently moved a motion (21206/3):
- That:
1. The Bowhill Water Supply Scheme Option Report be received
  2. A further report be prepared for Council's consideration that provides pricing options for the Bowhill Water Supply Scheme in 2022/23, incorporating the possible usage of the projected 59ML excess water allocation.
42. The motion was seconded and subsequently carried.
43. It is alleged that Cr Hall failed to appropriately declare and manage a conflict of interest in agenda item 7.1.3 by:
- failing to declare a conflict of interest in item 7.1.3
  - remaining in the council Chamber while the matter was deliberated
  - moving a motion for council to seek a further report that would consider pricing options for the scheme in 2022/23 and how a potential excess water supply could be utilised for the benefit of Bowhill property owners participating in the scheme.

*Response from Cr Hall*

44. In response to my investigation, Cr Hall submitted the following:

My intention at all times is to represent [t]he whole of Mid-Murray council rate payers, on this occasion however my own local area of Providence Drive Bowhill.

My wife and our family purchased the property in August 1989 as a shack, consequently through a development program over subsequent years the area is now a sort after Holiday Home area and boasts the only Holiday home location on the Murray River S A with common Water and T V. During these developing years I have personally served on the executive of the Bowhill Holiday Home owners association during negotiations with the previous property owner including court actions hence my knowledge of the water entitlements and transfers within the Council chamber and staff needed to be heard thus representing the rate payers of the development as required.

On all occasions I have my discussed and received advise for my intended actions with our (Mid-Murray council) legal solicitor Dallis Von Wald, I believe I did declare a conflict at each meeting and fully explained my intention to brief the Chamber on the history surrounding the water transfer development and benefits to individuals along with a perceived benefit to the council.

Personally my memory suggests that at one meeting following a discussion with a Director I stayed in the Chamber as he presented an alternative option that I believed would satisfy most of the Providence Drive rate Payers, and can only imagine that is where the controversy exists.

In my almost 12 years on Council I have been very conscious of the legal protocols and would never deliberately contravene same.

I should also mention at no stage was the Chambers [sic] decision going to benefit me or my family.

45. Cr Hall confirmed that his Bowhill property is now his primary residence.
46. I asked Cr Hall why he previously declared a material conflict of interest in items relating to the Bowhill Water Supply Scheme, before the October 2021 meeting, Cr Hall submitted 'The specifics no, however on every occasion a declaration has been declared'.

*Response from the CEO and Mayor*

47. In response to my investigation, the CEO advised that Cr Hall was first elected to the council in November 2010 and has been a member of the council since that time.
48. The CEO stated that they have 'always found that [Cr Hall] has worked in the best interests of community'; a view similarly expressed by the Mayor, who said it was his view that Cr Hall has shown 'the highest integrity, honesty and solid commitment to improve and better the Mid Murray Community without any malicious intent'.
49. The CEO told my Office that:
  - Cr Hall undertook mandatory elected member training at the commencement of his current term in 2018
  - Cr hall attended training with other elected members on 8 December 2020 from Kelledy Jones Lawyers which addressed elected member obligations under the Code of Conduct.
50. The CEO advised that in relation to item 7.1.3, there have been no further reports to the council about the Bowhill Water Supply Scheme.

**Relevant law/policies**

51. Division 3 of Part 4 of the Local Government Act sets out the circumstances in which an elected member may have a conflict of interest in a matter and how it must be dealt with.
52. Section 73 specifically relates to whether a member of a council has a material conflict of interest in a matter, and provides 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 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[.]

53. Section 74 provides that if an elected member has a material conflict in a matter to be discussed at a council meeting, they must inform the meeting of their material conflict of interest<sup>14</sup> and leave the meeting room while the matter is discussed and voted on.<sup>15</sup>
54. Section 75 details the circumstances in which an elected member has an *actual* or *perceived* conflict of interest. Of particular relevance to my investigation, subsections one and two state:

**75—Actual or 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.

...

55. Section 75A sets out the requirements for elected members if they have an actual or perceived conflict of interest, as follows:

**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.

...

- (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;

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<sup>14</sup> *Local Government Act 1999*, section 74(1)(a).

<sup>15</sup> *Ibid*, section 74(1)(b). A member of council is not considered to have contravened s74(1) if they have been granted approved by the Minister to take part in the meeting in accordance with s74(2) and (3). This does not apply in this case.

