

Report

Preliminary investigation - *Ombudsman Act 1972*

Complainant	Councillor Timothy Looker
Agency	City of Holdfast Bay
Ombudsman reference	2013/04777
Date complaint received	13 May 2013
Issues	<ol style="list-style-type: none">1. whether resolution C230413/903 at the 23 April 2013 council meeting was in breach of regulation 13(3) of the <i>Local Government (Procedures at Meetings) Regulations 2000</i>2. whether resolution C230413/903 at the 23 April 2013 council meeting was in breach of regulation 14 of the <i>Local Government (Procedures at Meetings) Regulations 2000</i>3. whether resolution C230413/903 at the 23 April 2013 council meeting was in breach of regulation 13(10) of the <i>Local Government (Procedures at Meetings) Regulations 2000</i>4. whether resolution C230413/903 at the 23 April 2013 council meeting was in breach of regulations 5(a), 5(c) and 5(d) of the <i>Local Government (Procedures at Meetings) Regulations 2000</i>.

Jurisdiction

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

In addition to the four issues I have determined to investigate, the complainant also complained that resolution C230413/903 at the 23 April 2013 council meeting was unlawful and asked the Ombudsman to determine the validity of the resolution. On 2 June 2013 the complainant informed my investigation that at the council meeting on 28 May 2013 the council made a resolution to rescind motion C230413/903. As such, I determined that further investigation of the issue of whether resolution C230413/903 at the 23 April 2013 council meeting was unlawful was unnecessary and unjustifiable.

Investigation

My investigation involved:

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the council
- considering the *Local Government (Procedures at Meetings) Regulations 2000 (the meetings regulations)*
- providing the complainant and the council with my provisional report for comment
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.¹ It is best summed up in the decision as follows:

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

Response to my provisional report

In response to my provisional report, the complainant commented that he agreed that no further investigation was warranted.

The council informed me that it would not be providing a response to my provisional report.

Background

1. At the council meeting on 22 January 2013 the following motion was carried:

Brighton Caravan Park (Report No: 34/13)

Motion

C220133/801

1. That Council commence an Expression of Interest process for the refurbishment and long term management of the Brighton Caravan Park with an expectation that a new agreement will commence on 1 July 2013.
2. That the current manager be advised immediately that Council will be seeking Expressions of Interest to determine on-going management of the Park.
3. That the new management of the Park no longer include annual rentals.
4. That the minutes be released following notification to the Park manager, with recommendations to the Park manager that he notify the annual renters as soon as possible.

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

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

Moved Councillor Clancy, Seconded Councillor Lonie

2. At the council meeting on 23 April 2013 motion C230413/903 was based on a recommendation included in the report from the council's General Manager, City Assets entitled 'Brighton Caravan Park - Section 270 Review (Report No: 151/13)'. The motion was as follows:
 1. That the Section 270 review be received and noted.
 2. That the decision made by Council at its meeting on 22 January 2013 in relation to not continuing with annual rentals at the Brighton Caravan Park from 1 July 2013 was made in full compliance with the Local Government Act 1999 and based on all relevant information that was available to the Council at that time.
 3. That Council, after considering the report and submissions reaffirms its decision to disallow annual rentals in the park consequent on the proposed up-grade.
 4. That Ms Marilyn Pearson be advised of Council's decision regarding this review.
3. Motion C230413/903 was moved by Cr Looker and seconded by Cr Huckstepp.
4. Two amendments were then moved to amend the motion. The minutes record the following:

First Amendment

1. That the Section 270 Review be received and noted.
2. That the decision made by Council at its meeting on 22 January 2013 in relation to not continuing with annual rentals at the Brighton Caravan Park from 1 July 2013 was made in full compliance with the Local Government Act 1999 and based on all relevant information that was available to the Council at that time.
3. That Council, after considering the report and submissions agrees to set aside a specific area on a short term basis within the park that caravans can move to.
4. That Ms Marilyn Pearson be advised of Council's decision regarding this review.

