

Final Report
Full investigation - *Ombudsman Act 1972*

| | |
|--------------------------------|---|
| Complainant | Mr Geoff Sheridan |
| Council member | Councillor Peter Charles |
| Council | City of Victor Harbor |
| Ombudsman reference | 2018/08009 |
| Date complaint received | 29 July 2018 |
| Issues | Whether Councillor Peter Charles breached the conflict of interest provisions of the <i>Local Government Act 1999</i> and clause 3.13 of the Code of Conduct for Council Members in relation to Agenda item 16.1.2 of the 23 July 2018 council meeting |

Jurisdiction

Mr Sheridan raised a complaint in relation to the conduct of Councillor Peter Charles at the council meeting on 23 July 2018 (**the council meeting**).

The complaint alleges a breach of Part 3 of the Code of Conduct for Council Members made pursuant to section 63 of the *Local Government Act 1999* (**the Code of Conduct**).¹ An act of a council member that may constitute grounds for complaint under the Local Government Act is taken to be an ‘administrative act’ for the purposes of the *Ombudsman Act 1972*.²

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

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from Cr Charles
- seeking more particulars from Cr Charles
- considering Cr Charles’ responses to the allegations
- considering:
 - the Ombudsman Act
 - the Local Government Act
 - the Code of Conduct
- providing the council, Cr Charles and the complainant with my provisional report for comment, and considering their responses
- preparing this report.

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

² Section 263A(4) Local Government Act; section 3, Ombudsman Act.

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.³ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...⁴

Response to my provisional report

In response to my provisional report Cr Charles acknowledged my provisional views and foreshadowed recommendation stating 'I shall do as I am instructed by you and under the legislation'.

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

The complainant commented that he accepted my provisional views.

Consequently, I have not changed my views expressed in the provisional report.

Background

1. Cr Charles is a council member at the City of Victor Harbor (**the council**). At the time of the complaint, Cr Charles held that position and was subsequently returned as a council member at the Local Government Election in November 2018.
2. In 2018, I investigated a complaint about a potential breach of the Code of Conduct by Cr Charles.
3. It was alleged in that complaint that Cr Charles deceived members of the public by posting an incorrect media release on social media about the Victor Harbor Whale Centre.
4. My investigation concluded that Cr Charles, in sharing the media release relating to the pending closure of the Victor Harbor Whale Centre, breached the Code of Conduct.
5. My final report, dated 7 June 2018 (**the final report**), concluded that Cr Charles committed misconduct in public administration and made the following recommendation:

Cr Charles offer a public apology at a public meeting for sharing incorrect information to the general public which was misleading.

6. The final report was presented to the council at its ordinary meeting on 23 July 2018 under the cover of Agenda item 16.1.2 titled 'Code of Conduct - Cr Charles.

³ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

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

7. The minutes for the council meeting do not record that Cr Charles declared a conflict of interest for the matter and relevantly provide as follows:

OC4532018 Moved: Cr Karen Dutton

Seconded: Cr Pat Chigwidden

That Council receive the Full Investigation Report provided by the Ombudsman dated 7 June 2018.

CARRIED

OC4542018 Moved: Cr Moira Jenkins

Seconded: Cr Carol Schofield

That Council note the Ombudsman's finding that by sharing the 'media release' on social media about the Whale Centre, Cr Charles breached the provisions of section 63 of the Local Government Act and Clauses 2.5, 2.7 and 2.8 of Part 2 of the Code of Conduct thereby acting in a manner contrary to the law within the meaning of Section 25 (1) (a) of the Ombudsman Act.

CARRIED

OC4552018 Moved: Cr Moira Jenkins

Seconded: Cr Pat Chigwidden

That Council accept the Ombudsman's recommendation that Cr Charles offer a public apology at a public meeting for sharing incorrect information to the general public which was misleading.

CARRIED

9.01pm Cr Peter Charles provided an unreserved public apology to the community for sharing incorrect information to the general public which was misleading.

OC4562018 Moved: Cr Carol Schofield

Seconded: Cr Moira Jenkins

That Council receive and note Cr Charles public apology.