- (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.

...

56. Finally, 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.

57. Clause 3.13 of the Code of Conduct for Council Members relevantly provides:

**Conflict of interest**

- 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 Hall breached clause 3.13 of the Code of Conduct for Council Members by failing to declare and manage a material conflict of interest in agenda item 7.1.2 at a council meeting on 12 October 2021**

58. On 12 October 2021, the council was asked to consider agenda item 7.1.2 which related to the transfer of Bowhill's water entitlements. Specifically, the council was asked to consider whether to formalise a procedure which would allow property owners connected to the Bowhill Water Supply Scheme, to transfer their personal domestic water licence to the council, or alternatively, for council to cease the transfer of water licence allocations.
59. I have considered whether Cr Hall had a material conflict of interest in relation to agenda item 7.1.2, for the purposes of section 73(1) of the Local Government Act. This requires me to consider whether Cr Hall (or a member of his family, per section 73(1)(b) of the Act) *would* receive a benefit or suffer a loss *depending on the outcome* of the council's consideration of the matter.
60. As an owner of property in Bowhill with a water licence connected to the Bowhill Water Supply Scheme, I am satisfied Cr Hall held a personal interest in agenda item 7.1.2. I have been advised that the scheme only covers around 200 out of nearly 9000 ratepayers in the Mid-Murray council region and therefore I do not consider that Cr Hall's interest was shared in common with all or a substantial proportion of the ratepayers, electors or residents of the council area.<sup>16</sup> Noting Cr Hall's submission that he resides at his Bowhill property with his wife, I consider that any interest in agenda

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<sup>16</sup> Having regard to section 73(2)(a) of the *Local Government Act 1999*.

item 7.1.2 also extends to a benefit obtained or loss suffered by Cr Hall's wife (pursuant to section 73(1)(b) of the Local Government Act).

61. In determining whether Cr Hall held a material conflict of interest in agenda item 7.1.2, I must consider whether Cr Hall *would* have gained a benefit or suffered a loss depending on the outcome of council's consideration of the matter.
62. In my view, Cr Hall would have gained a benefit in the council voting to maintain the scheme, and through the council's introduction of a procedure providing for the transfer of his water licence to the council which would allow him to offset any excess water usage at his property.
63. Arguably council voting to formalise this procedure would also mean Cr Hall would suffer a loss to the extent that the procedure would impose fees on property owners by way of an administration fee to the council and payment of a landscape levy. While relatively minor, the cost would still be incurred by Cr Hall as a property owner and participant of the scheme. I note the council's report which outlined the advantage of the transfer of water licence allocations for Bowhill property owners who engaged in the scheme being that:
  - property owners would not be required to purchase and run/maintain a pump
  - property owners would not need to install an approved meter and perform quarterly meter readings to DEW or purchase water on the market if they exceeded their water allocation.
64. I understand cessation of the transfer of water licence allocations from property owners to the council would therefore result in property owners needing to purchase, run and maintain a pump and/or install an approved meter for water readings. Arguably this would be a 'loss' suffered by Cr Hall as a property owner if the council voted for Option 1 to cease the transfer of water licence allocations. In my view, any outcome resulting from the council's consideration of agenda item 7.1.2 would have led to Cr Hall gaining a benefit or suffering a loss in some form or another.
65. Having regard to this, I am satisfied Cr Hall held a material conflict of interest in agenda item 7.1.2. I note that this is consistent with advice provided to Cr Hall by the council's Manager, Strategy, Innovation & Governance in February 2021, and indeed consistent with Cr Hall's previous declarations in relation to council consideration of matters regarding the Bowhill Water Supply Scheme.
66. Section 74 of the Local Government Act requires that a council member with a material conflict of interest in a matter to be discussed at a council meeting must inform the meeting of their material conflict of interest and leave the meeting room.<sup>17</sup>
67. Cr Hall is aware of these obligations, having declared a material conflict of interest in matters regarding the scheme at council meetings in February, July and August 2021.
68. Despite this, Cr Hall declared an *actual* conflict of interest in relation to agenda item 7.1.2 at the council meeting on 12 October 2021. Cr Hall then remained in the council Chamber and proceeded to speak to the proposed motion relevant to item 7.1.2, expressing his preference that council vote to formalise a procedure for the scheme (option 2). Cr Hall also proposed a third recommendation for the council to consider.