Moved Councillor Yates, Seconded Councillor Donaldson

Second Amendment

C230413/903

1. That the Section 270 Review be received and noted.
2. That the decision made by Council at its meeting on 22 January 2013 in relation to not continuing with annual rentals at the Brighton Caravan Park from 1 July 2013 was made in full compliance with the Local Government Act 1999 and based on all relevant information that was available to the Council at that time.
3. That Council, after considering the report and submissions agrees to:
 - (a) set aside a specific area on a short term basis within the park for caravans to be relocated; and
 - (b) a staged redevelopment of the caravan park, in such a way that the area for the annual agreement holders is the last to be developed, if practicable;
 - (c) that the people with current annual agreements are given a further nine months, (on a temporary basis) from 30 June 2013 to seek alternative accommodation.
4. That Ms Marilyn Pearson be advised of Council's decision regarding this review.

Moved Councillor Bouchee, Seconded Councillor Fisk

The further amendment on being put was **Carried**

Division called

A division was called:

Those voting for; Councillors Fisk, Patton, Dixon, Bouchee, Patterson and Yates (6)
Those voting against: Councillors Looker, Clancy, Donaldson, Lonie and Huckstepp (5).

His Worship the Mayor declared the Second Amendment **Carried**

The motion, as amended, on being put was **Carried**

5. Apparently there was some confusion in the chamber. Some elected members are of the view that the mayor did not allow any debate on the first amendment (which it is said does not support the mayor's position on the matter) and did not put it. It is alleged that the mayor allowed considerable discussion of the second amendment (which it is said supports the mayor's position on the matter) and that it was put and voted on, without the first amendment being disposed of.
6. It is alleged that several elected members questioned the fact that the first amendment was not put, but that they were ignored by the mayor.
7. The council has advised me that, as there was some confusion in the chamber when the second amendment was put and voted on before the first, and there was concern from some elected members, council administration sought legal advice on the issue (**the legal advice**). The legal advice was sought primarily on the issue of how to best record the decision making process in the minutes of the meeting. The legal advice included the following relevant information:

...

* there was and is an existing valid resolution of the Council made at its meeting on 22 January which, amongst other things, provides that there will be no further annual rentals from 1 July 2012.

* the section 270 process considered and addressed the issue of the Council's processes in arriving at the above decision and the recommendation, amongst other things, recognised the validity of the above decision.

* the (second) amendment moved by Cllr Bouchee was to the effect that the residents who currently have annual rentals be given 9 months (i.e. to 31 March 2014) to seek alternative accommodation. This does not, in my view, result in a revocation of or an amendment to the decision to no longer have annual rentals. Indeed, the extension of the rights of tenure by 9 months is clearly not an annual right. Accordingly, the decision does not appear to be caught by regulation 13(3) of the Meeting Regulations.

* it does appear, however, that there were procedural defects in arriving at the decision which includes Cllr Bouchee's amendment. You advise that her amendment was the second amendment and before it was put the first amendment was not disposed of. This is a procedural defect as the meeting could not entertain a second amendment whilst a prior amendment remained unresolved. This places the Council in a difficult position of either moving to address the defects by remaking the decision or relying upon the presumption of regularity unless and until another authority rules the resultant decision to be invalid because of the defect - the presumption would be premised upon an apparent intent by the meeting (i.e. no member raised a point of order) to abandon the first amendment by proceeding with the second amendment.

8. The minutes of the council meeting on 14 May 2013 record the following:

16.2 **Confirmation of the Minutes**

Motion

That the minutes of the meeting held 23 April 2013 are confirmed.

Moved Councillor Looker, Seconded Councillor Bouchee

His Worship the Mayor, under Section 13(7) of the Local Government (Meetings at Proceedings) Regulations 2000 determined that the motion would not be considered.