CARRIED

8. Cr Charles provided my investigation with the link to the official recording of the council meeting during which the council members were asked to consider Agenda item 16.1.2. The video footage, and the minutes of the meeting, confirm that Cr Charles did not declare a conflict of interest in the matter and thereafter voted against each motion for Agenda item 16.1.2.
9. Furthermore, Cr Charles offered a public apology in accordance with my recommendation. I note, however, that although the council resolved to accept the motion for Cr Charles' apology, Cr Charles voted against the motion.
10. In response to my questions about the allegations of a conflict of interest in Agenda item 16.1.2, Cr Charles advised my investigation that:

In answer to the Ombudsman my answer to **all** his questions is **NO! I did not believe that I had any conflict on any of the levels from Material through to Perceived. I am certain it would be impossible to find any reasonable member of the community who would give a damn or take the slightest bit interested [sic] in this issue. This is All political [sic] it is history and I mention once again it was I and only I who in the debate of the original item ""Possible closing of whale centre after the school**

holidays” who recommended that the Whale Centre REMAIN open in the expectation that Oceanic Victor may take it over as if it were closed as is the norm in any commercial business. There is no good will, and any property is worthless or greatly depreciated when it is placed on the foot path.

I have no idea what gain or loss ‘anyone’ could imagine I suffered. My reputation was neither enhanced or damaged because of this issue.
If one person took my comment out of context OTHER than the Administration (Mayor) who use COCs as a weapon.
As per usual it is up to You to judge (Ombudsman).

I did not claim that the Whale centre was closing I only quoted the Administrations recommendation from the Agenda item.
I believe you have been supplied copy of the post that I made on face book .

My other crime as I recall was that I did not say that it was “my personal opinion and not that of Council”.

Lastly the Ombudsman had made recommendation that the issue was of public interest and could be done with whatever the parties saw fit.

Relevant law

11. Section 73(1) of the Local Government Act defines the circumstances in which an elected member has a material conflict of interest in a matter as follows:

73—Material conflicts of interest

- (1) Subject to this section, for the purposes of this Subdivision, a member of a council has a material conflict of interest in a matter to be discussed at a meeting of the council if any of the following persons would gain a benefit, or suffer a loss, (whether directly or indirectly and whether of a personal or pecuniary nature) depending on the outcome of the consideration of the matter at the meeting:
- (a) the member;
 - (b) a relative of the member;
 - (c) a body corporate of which the member is a director or a member of the governing body;
 - (d) a proprietary company in which the member is a shareholder;
 - (e) a beneficiary under a trust or an object of a discretionary trust of which the member is a trustee;
 - (f) a partner of the member;
 - (g) the employee or an employee of the member;
 - (h) a person from whom the member has received or might reasonably be expected to receive a fee, commission or other reward for providing professional or other services;
 - (i) a person of a prescribed class.

12. 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.

13. 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.

14. 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.

15. Clause 3.13 of the Code of Conduct:

Council members must be committed to making decision 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 Councillor Peter Charles breached the conflict of interest provisions of the *Local Government Act 1999* and clause 3.13 of the Code of Conduct for Council Members in relation to Agenda item 16.1.2 of the 23 July 2018 council meeting

16. Cr Charles advised my investigation that he did not consider that he had a conflict of interest in the matter. Regardless, I must determine whether or not Cr Charles had a material, actual or perceived conflict of interest in Agenda item 16.1.2 at the council meeting and, if so, whether he appropriately dealt with any such conflict of interest.

