

Report

Full investigation - *Ombudsman Act 1972*

Complainant	Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>
Agency	City of Adelaide
Ombudsman reference	2016/10027
Date complaint received	16 December 2016
Issues	Whether Cr Wilkinson 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 Item 5, Recommendation 5.10, at a Council meeting on 22 November 2016.

Jurisdiction

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

Investigation

My investigation has involved:

- considering media reports
- seeking a written response from Cr Sandy Wilkinson, City of Adelaide (**the Council**)
- meeting with Cr Wilkinson, Mr Mark Goldstone, Chief Executive Officer, City of Adelaide, and Ms Kylie Bennetts, Governance Manager, City of Adelaide
- interviewing Cr Wilkinson on oath
- seeking a written response from Cr Anne Moran, City of Adelaide, and clarifying that response by telephone
- considering the *Ombudsman Act 1972* (**the Ombudsman Act**), *Local Government Act 1999* (**LGA Act**) and the Code of Conduct for Council Members (**the Code of Conduct**)
- preparing a provisional report and providing it to Cr Wilkinson for comment
- preparing this 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.¹ It is best summed up in the decision as follows:

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

Response to my provisional report

In response to my provisional report, Cr Wilkinson advised my Office by email dated 13 June 2017 that he had no further comment to make, and that he was prepared to issue a public apology.

Background

1. On 8 November 2016, the Council's Strategy, Planning & Partnerships Committee (**the Committee**) held a Committee meeting.
2. At that meeting, a recommendation was made to note a proposal to review the Council's Heritage Incentives Scheme (**HIS**) Operating Guidelines (**the Guidelines**), which would increase the subsidies paid to home-owners for heritage restoration work.
3. The Committee meeting Minutes show that the recommendation was moved by Cr Wilkinson and seconded by Cr Susan Clearihan.
4. The recommendation was then put before the Council at a Council meeting on 22 November 2016, and a motion to adopt the recommendation and Guidelines was amended and moved by Cr Moran and Cr Phillip Martin, and a subsequent amendment was further moved by Cr Natasha Malani and Cr David Slama to include that:

...the amount for the assistance for professional fees [be raised] from 50% to 75% in the operating guidelines.

5. It was then reported in a news article on 13 December 2016 that concerns had been raised about Cr Wilkinson's participation in the motion and his failure to declare an interest in the matter, as he is a heritage consultant and owns a business that provides heritage restoration services.³
6. In that article, it is stated that Cr Wilkinson told the media that:

...the motion had the potential to financially benefit his business - Alexander Wilkinson Design Pty Ltd - but only indirectly, by increasing a potential subsidy for his services.⁴

7. The article also stated that Cr Wilkinson considered his actions in remaining in the chambers to vote and debate on the motion was appropriate, and he was quoted in the article as follows:

¹ 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.

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

³ InDaily, 'Conflict of interest questions over city Council vote', < <http://indaily.com.au/news/local/2016/12/13/conflict-of-interest-questions-over-city-Council-vote/> > 13 December 2016.

⁴ Ibid.

The rebate that property owners get is paid to the owners of the (property)...[and that heritage restoration work is]...only a fairly minor proportion of what I do.... There's a number of people that provide that sort of service.

...it's important that the Council is doing everything it can to encourage people to be restoring their heritage buildings in Adelaide...That's where I'm coming from.⁵

8. Cr Moran, who moved the motion, also told the media that she had offered to move the amendment on Cr Wilkinson's behalf, and was directly quoted as follows:

I, too, was nervous that he had been too close [to the matter] and so was Sandy.