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<sup>17</sup> A member of council is not considered to have contravened s74(1) if they have been granted approval by the Minister to take part in the meeting in accordance with s74(2) and (3). This does not apply in this case.

This approach is contrary to Cr Hall's management of his conflict of interest at previous meetings which considered the scheme; at these meetings he left the council Chamber.

69. Cr Hall submits that he remained at the meeting as it was his intention to brief elected members on the history of the scheme and that, 'at no stage was the Chambers [sic] decision going to benefit me or my family'.
70. I am not persuaded by Cr Hall's submissions. In my view, there is no clear explanation for Cr Hall's change in approach in declaring and managing a conflict of interest in matters regarding the scheme (in which I am satisfied he had a clear material conflict of interest). While I cannot speculate as to Cr Hall's frame of mind when he declared this conflict, it is conceivable that Cr Hall was driven by his own interests and concern over the outcome of agenda item 7.1.2, which led him to debate the scheme and propose an alternative approach for council's consideration (which arguably he may have also benefited from). I also do not accept Cr Hall's submission that he would have not benefited from the council's consideration of agenda item 7.1.2, for the reasons set out above.

### Opinion

In light of the above, my view is that Cr Hall failed to appropriately declare and manage a material conflict of interest in agenda item 7.1.2 of the council's meeting on 12 October 2021, and in doing so Cr Hall breached section 74 of the Local Government Act and clause 3.13 of Part 3 of the Code of Conduct.

### **Whether Cr Hall breached clause 3.13 of the Code of Conduct for Council Members by failing to declare and manage a conflict of interest in item 7.1.3 at a council meeting on 12 October 2021**

71. At the same meeting on 12 October 2021, elected members were asked to consider agenda item 7.1.3 which related to council's use of 59ML of excess water following the council's purchase of 187ML of water to cover the Mannum Waters marina evaporation. Potential options put to the council were to sell the excess water annually on the 'temporary water market' or to provide the excess water to participants of the Bowhill Water Supply Scheme.
72. Elected members were asked to consider whether to receive a report prepared by council administration in support of the agenda item, or, to receive the report and request preparation of an additional report considering pricing options for the Bowhill Water Supply Scheme in 2022/23 'incorporating the possible usage of the projected 59ML excess water allocation'. This would only be applicable if the council had previously voted to maintain the Bowhill Water Supply Scheme at agenda item 7.1.2 (which it did not).
73. While I am of the view Cr Hall held a personal interest in agenda item 7.1.3 as an owner of property at Bowhill and participant of the Bowhill Water Supply Scheme, I do not consider that Cr Hall held a material conflict of interest in agenda item 7.1.3 as there is not a clear benefit or loss to Cr Hall in council's consideration of the matter. At most, the council could have voted (and subsequently did) to have another report prepared by council administration outlining how participants of the scheme may benefit from council's excess 59ML of water. This does not immediately result in Cr Hall obtaining a benefit.
74. Nevertheless, I have determined that Cr Hall held an actual conflict of interest in the matter. An actual conflict of interest can be said to exist where a member of a council's

interest conflicts with the public interest, such that it might lead to a decision that is contrary to the public interest.<sup>18</sup> I am satisfied that in this case:

- Cr Hall held a personal interest in agenda item 7.1.3 in having the council further consider allocation of its excess water to participants of the Bowhill Water Supply Scheme, an interest that was not held in common with all or a substantial proportion of ratepayers, electors or residents of the Mid Murray area<sup>19</sup>
- the public interest was for the council to decide how best to deal with an excess of 59ML of water, having regard to the priorities and needs of the community as a whole, including how best to 'maximise the return on council's assets' which may be to sell the excess water on the temporary water market; it was also in the public interest to ensure that council's time and resources were allocated effectively on matters that benefit the whole community, rather than just a portion of ratepayers
- Cr Hall's interest could be said to conflict with this public interest in a manner that could have led to a decision that was *contrary* to the public interest; in particular, Cr Hall's decision to move a motion committing council to commit resources on preparing a further report exploring ways to benefit only a small portion of the community (participants in the scheme), rather than vote to simply receive council's report on the matter.