16.3 **Remaking of Decision C230413/903**

Councillor Looker requested that due to procedural defects decision C230413/903 needed to be remade.

Moved Councillor Looker, Seconded Councillor Bouchee

His Worship the Mayor, under Section 13(3) of the Local Government (Meetings at Proceedings) Regulations 2000 determined that the motion would not be considered as it should be dealt with through either an amendment or rescission motion.

9. Council administration sent the legal advice to the elected members on 16 May 2013. The following cover letter was attached:

Good morning everyone

I'm aware that there has been much toing and froing about the processes relating to the confirmation of the minutes at Tuesday's council meeting.

I thought it might be helpful to provide you with some bullet points on what's happened and the next steps.

- Although Council did not confirm the minutes of the 23 April 2013 meeting, the decisions of that meeting are not in doubt. (The minutes are intended to be a record of what occurred; they do not 'make' a decision.)
- No further action is required until the next meeting of Council where Council can;
 1. confirm the Minutes as they stand; or
 2. confirm the Minutes with a correction - which must be resolved by the majority of members if it is believe [sic] that the minutes do not reflect a true and accurate record of what happened.
- If a Member wants to change a decision then, following Reg. 13(3), a motion on notice to revoke or amend the decision is required.
- The issue of a 'procedural irregularity' has been raised. A 'procedural irregularity' occurs when the prescribed meeting procedures are not followed. This happens with reasonable frequency. Speaking to a motion more than once is a common example. These irregularities do not invalidate a decision. Indeed, there is a presumption of regularity unless or until an appropriate authority decides otherwise.
- In the meeting of the 23rd a procedural irregularity occurred when an amendment, which had been moved and seconded, was followed by a second amendment, which subsequently became the motion. For all intents and purposes the first amendment had been 'abandoned'.
- Members can either rely on the presumption of regularity or remake the decision.

...

10. At its meeting on 28 May 2013 the council confirmed the minutes of the 23 April 2013 council meeting.

Issue 1 – whether resolution C230413/903 at the 23 April 2013 council meeting was in breach of regulation 13(3) of the meetings regulations

11. The complainant alleges that resolution C230413/903 was flawed because five days written notice of the motion to amend resolution C220113/801 was not provided, in breach of regulation 13(3) of the meetings regulations.
12. Regulation 13(2), (3) and (4) of the regulations provide as follows:
 - (2) The notice of motion must be given to the chief executive officer at least five clear days before the date of the meeting at which the motion is to be moved.
 - (3) A motion the effect of which if carried, would be to revoke or amend a resolution passed since the last periodic election of the council must be brought by written notice of motion.
 - (4) If a motion under subregulation (3) is lost, a motion to the same effect cannot be brought -
 - (a) until after the expiration of 12 months; or
 - (b) until after the next periodic election,whichever is the sooner.
13. The complainant alleges that the second amendment was not a legal amendment as it amended the resolution of 22 January 2013 by changing the period for which the annual leases continue to exist, and was moved without written notice as required by regulation 13.
14. The effect of the second amendment is that the residents who currently have annual rentals be given 9 months to seek alternative accommodation. In my opinion, by providing an additional transitional period, the second amendment does not have the effect of revoking or amending the 22 January 2013 resolution. As such, I agree with the council's legal opinion that the extension of the rights of tenure by 9 months is clearly not an annual right and that the decision is not caught by regulation 13(3) of the meeting regulations.

Opinion

In light of the above, my final view is that the council did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

Issue 2 – whether resolution C230413/903 at the 23 April 2013 council meeting was in breach of regulation 14 of the meetings regulations

15. The complainant alleges that resolution C230413/903 at the 23 April 2013 council meeting was flawed because the second amendment was put before the first amendment, in breach of regulation 14 of the meetings regulations.