I'm comfortable in that I assume he thought long and hard about it.
I trust Sandy's judgement.⁶

9. In a second media article, in which I was quoted as saying I would more than likely investigate the matter, the following statement by Cr Wilkinson is provided in regard to legal advice he had obtained about whether he had any type of conflict of interest under the LGA Act:

1. He had not breached the material conflicts of interest provisions in Section 73 and 74 of the Local Government Act 1999 ("the Act") by participating in debate and voting on the Committee and Council Agenda Item "Review of Heritage Incentive Scheme Operating Guidelines" on 8 and 22 November 2016 respectively.
2. Section 73(1) only creates a material conflict of interest where the member "would" gain a benefit, or suffer a loss, depending upon how the matter was decided.
3. The word "would" in this sense means (in effect) "will" gain a benefit or suffer a loss as opposed to, for example, "may" or "might" at some time in the future depending upon whether other facts or circumstances occurred.
4. The use of the word "would" by Parliament suggests that there must be a direct temporal (immediate) cause and effect by the resolution of Council and the conferring of the benefit or the suffrage of the loss.
5. Section 73(1) does not potentially apply, in any event, as the incentives are paid to the owners of heritage properties rather than, for example, their architects or building design consultants.⁷

10. The article also states that:

...the unequivocal legal advice received was that there was no requirement for him to declare an interest or absent himself from the meeting under Section 74 of the Act.⁸

11. Cr Wilkinson is then quoted directly as follows:

Accordingly, there is no possibility that I have committed an offence under Section 74(1) giving rise to the penalties in Section 74(4)(1)(b).

During consideration of this matter, it has been drawn to my attention that a separate Section in dealing with 'perceived conflicts of interest' was included in the Act by an amendment in March 2016. Section 75A, which is not a penalty provision, requires a member to disclose a "perceived" conflict of interest where the member could reasonably be taken from the perspective of an impartial, fair-minded person to have a conflict of interest in the matter.⁹

12. The Deputy Ombudsman and I met with Cr Wilkinson, Mr Goldstone and Ms Bennetts, Governance Manager of the Council, on 15 December 2016 to discuss how the

⁵ Ibid.

⁶ Ibid.

⁷ InDaily, 'Ombudsman 'more than likely' to investigate city Councillor', <<http://indaily.com.au/news/local/2016/12/16/ombudsman-likely-to-investigate-city-Councillor/>> 16 December 2016.

⁸ Ibid.

⁹ Ibid.

concerns about Cr Wilkinson's involvement in the motion to increase the HIS subsidy would be addressed.

13. On 16 December 2016, I indicated to the media that I would most likely conduct an investigation into the matter,¹⁰ and Cr Wilkinson independently responded to that media report by providing me with relevant documentation, including copies of Minutes and legal advice he had obtained in relation to whether he had a conflict of interest.¹¹
14. Shortly after those events, on 20 December 2016, I decided to conduct an 'own initiative' investigation pursuant to section 13(2) of the Ombudsman Act.
15. I do not consider it necessary to consider whether Cr Wilkinson had a conflict of interest in relation to the recommendation that was moved at the Committee meeting on 8 November 2016.
16. Council committees are established by councils pursuant to section 41 of the Local Government Act for the purpose of assisting the council in the performance of its functions, inquiring into and reporting to the council on matters within the ambit of the council's responsibilities, providing advice to the council to exercise, and to perform or discharge delegated powers, functions or duties of the council.
17. As the Committee is only delegated to make recommendations, which may or may not be adopted by Council,¹² I do not consider that the Committee meeting was a meeting of Council for the purposes of the conflict of interest provisions under the LGA Act.

Relevant law

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

Conflict of interest

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

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

73—Material conflicts of interest

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

¹⁰ Ibid.

¹¹ Email dated 16 December 2016.

¹² Decision Making at Adelaide City Council, <http://www.cityofadelaide.com.au/your-council/role-of-council/how-council-works/>, Last viewed 27 April 2017.

- (f) a partner of the member;
 - (g) the employer or an employee of the member;
 - (h) a person from whom the member has received or might reasonably be expected to receive a fee, commission or other reward for providing professional or other services;
 - (i) a person of a prescribed class.
- (2) A member of a Council will not be taken to have a material conflict of interest in a matter to be discussed at a meeting of the Council—
- (a) if the relevant benefit or loss would be enjoyed or suffered in common with all or a substantial proportion of the ratepayers, electors or residents of the Council area; or
 - (b) on account of an interest under subsection (1) of a relative of the member, other than the member's spouse or domestic partner, if the member does not know, and could not reasonably be expected to know, of the interest.
- (3) A member of a Council who is a member, officer or employee of an agency or instrumentality of the Crown, will be regarded as having a material conflict of interest in a matter before the Council if the matter directly concerns that agency or instrumentality but otherwise will not be regarded as having an interest in a matter by virtue of being a member, officer or employee of the agency or instrumentality.
- (4) In this section—
- agency or instrumentality of the Crown*** includes—
- (a) an administrative unit of the Public Service;
 - (b) a body corporate comprised of, or including or having a governing body comprised of or including, a Minister or Ministers of the Crown or a person or persons appointed by the Governor or a Minister or other agency or instrumentality of the Crown.