Material conflict of interest

17. The first issue to consider is whether Cr Charles, for the purposes of section 73(1) of the Local Government Act, had a material conflict of interest in relation to Agenda item 16.1.2 and, if so, whether he breached sections 74(1)(a) and (b) of the Local Government Act.
18. In this regard, to determine that Cr Charles had a material conflict of interest, I must first be satisfied that Cr Charles had an interest in Agenda item 16.1.2, within the meaning of section 73(1) of the Local Government Act. In order to establish this, I must be satisfied that Cr Charles would receive a benefit or suffer a loss of the type as described in section 73(1) (that is, either a direct or indirect personal or pecuniary benefit or loss) depending on the outcome of the consideration of the matter at the meeting.
19. The purpose of Agenda item 16.1.2 was for the council to consider three motions relating to receipt and noting of the final report and the acceptance of my recommendation that Cr Charles offer a public apology.
20. Cr Charles did not declare a conflict of interest in Agenda item 16.1.2 and remained in the chamber while the council considered each of the three motions. The video footage of the council's consideration of Agenda item 16.1.2 shows that Cr Charles voted against each of the three motions. I also note that Cr Charles, having made an apology, voted against the motion to accept that apology.
21. The issue for my consideration is whether Cr Charles had a material conflict of interest in Agenda item 16.1.2 and whether by remaining in the chamber and participating in the council's consideration of Agenda item 16.1.2 he breached section 74 of the Local Government Act.
22. The use of the word 'would' in section 73(1) of the Local Government Act indicates that there must be more than a mere possibility of a council member gaining a benefit or suffering a loss, and it is necessary to establish a clear link between the outcome of the vote and the member gaining a benefit or suffering a loss.
23. Although I consider that in the council receiving the final report, the findings and the recommendation, there could be a negative impact upon Cr Charles' reputation and image, I am not satisfied however, that there exists a clear and defined link between the relevant motions and Cr Charles suffering a loss or gaining a benefit. That is, from the information before me, I am not satisfied that the council's decision whether to receive the final report, the findings and recommendation, would result in Cr Charles suffering a loss or gaining a benefit. Any potential reputational damage is speculative only.
24. Therefore my view is that Cr Charles did not have a material conflict of interest within the meaning of section 73 in relation to the receipt of the final report, the findings and recommendation in Agenda item 16.1.2 considered at the council meeting of the Local Government Act.

Actual conflict of interest

25. The second issue for consideration is whether Cr Charles had an actual conflict of interest in relation to the receipt of the final report, the findings and recommendation in Agenda item 16.1.2 for the purposes of section 75 of the Local Government Act and, if so, whether Cr Charles was in breach of section 75A of the Local Government Act by failing to appropriately deal with any such conflict of interest.
26. Under section 75(2) of the Local Government Act an actual conflict of interest exists where there is a conflict between:
 - a council member's interest (whether direct or indirect personal or pecuniary); and
 - that of the public interest.that might lead to a decision that is contrary to the public interest.
27. It is my view that Cr Charles had a direct personal interest in the motions to receive and note the final report, and implement its recommendations. Cr Charles was the subject of the final report which expressed adverse views about Cr Charles' conduct.
28. I consider that the public interest in the matter for Agenda item 16.1.2 is that the public has the right to have a member of the council to:
 - act in a manner free from bias and in the best interest of the ratepayers, electors or residents of the council area and
 - participate in decision making free from influence by their own personal interests.
29. I also consider that there is a public interest in my reports being duly received and noted and any recommendations being acted upon to ensure that council members who breach the Code of Conduct are held accountable and dealt with transparently.
30. The question remains whether Cr Charles' direct personal interest was in conflict with the public interest.
31. In the circumstances, I consider that Cr Charles' direct personal interest was in conflict with the public interest. In reaching this view, I have considered the fact that Cr Charles voted against receiving the final report, the findings and recommendation. Furthermore, Cr Charles voted against the council accepting his own apology. Therefore, I consider that there is evidence that Cr Charles' narrower personal interest conflicted with the broader interest of the council's ratepayers in that Cr Charles' actions appear to have been motivated by his own self-interest. I consider that Cr Charles' interest may have led to a decision that is contrary to the public interest.
32. Therefore, my view is that Cr Charles had an actual conflict of interest for the purposes of section 75(2) of the Local Government Act in relation to each of the motions in Agenda item 16.1.2.

Perceived conflict of interest

33. For completeness, I have also considered whether Cr Charles had a perceived conflict of interest in Agenda item 16.1.2 for the purposes of section 75 of the Local Government Act.
34. Under section 75A(1)(b) of the Local Government Act, a perceived conflict of interest 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. In this regard, a perceived conflict of interest is a matter of perception and does not require the council member to have an actual conflict of interest.