16. Regulation 14 of the meetings regulations provide as follows:

14 - Amendments to motions

- (1) A member who has not spoken to a motion at an earlier stage of the debate may move or second an amendment to the motion.
 - (2) An amendment will lapse if it is not seconded at the appropriate time.
 - (3) A person who moves or seconds an amendment (and, if he or she chooses to do so, speaks to the amendment) will, in so doing, be taken to have spoken to the motion to which the amendment relates.
 - (4) If an amendment is lost, only one further amendment may be moved to the original motion.
 - (5) If an amendment is carried, only one further amendment may be moved to the original motion.
 - (6) Subregulations (1), (3), (4) and (5) may be varied at the discretion of the council pursuant to regulation 7.
17. The minutes of the 23 April 2013 council meeting show that the second amendment to motion C230413/903 was put before the first amendment to the motion. The minutes show that the first amendment was moved and seconded but was not put. As such, the first amendment was not recorded as being carried or lost.
18. It appears to me that, in putting the second amendment to motion C230413/903 without properly disposing of the first amendment, the council breached regulation 14 of the meetings regulations.
19. However, I note that this procedural defect does not have the effect of making the decision on motion C230413/903 invalid by virtue of the operation of the presumption of regularity, to which the council's legal advice refers. I note also that whilst it appears that the motion was moved in breach of regulation 14, the council remade the decision at its meeting on 28 May 2013. Accordingly, I see no need to consider this issue further.

Opinion

In light of the above, my final view is that further investigation of this issue is unnecessary and unjustifiable within the meaning of section 17(2)(d) of the Ombudsman Act.

Issue 3 – whether resolution C230413/903 at the 23 April 2013 council meeting was in breach of regulation 13(10) of the meetings regulations

20. The complainant alleges that resolution C230413/903 was flawed because the elected members spoke many times in response to the motion, in breach of regulation 13(10) of the meetings regulations.
21. Regulation 13(10) of the meetings regulations is as follows:
- (10) A member may only speak once to a motion except—
 - (a) to provide an explanation in regard to a material part of his or her speech, but not so as to introduce any new matter; or

- (b) with leave of the meeting; or
 - (c) as the mover in reply.
22. There is no audio recording available of the council meeting and no formal records are kept on who has spoken on each motion. However, it does appear that a general discussion took place in relation to motion C230413/903 and that elected members, including the mayor, spoke multiple times to the motion.
23. However, for the same reasons as outlined above for the previous issue, I see no need to consider this issue further.

Opinion

In light of the above, my final view is that further investigation of this issue is unnecessary and unjustifiable within the meaning of section 17(2)(d) of the Ombudsman Act.

Issue 4 – whether resolution C230413/903 at the 23 April 2013 council meeting was in breach of regulations 5(a), 5(c) and 5(d) of the meetings regulations

24. The complainant alleges that resolution C230413/903 was in breach of regulations 5(a), (c) and (d) of the meetings regulations because the debate was ‘unruly’.
25. Regulations 5(a), (c) and (d) of the meetings regulations are as follows:

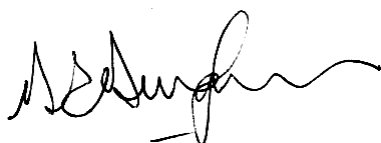
5 –Guiding Principles

The following principles (the Guiding Principles) should be applied with respect to the procedures to be observed at a meeting of a council or a council committee—

- (a) procedures should be fair and contribute to open, transparent and informed decision-making;
 - ...
 - (c) procedures should reflect levels of formality appropriate to the nature and scope of responsibilities exercised at the meeting;
 - ...
 - (d) procedures should be sufficiently certain to give the community and decision-makers confidence in the deliberations undertaken at the meeting;
26. As there is no audio recording available of the council meeting, I am unable to determine to the necessary standard of proof whether regulations 5(a), (c) and (d) of the meetings regulations were breached at the council meeting on 23 April 2013.

Opinion

In light of the above, my final view is that the council did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.



Richard Bingham
SA OMBUDSMAN

20 June 2013