20. 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.

21. 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.
22. 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 a kind prescribed by regulation for the purposes of this section.
23. As at 9 August 2016, regulation 8AAA of the *Local Government (General) Regulations 2013* prescribed the following as the matters of ordinary business of a Council for the purposes of section 75A(6) of the Local Government Act :

8AAA–Conflicts of interest–ordinary business matters

- (1) For the purposes of sections 74(6) and 75A(6) of the Act, the following matters are prescribed:
 - (a) the conduct and consideration of a review under section 12 of the Act;
 - (b) the adoption or alteration of a training and development policy under section 80A of the Act;
 - (c) the adoption or amendment of a strategic management plan under section 122 of the Act;
 - (d) the adoption or revision of an annual business plan or budget under section 123 of the Act;
 - (e) the declaration of rates (other than a separate rate) or a charge with the character of a rate.
- (2) In connection with subregulation (1), a matter to be discussed at a meeting of the Council that relates to a matter within the ambit of paragraphs (a) to (e) (for example, a discussion relating to the preparation of a strategic management plan) is prescribed.
- (3) In addition, for the purposes of section 75A(6) of the Act, a matter before a Council–
 - (a) that is of interest to a member of the Council because the member is a member, officer or employee of an agency or instrumentality of the Crown (within the meaning of section 73(4) of the Act); and
 - (b) that does not directly concern that agency or instrumentality, is prescribed.

Whether Cr Wilkinson 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 Item 5, Recommendation 5.10, at a Council meeting on 22 November 2016.

24. On 9 February 2017, Cr Wilkinson attended my Office to provide evidence in an interview taken under oath.
25. During the interview, Cr Wilkinson was questioned about the nature of the work he undertakes with his business, Alexander Wilkinson Design Pty Ltd (**AWD**), in particular his heritage restoration work. Cr Wilkinson responded as follows:

...So we provide advice and documentation for registration of heritage buildings...um, and ah...as I said it's a small component of what the business is about. It's one that I'm known for, because of my passion for heritage and my motivation for standing for the city Council is about protecting the city's heritage and improving planning in the city so...it probably looms larger in people's minds.

... I um ran for Council on the basis of protecting heritage and improving how heritage is protected and uh managed in the city, that's why I ran for the Council along with improving planning controls in the city. And so, I'm outspoken in the public media and public eye, so...people would probably have the perception that that's mainly what I do, as opposed to a fairly minor aspect of what I do which is mainly town houses.

26. My Office further questioned Cr Wilkinson about what percentage of his work relates to heritage restoration:

Q. In a meeting at this Office on 15 December 2016, you stated that only a small component of your work is heritage related, approximately 5% of what you do. Can you provide any supporting evidence of how you came to the calculation of 5% or 10%?

A. It is in that range. Looking at my schedule of docs, and identifying which ones of those were, um, heritage ones.

Q. How accurate do you consider that estimate would be compared to schedule?

A. Oh, well, I just you know, tallied the ones, ticked the ones that looked like those ones that were heritage type jobs. And it depends how many years you go back.

Q. How much revenue does the business generate in relation to heritage restoration work annually?

A. Oh, I think my gross fees for a year would be...last year about \$160,000.... That's a total of all jobs.

Q. How much of that would be heritage related work?

A. 5-10% of that. [\$8000 - \$16,000]

Q. How many other businesses [in the area] provide heritage restoration services.

A. There are a number of architectural firms that have heritage, um, as what they do.

[Cr Wilkinson then listed the names of a number of firms]

...there's quite a few, and there's a lot more that, um, ah, um, ah...[another example is] Flight Path Architects.