75. By extension, I consider that at the time of the relevant meeting, an impartial, fair-minded person could have perceived Cr Hall to have a conflict of interest in the matter, having regard to the above. Specifically, that at the time of the relevant meeting and consideration of agenda item 7.1.3, Cr Hall was an owner of property at Bowhill, he was a participant of the Bowhill Water Supply Scheme, he therefore held an interest in whether the council would provide its excess 59ML water to participants of the scheme, and this interest could lead to a decision by the council that was contrary to the public interest.
76. I asked Cr Hall to clarify whether he considered he ought to have declared a conflict of interest in agenda item 7.1.3. Cr Hall responded that he 'did declare'. This is not the case. While Cr Hall declared an interest in agenda item 7.1.2, he did not declare an interest in agenda item 7.1.3.
77. Sections 75A(1) and (2) of the Local Government Act requires that a member of a council who has an actual or perceived conflict of interest in a matter to be discussed at a meeting of a council to deal with the actual or perceived conflict of interest in a 'transparent and accountable way'. This includes informing the meeting of their interest and advising the meeting about how they intend to deal with said interest.
78. I do not consider that Cr Hall dealt with his conflict of interest in agenda item 7.1.3 in a transparent way, having failed to declare the interest. Had Cr Hall declared his actual/perceived interest in agenda item 7.1.3, it was open to him to remain in the council Chamber (as he did). While I have considered section 75A(5) which provides that non-participation in the meeting is not the only way in which a member of council may appropriately deal with an actual or perceived conflict of interest in a transparent and accountable way, I question the appropriateness of Cr Hall moving or voting on the relevant motion, particularly given his narrower interest conflicting with that of the public.

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<sup>18</sup> *Local Government Act 1999*, section 75.

<sup>19</sup> Having regard to section 73(2)(a) of the *Local Government Act 1999*.

79. In my view, Cr Hall's failure to restrict his participation in relation to agenda item 7.1.3 given the extent of his interest which could lead to a decision contrary to the public interest, leads me to conclude that he did not deal with his actual and perceived conflict of interest in a transparent and accountable way.

### Opinion

In light of the above, my view is that Cr Hall had an actual and perceived conflict of interest in agenda item 7.1.3 at the council's meeting on 12 October 2021, and that Cr Hall failed to appropriately declare and manage that conflict, contrary to section 75A of the Local Government Act, and in breach of clause 3.13 of the Code of Conduct.

### Additional issue

80. While not the primary issue in this investigation, I note with concern the council's use of, and Cr Hall's apparent participation in, several informal gatherings in relation to the Bowhill Water Supply Scheme. This is particularly having regard to information received by my Office that the council's attitude toward the scheme shifted during one of the informal gatherings in relation to this matter.
81. While I did not investigate this specific issue, I note that the local government scheme does not intend for informal gatherings, now referred to as 'information or briefing sessions', to be utilised in such a way as to 'obtain, or effectively obtain' a decision by elected members; nor should it be a forum for an elected member to provide persuasive arguments in favour of a particular approach to be taken by the council (even more important when said elected member has a material conflict of interest in the subject matter). I encourage careful consideration and oversight by the council to ensure information or briefing sessions are being utilised in the appropriate manner.

## Summary and final comment

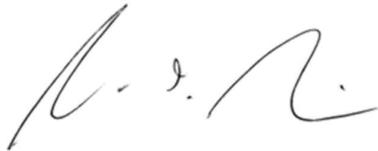
In light of the above, my final view is that:

- Cr Hall had a material conflict of interest in agenda item 7.1.2 at the council's meeting on 12 October 2021, and he failed to appropriately declare and manage this conflict of interest in accordance with section 74 of the Local Government Act. In doing so, Cr Hall breached clause 3.13 of the Code of Conduct.
- Cr Hall had an actual and perceived conflict of interest in agenda item 7.1.3 at the council's meeting on 12 October 2021, and he failed to appropriately declare and manage this conflict of interest in accordance with section 75A of the Local Government Act. In doing so, Cr Hall breached clause 3.13 of the Code of Conduct.

I do not consider it appropriate to make recommendations to the council to reprimand Cr Hall for his conduct having regard to Cr Hall's decision to not nominate in the Local Government elections in November 2022, and the fact that the council is now in its caretaker period. Accordingly, I have not made any recommendations in relation to my final views.

However, I note that 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.

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**

10 October 2022