35. I consider that an impartial, fair-minded person who was appraised of the following facts:
- Cr Charles was the subject of the final report; and
 - the final report made findings in regards to his conduct at the council meeting; and
 - the final report made a recommendation that Cr Charles issue a public apology

could reasonably conclude that Cr Charles had an actual conflict of interest in the matter. I consider, therefore, that Cr Charles had a perceived conflict of interest for the purposes of section 75A(1)(b) of the Local Government Act.

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

36. As Cr Charles did not inform the meeting of his direct personal interest in Agenda item 16.1.2 (let alone how he proposed to deal with that interest), I do not consider that he complied with the requirements in section 75A(1) of the Local Government Act.
37. I note, however, that Cr Charles' interest would not have necessarily precluded him from participating in the meeting or voting. However, for the interests of transparency and accountability, Cr Charles should have informed the meeting of his interest in Agenda item 16.1.2 and should have stated why he thought it appropriate for him to remain in the chamber and vote on the matter.
38. It is my view, therefore, that Cr Charles had an actual and a perceived conflict of interest in relation to the receipt of the final report, the findings and recommendation in Agenda item 16.1.2 and did not deal with that interest in a transparent and accountable way as required by section 75A(1) of the Local Government Act.
39. In failing to comply with the conflict of interest provisions under the Local Government Act, it is therefore also my view that Cr Charles breached clause 3.13 of the Code of conduct.

Other comments

40. I note with concern that it could be inferred from Cr Charles' response to my investigation that he either does not fully comprehend his conflict of interest obligations under the Local Government Act or has wilfully disregarded those obligations.
41. I am aware that, as a recently re-elected council member, Cr Charles would have been required to undertake conflict of interest training. In light of that, I do not consider it necessary to recommend further training.
42. I also have concerns about Cr Charles' attitude to my final report as indicated by statements such as the following:
- I am certain it would be impossible to find any reasonable member of the community who would give a damn or take the slightest bit interested [sic] in this issue.
43. Further, I consider that Cr Charles' apology at the meeting on 23 July 2018 could be interpreted as sarcastic in tone and indicates an unwillingness to take responsibility for his conduct.
44. In my view, this kind of attitude is not befitting of an elected member. I simply comment that, regardless of his personal views, Cr Charles has an obligation to act respectfully and act in a way that generates community trust and confidence in the council.

45. I also note with concern that there has been a considerable history of complaints about Cr Charles which have alleged breaches of the Code of Conduct.
46. In light of the above, I have carefully considered whether to recommend that the council lodge a complaint with the South Australian Civil and Administrative Tribunal pursuant to section 264 of the Local Government Act in relation to the breach addressed in this report.
47. I have decided that, on balance, it is not necessary to make such a recommendation in this instance, particularly noting that Cr Charles would have had the benefit of conflict of interest training since this complaint was made. I have also had regard to Cr Charles' response to my provisional report.

Opinion

In light of the above, my final view is that in failing to comply with the conflict of interest provisions under the Local Government Act, Cr Charles breached clause 3.13 of Part 3 of the Code of Conduct. In this way, Cr Charles acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council:

1. reprimand Cr Charles
2. require Cr Charles to 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 on 23 July 2018.

Final comment

I now report council Cr Charles' conduct to the principal officer of the council, as required by section 18(5) of the Ombudsman Act.

In accordance with Part 3 of the Code of Conduct for Council Members, this report must be provided to a public meeting of the council within two ordinary meetings of the council receiving my report.

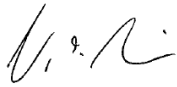
In accordance with section 25(4) of the Ombudsman Act I request that the council report to me by **28 June 2019** on what steps have been taken to give effect to the recommendations above; including:

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

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.

Pursuant to section 263B(2) of the Local Government Act, if a council member fails to comply with a council requirement made as a result of an Ombudsman recommendation such as those above, the council member will be taken to have failed to comply with Chapter 5 Part 4 of the Local Government Act. In this event, the council is to ensure that a complaint is lodged against the member with the South Australian Civil and Administrative Tribunal.

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.



Wayne Lines
SA OMBUDSMAN

24 April 2019