I do...I probably do more, um, townhouse, residential development work...um...because I, um, have qualifications in town planning as well as architecture. So I did my first degree in town planning, my second degree in architecture, so that combination of planning and architecture particularly lends itself to...ahh...dealing with the planning approval process for residential development, so that's probably the main stay of my work is based on having that dual qualification.

27. As Cr Wilkinson had initially moved the recommendation in relation to the HIS at the Committee meeting on 8 November 2016, my Office then sought to distinguish the role and function of the Committee from that of the Council.
28. Cr Wilkinson and his solicitor, Mr Mark Hamilton, Managing Partner, Grope Hamilton Smith, explained that all members of the Council sit on the Committee, which makes recommendations to the Council. However, it was further explained that not all recommendations are then ratified by the Council.
29. Cr Wilkinson also explained that the recommendation in relation to the HIS had not been drafted by him, nor any other Council member. He explained that it been prepared by Council administration as part of a general policy review, and that he was only provided with a copy of the amendments to the HIS Guidelines at the time of the Committee meeting.
30. My Office questioned Cr Wilkinson as to whether he had discussed the amendments to the HIS Guidelines prior to the Committee meeting on 8 November 2016. Cr Wilkinson's responses to those questions were as follows:

Q. Did you have any discussions about [the amendments] prior to going to the Committee?

A. Um.....[long pause].....

No. I'd be talking with planning staff all the time about things, and that would be among topics that...

Q. Did you have any specific discussions about the agenda item?

A. No, I only...saw it on the agenda on Thursday.

Q. Was that the first you knew about a proposed review? When it came to the committee?

A. Um, I had...ah...spoken with Simon Weidenhofer - he's the heritage architect for Council - some months prior. And ah, his...that's gonna be coming up to Council later in the...so I knew, I knew it was gonna pop up on our agenda at some stage.

Q. ... What was the context of those discussions?

A. Um...[long pause]...that um...the ah...the way that the ah...the incentive scheme didn't provide for funding of fences was something I remember discussing with him. That uh...um...previously the Council had provided funding assistance for reinstating authentic fences.

And um...I think because there had been some questions over whether or not the fence was part of the heritage fabric of the building and therefore whether Council could protect a fence. And therefore whether or not Council could protect a fence. Some ERD Court decisions which threw into question, and sort of further to that there's been a sort of move towards not...that basically had conversations saying it's ridiculous that someone can't get funding assistance to replace a brush fence with a traditional picket fence. That's something that we're trying to achieve.

...Um...ahh...well I was aware of differences in how the heritage incentive scheme had operated as it was at that time as opposed to how it had previously, and was aware that um...that ah...people were not getting assistance for things that previously they had been able to get assistance for, and understanding the spirit of what was intended by the program.

Trying to uh...um...identify how those things had changed for the worse and how they ought to be providing assistance to, uh, get good outcomes such as people replacing brush fences, picket fences.

...

Q. Did the discussion with [Mr Weidenhofer] go broader [than the discussions about fences]?

A. That was the main issue.

31. My Office also sought clarification from Cr Wilkinson as to how the HIS operated:

Q. How does the incentive scheme work?

A. The um, the uh, ah...member of the public, property owner, will uh...contact the Council. The Council does promotions with its uh, when it sends out the rates advising property owners about the scheme, and advertises on the website.

[Mr Hamilton: There are about 2200 heritage property owners in the City of Adelaide.]

So they get notified...and then so...when the heritage property owner wants to do something, they usually contact the Council...

Q. Does the Council choose who does the work?

A. No. It's the property owner...they would speak to Council heritage staff, and um...really it depends on the nature of the work, whether they then get um...tradespeople to

uh...get quotes to do the work, and do the work, or they get uh...um...a heritage consultant to do...heritage documentation for more involved work.

Q. [So the work] wouldn't necessarily involve a consultant, [individuals] can go straight to a tradesperson?

A. A lot of it might be painting, or stripping a wall. Or picket fences are often...

Q. Then they get a reimbursement?

A. Yes.

32. Cr Wilkinson was then questioned in relation to the motion that was moved by Cr Moran to accept the recommendation made by the Committee in relation to the HIS at the Council meeting on 22 November 2016:

Q. Please explain your understanding of why Cr Anne Moran moved the motion.

A. Um, [it was] something I discussed with her and she, she uh...was on the same, of the same view that, [that increasing the subsidy was] something Council should do.

Q. But why did she move the motion?

A. Um....[long pause] well I've discussed it with her...

We get the agenda item the Thursday before [a Council meeting], [and] at some stage between then and the Council meeting I...I discussed it with Anne. We discussed items of the agenda [because] that's what members do, and uh...uh...uh...yeah.

So I disc...I said that we provide 75% funding assistance for the main street historical façade improvement scheme to provide more incentive for people to do things, and ah...ahh...that it would be a good idea to do that with the professional fees, and she ah...she agreed with that, and um...ahh...umm...that um...ahh...she said well, I'm...I'm happy to move it, so um...'cause she agreed with that.

Q. And I guess that I'm just interested in the discussions that you had with Cr Moran. Did you ask her to move the motion?

A. Um...we'd discussed it and I...recall she said, well I'm happy to move that.

Q. Did you ask her at any stage to move on your behalf?

A. Um...[long pause]...

[Mr Hamilton: If you can't recall, there's three answers - yes, no, I cannot recall]

[Legal Officer: I remind you that you are on oath.]

A. ...I mean I can't specifically recall, but we certainly did discuss it and I put up the idea. In terms of the essence of the idea, I put forward the idea. And my recollection is she was, ah...of the same view that it's a good idea and offered to do it, and I said that's great.

Q. [Do you have] any thought as to whether [the subsidy increase] would benefit your business?

A. Um...well, no one is ever absolutely certain of these things. But I consider that the subsidy goes to the property owner, it's not something that goes to the consultant. And as the subsidy gets paid to the property owner, not the consultant or the contractor, and the property owner is a class of people, my thinking on it was that I would not get a benefit. The property owner would, I would not, and they're a class of people. The 2200 people.

Q. Was there any particular reason that you didn't move the motion yourself, given this was something you had a view about?

A. [Pause]... Well, I think um...uhh...uhhh, the uh...[long pause]...it's probably better coming from somebody on Council who's not directly involved in something like that.

Q. Were you concerned about the perception [that you may have had a conflict of interest]?

A. Yeah, I was concerned about the perception, which is why in hindsight I feel I should have um...[inaudible] March changes to the legislation declared the perceived conflict of interest.

Q. Why were you not comfortable in moving the motion yourself?

A. Um...[long pause]...I can't specifically recall but you know I think she [Cr Moran] might have said something along the lines of, [it] probably better coming from me and...

Q. I refer to the comments made by Cr Moran in the first InDaily article ...Do you have any idea why Cr Moran would have made those comments?

[Cr Wilkinson viewed the article for a considerable amount of time]

A. Umm...yeah, I can't recall specifically, but the general conversation was sort of um...as elect members you get situations that arise from time to time...do we have any conflict of interest or not, we're not lawyers...and um...uhhh, so uh, yeah. As I said before, because I felt that because the benefit was paid to the property owners, and they're a class of people, that there would not be a direct benefit to me.

Q. Was that something you had turned your mind to?

A. No, not like that. That's sort of the thought process that I had myself. Well, part of the reason why I ran for the city Council in 2007 was to improve heritage policy for people who elected me to that position...expecting me to be advancing that cause for the benefit of all. I was worried about this perceived conflict that I did feel at the time that, uh, that because the benefit goes to the property owner, and they're a class of 2200 people it's not something that gets paid to me, um, so yeah I was nervous about it, but um, that I felt that, I think given that's how the...my recollection of how the conflict of interest provisions are, that it was uh, that I didn't have a material conflict.

33. Cr Wilkinson was questioned as to whether, and to what degree, the subsidy would benefit his business. He responded as follows, with reference to his initial response to the media:

Um...so the journalist from InDaily rang me...I was in the car at the time, speaking in the car speakerphone. Um, and uh...and he asked me [about whether I had a conflict of interest] and my response, which was in the article there, was that there may be some indirect benefit. I do understand now the ah, the perceived conflict of interest provisions that came in, in March, that there was a perceived conflict of interest.

I suppose I was a bit vague because I was a little bit unsure, that um...ahhh...that certainly, you know...in hindsight I should have declared a perceived conflict of interest because both provisions that came in, in March...

34. Cr Wilkinson also provided the following responses as to whether the increase to the heritage restoration subsidy would result in an increase in his business, either directly or indirectly:

A. Um...it didn't really occur to me at the time, but the uhh, when it was in uh rung by [InDaily reporter] Bension Siebert and he put that proposition to me, that's when I said...well perhaps but only indirectly.

Q. Can you please explain what you meant by that at the time?

A. Well, I wasn't really thinking of myself in this thing, I was just thinking about the Council's policy, and how it improves its policy for the benefit of heritage in the city. So that's sort of where my mind was at, that I was just thinking in that framework, really.

I wasn't really thinking about how it related to my business, or some opportunity or benefit for me, I was just thinking in terms of how it would benefit heritage, and heritage property owners in the city.

Q. Do you consider there could be some flow on benefit to service providers?

A. Um...oh there's hindsight...and with hindsight one could extrapolate that potentially. But uh, certainly at the time when I was deciding whether or not I would stay in the Council chamber or not, I wasn't thinking that. I was just thinking in terms of improving the policy and that the benefit went to the property owners, and that they are a class of people, as I said before...

[Mr HAMILTON: that's a legal issue that I've addressed in my letter. Causation blah blah blah. Might vs would.]

Well there's a number of people who provide that sort of service, so, you know, it might.

Q. But you wouldn't go as far as to say would benefit?

A. No, but it might. In hindsight.

35. My Office then drew Cr Wilkinson's attention to the conflict of interest provisions under the LGA Act, and questioned whether councillors had received training on the new provisions that came into effect on 31 March 2016. Cr Wilkinson could not specifically recall whether he had attended such training, but also stated that:

We have a lot of meetings at the Council and stuff like that so I can't recall the specific...I can imagine that, the...we would have...um...

36. Cr Wilkinson also accepted that he had a responsibility to be aware of such provisions.

37. When questioned further about the specific conflict of interest provisions under the LGA Act, Cr Wilkinson stated the following:

I saw what I was doing was in the public interest, not contrary to public interest, and I sort of considered that I'm not the person getting the subsidy. So, um, therefore I'm not getting a benefit. That's how I looked at it.

...That's why people elected me...to help forge better outcomes for heritage in the city, as I felt that I was doing what I was elected to do, and it wouldn't be ...expect any less of me in terms of trying to improve how things were done.

My recollections from whatever training sessions I had...as I said I wasn't recalling the specific of it, but in hindsight I think I did definitely have a perceived conflict of interest. And that's why I...that's what Natasha Jones of Kelledy Jones has provided.

38. In light of that response, Cr Wilkinson was also questioned as to whether he considered that he had dealt with any type of conflict of interest in a transparent and accountable way in accordance the LGA Act. His response was as follows:

No, no...no, and that's why now I know how to deal with it for future reference.

39. Cr Moran also provided the following statement by email to my investigation in regard to the events that preceded the amendment that was put forward by her at the Council meeting on 22 November 2016:

Sandy and I had a very short conversation about a staff recommendation regarding financial assistance for the payment of professional fees for heritage work. We thought 50% should be raised to 75%. Sandy drafted the amendment to the motion and I offered to move it.

We had recently had briefings educating us on the new conflict of interest laws which are confusing and restrictive so when I said I was nervous in the media it wasn't about him having a conflict as I understand it (sic) it was because there were new unfamiliar rules that had made everyone on Council alarmed.

As I understand (sic) a Councillor can have an interest and must identify it but that doesn't necessarily mean he has a conflict (sic) If he only has an interest but no conflict he can stay and vote in the matter as Sandy did. He also participated in the debate.

When I said eyebrows were raised when he did that it was because the Councillors are alarmed by the new laws and in my opinion are being over cautious and nervous (sic) I was comfortable that Sandy had no conflict but had an interest so it was better for me to move it.¹³

...I didn't think he had a conflict because he had no clients at the time that were applying for heritage assistance so he told me. I really can't remember much else. I was nervous because of the new stricter rules that's all.¹⁴

40. In light of the evidence obtained from Cr Wilkinson and Cr Moran, I must now consider whether Cr Wilkinson breached any of the conflict of interest provisions under the LGA Act.

Section 73 - Material conflicts of interest

41. A material conflict of interest, under section 73(1) of the LGA Act, exists where a person or entity listed under section 73(1)(a)-(i) would gain a benefit or suffer a loss (whether directly or indirectly, pecuniary or non-pecuniary) depending on the outcome of the consideration of the matter by the elected member.
42. Although Cr Wilkinson conceded it was possible that he could share in a benefit as a result of an increase to the HIS subsidy, I am persuaded by the submissions from both Cr Wilkinson and Mr Hamilton that it is unlikely that Cr Wilkinson *would* as opposed to *could* obtain a benefit.
43. The use of the word 'would' under section 73(1) indicates that there must be more than a strong possibility, and that it would be necessary to establish a clear link between the effects of the member's vote and that member then obtaining a benefit or loss.
44. As the subsidy is paid to the owner of the heritage property, they receive the direct benefit. If that person chooses to engage the services of a heritage consultant, such as AWD, AWD would ultimately be paid the same amount that they would have received prior to subsidy increase.
45. Whilst it is possible that the effect of the increase to the HIS subsidy could result in more members of the public undertaking restoration work, leading to more people engaging Cr Wilkinson's heritage service more often, there is no evidence that this would happen.

¹³ Email from Cr Moran to my Legal Officer dated 6 April 2017.

¹⁴ Email from Cr Moran to my Legal Officer dated 11 April 2017.

46. Also, as there are a number of heritage consultants in South Australia, and property owners are not required to consult with one, I consider that the possibility that Cr Wilkinson could be one such beneficiary to the increase in any work undertaken, to be relatively remote.
47. Therefore, I accept that Cr Wilkinson did not have a material conflict of interest within the meaning of section 73(1) of the LGA Act.
48. By way of comment, although Cr Wilkinson told media that the motion had the potential to indirectly financially benefit his business, I accept Cr Wilkinson's response during his interview that he had been caught off guard by questioning from the journalist, and that he may not have fully understood the weight or possible inferences that could be drawn from his comments.

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

49. An actual conflict of interest, under section 75A(1)(a) of the LGA Act, exists where there is a conflict between:
- a member of council's interests (whether 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 Wilkinson have an interest?

50. I am of the view that Cr Wilkinson had an indirect, personal interest in Item 5, Recommendation 5.10, at the Council meeting on 22 November 2016.
51. The Item related to heritage restoration, and Cr Wilkinson is a heritage consultant, who also actively promotes himself in his capacity as an elected member as an advocate for heritage preservation.¹⁵
52. Due to his professional and personal interests, I consider that Cr Wilkinson would have had a preconceived view on the motion. I am persuaded, on balance, that Cr Wilkinson would have had a preconceived view, due to the following factors:
- he moved the recommendation at the meeting on 8 November 2016 in support of the amendments
 - he stated during his interview with my Office that he had previously had conversations with Council administration in regard to extending the HIS
 - he holds well-publicised views in regard to the promotion of heritage restoration.¹⁶
53. Therefore, whilst I do not consider Cr Wilkinson had a material interest, as per my reasoning above, I consider he had an indirect personal interest in the matter that would have influenced his decision in voting on the amendments.

Did Cr Wilkinson's interest conflict with the public interest?

54. In regard to whether Cr Wilkinson's own interest conflicted with the public interest, I must firstly determine what the public's interest in this matter is.

¹⁵ <<http://www.cityofadelaide.com.au/your-council/role-of-council/councillors/sandy-wilkinson>>.

¹⁶ Ibid.

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55. I am of the view that the public's interest in the matter is not whether the public has a view in regard to heritage restoration, but whether or not council members were unbiased and impartial in their views on the matter.
56. Therefore, as Cr Wilkinson had an interest in the matter, and I consider those views prevented him from being impartial, I consider there was a conflict with the public's interest in having council decisions made without bias.

Might that conflict have led to a decision that is contrary to the public interest?

57. As Cr Wilkinson's vote had the potential to affect the outcome of the motion, I also consider that his vote might have also therefore led to a decision that was contrary to the public interest.
58. Cr Wilkinson also did not declare that he had an interest in the matter, and actively participated in the debate and voting on the matter. Therefore, he had the potential to influence other member's views on the motion without disclosing any preconceived views on the matter.
59. Therefore, it is possible that the amendments to the HIS might not have been properly scrutinised in a way that was impartial and unbiased.
60. Whilst Council members often hold views on certain issues, they must be transparent in those views and keep an open mind when voting for or against such matters.
61. In light of the information before me, particularly those factors listed above, I am of the view that the conflict between Cr Wilkinson's personal interest and the public interest might have led to a decision that was contrary to the public interest, as it might not have been made without bias or influence from a member who had an interest in the matter.
62. Therefore, I am of the view that Cr Wilkinson had an actual conflict of interest within the meaning of section 75(1)(a) of the LGA Act.

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

63. Whilst my view is that Cr Wilkinson had an actual conflict of interest, for completeness of my report I will also consider whether he had a perceived conflict of interest.
64. A perceived conflict of interest, under section 75A(1)(b) of the LGA Act, exists where a council member could reasonably be taken, from the perspective of an impartial, fair-minded person, to have a conflict of interest in the matter.
65. I consider it is likely that an impartial, fair-minded person, could reasonably perceive Cr Wilkinson to have had either a material or actual conflict of interest.
66. At face value, it looked like the Council was voting on a subsidy that might benefit heritage consultants. This view is supported by concerns raised by Cr Wilkinson's fellow council members, which are echoed in the corresponding media reports referred to above.
67. Therefore, I must now turn my mind to whether Cr Wilkinson appropriately dealt with the actual or perceived conflict of interest in accordance with section 75A of the LGA Act.

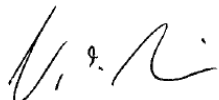
Section 75A- Dealing with an actual or perceived conflict of interest

68. 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.
69. The LGA Act further sets out at section 75A(2) 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.
70. As noted above, Cr Wilkinson conceded that he did not deal with the perceived conflict of interest in a transparent and accountable way.
71. As he neither declared an interest, nor did he deal with it in any other way, I am also of the view that Cr Wilkinson did not appropriately deal with the actual or perceived conflict of interest in accordance with section 75A of the LGA Act.
72. In light of the above, my view is that Cr Wilkinson had an actual or perceived conflict of interest in relation to Item 5, Recommendation 5.10, at a Council meeting on 22 November 2016, and that he breached section 75A(2) of the Local Government Act by failing to appropriately deal with the conflict of interest.
73. In failing to comply with the conflict of interest provisions under the LGA Act, it is therefore also my view that Cr Wilkinson breached Clause 3.13 of the Code of Conduct in relation to Item 5, Recommendation 5.10, at the Council meeting on 22 November 2016.
74. Further, by way of comment, I am of the view that in asking Cr Moran to move the motion on his behalf, Cr Wilkinson was in some way aware that he ought not be involved in the moving of the amendments without declaring an interest.
75. During his interview, as reflected in the transcript above, Cr Wilkinson was hesitant to respond to questions about this issue, in addition to questions about whether he had received training in regard to the conflict of interest provisions that were introduced in March 2016.
76. I also note that Cr Wilkinson accepted that it was his responsibility as an elected member to ensure he was aware of, and understood the conflict of interest provisions at all times.

Summary and Recommendations

77. In light of the above, my view is that Cr Wilkinson 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.
78. 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 Cr Wilkinson issue a public apology to the Council within two ordinary meetings of the Council for failing to appropriately deal with the conflict of interest at the meeting of 22 November 2016.

79. I have sent a copy of my report to the Principal Member of the Council as required by section 18(5) of the *Ombudsman Act 1972*.
80. 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*.
81. In accordance with Part 3 of the Code of Conduct for Council Members, my final report must be provided to a public meeting of the Council. I stipulate that this occurs within two ordinary meetings of the Council receiving my report.



Wayne Lines
SA OMBUDSMAN

15 June 2017