

Report

Full investigation - *Ombudsman Act 1972*

Complainant	The Ombudsman Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>
Council member	Councillor Peter Charles
Council	City of Victor Harbor
Ombudsman reference	2018/00323
Date complaint received	22 December 2017
Issues	Whether Cr 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 the consideration of Agenda Item 16.1.1 of the 18 December 2017 council meeting

Jurisdiction

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.²

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

The issue was brought to my attention by Mr Geoff Sheridan, the Acting Chief Executive Officer (**CEO**) of the council at the time of the 18 December 2017 council meeting. Given that Mr Sheridan did not make a formal complaint to my Office, but rather informed me of the events of the council meeting, and that Mr Sheridan is no longer the Acting CEO of the council, I commenced an 'own initiative' investigation under section 13(2) of the Ombudsman Act.

Investigation

My investigation has involved:

- assessing the information provided by the Acting CEO
- seeking a response from Cr Charles
- considering:
 - the Ombudsman Act
 - the *Local Government Act 1999*

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

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

- the Code of Conduct
- providing the agency and Cr Charles with my provisional report for comment, and considering their responses
- preparing this report.

Standard of proof

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

Thank you for taking it upon yourself to deal me yet another Code of Conduct. Whether I had a perceived conflict of interest or not is entirely open to your interpretation, and given the fact I apologised for my misdemeanour as recommended then left the chambers without declaring a perceived conflict of interest or a reason why, it seems somewhat trivial and dare I say a golden opportunity to, in my opinion, tarnish my reputation as an Elected Member. I find your provisional report to be 'splitting hairs' over a so called minor incident. Nevertheless, you have a [sic] given a compelling explanation, so I will wait in anticipation for your final report. And please, do not hesitate to make any of my Code of Conducts a public issue as I am more than happy to be judged by the court of public opinion.

The council's principal officer, Mayor Graham Philp noted my provisional view that Cr Charles breached the conflict of interest provisions of the Local Government Act and Part 3 of the Code of Conduct. Mayor Philp also:

- queried whether implementation of my recommendation could occur before the next council election
- expressed some doubt as to the impact of further training on Cr Charles, based on the fact that Cr Charles had received more training on these issues than other council members.

Having considered those responses, my views remain as set out in my provisional report.

Background

1. Councillor Peter Charles is a councillor for the City of Victor Harbour (**the council**) and has held that position since 2014.
2. In 2017, in response to a referral from the Independent Commissioner Against Corruption, I investigated a matter raising a potential issue of misconduct in public administration arising from Cr Charles' conduct.

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.

3. It was alleged that Cr Charles publicly disclosed information included within a special council meeting agenda identified for confidential consideration, prior to the meeting being convened on 20 March 2017.
4. My investigation found that Cr Charles should reasonably have known the information was confidential and by disclosing it he breached clauses 3.2 and 3.3 of the Code of Conduct and therefore committed misconduct in public administration within the meaning of section 5(3) of the *Independent Commissioner Against Corruption Act 2012*.
5. My final report, dated 20 October 2017 (**the final report**), made the following recommendations:
 1. That the council arrange for Cr Charles to attend training relevant to confidentiality provisions
 2. That Cr Charles issues a public apology to the council in relation to his disclosure of confidential information.
6. The final report was presented to the council at Agenda Item 16.1.1 of the council meeting held on 18 December 2017. The title of the Item was 'Code of Conduct - Public Disclosure of Confidential Information - (Cr Charles)'.
7. The Agenda Report for Item 16.1.1 of the 18 December 2017 council meeting included the following recommendations:
 1. That Council receive the Final Report of the full investigation pursuant to referral under section 24(2)(a) of the Independent Commissioner Against Corruption Act 2012 dated 20 October 2017 and its findings.
 2. That under section 263B(1)(a) and (b) of the Local Government Act:
 - a. That the Council arrange for Cr Charles to attend training relevant to confidentiality provisions
 - b. That Cr Charles issues a public apology to the council in relation to his disclosure of confidential information.
 3. That in accordance with section 25(4) of the Ombudsman Act Council provide a report to the Ombudsman by 30 January 2018 on what action the council has taken to implement the recommendations including:
 - Details of the actions that have been commenced or completed
 - Relevant dates of the actions taken to implement the recommendationsIn the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.
 4. That Council note that 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 in the District Council.
8. The transcript for Agenda Item 16.1.1 of the 18 December 2017 council meeting records, in part:

16.1.1 Code of Conduct - Public Disclosure of Confidential Information (Cr Charles)

- Mayor* *Next item on the agenda is 16.1.1 deals with a code of conduct public disclosure of confidential information. Recommendation that council receive the Final Report of the full investigation pursuant to referral under section 24... Councillor Dutton happy to move that way? Second by... Cr Schofield.*
- Cr Charles* *Mr Mayor.*
- Mayor* *Mr Charles.*
- Cr Charles* *In accordance with the recommendations made relative to this matter I look forward to attending training as recommended to you. Further I publicly and unreservedly apologise to council.*
- Mayor* *Thank you. But we'll cover that one next. Next one down. Thank you. This is just receiving the final report. Any other discussion?*
- No other discussion?*
- <Mayor seeks advice from CEO>*
- It is up to him to call?*
- <To Cr Charles> There is a possibility you have a conflict of interest.*
- Cr Charles* *I, I have to deliver what I have just delivered. Having done that I can leave the room if it makes you feel a whole lot better but you know there's nothing like gaining a few more points on my ah...*
- Mayor* *Yep Well look, just...we'll just do 16.1 and then get a bit more formal on the process.*
- To receive the report, all those in favour.*
- And those against.*
- That's carried. Thank you.*
- 16.1 part 1 2. Ah...deals with the um recommendations for.. as set out.. so this is where you may have the conflict of interest Cr Charles.*
- Cr Charles* *Oh it's on. You'd only be too happy to bring that to my attention and take it to the Ombudsman or wherever wouldn't you?*
- Oh look, I don't see that there's, look I don't know any better, to be quite honest but what more could a person say?*
- Mayor* *Oh yep, I understand where you are coming from but the process is...*
- Cr Charles* *So so your'e [sic]*
- Mayor* *The point of process is we need to... or we may change the rule. It's up to council to change or accept the recommendation.*
- Cr Andrews* *I move that Cr Charles...*
- Mayor* *Away you go. Sorry... are we...*
- If he's going to claim a conflict of interest he's going to have to leave.*
- <Cr Charles exits the chamber>*

9. This investigation has viewed video footage of the council's consideration of Agenda Item 16.1.1 of the 18 December 2017 council meeting which shows that Cr Charles voted in favour of receiving the final report and its findings. Cr Charles remained outside the chamber as the council considered recommendations two, three and four set out in the Agenda Report.
10. Cr Charles provided my investigation with the video footage of Agenda Item 16.1.1 of the 18 December 2017 council meeting. He said that he clearly did have a conflict of interest and left the chamber at the commencement of Item 16.1 after he apologised. Cr Charles stated that the video shows that he did not commit any breach of legislation.
11. Cr Charles suggested that he has been targeted in complaints to my Office because of the issues he is pursuing in motions and questions in council meetings. He claimed that he has been bullied, his actions exaggerated and, in some cases, invented.

Relevant law

12. 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.

13. 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.

14. 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.

15. 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.

16. Clause 3.13 of the Code of Conduct provides:

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 Cr 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 the consideration of Agenda Item 16.1.1 of the 18 December 2017 council meeting

17. The issue is whether Cr Charles had a material, actual or perceived conflict of interest in Agenda Item 16.1.1 of the 18 December 2017 council meeting and, if so, whether he appropriately dealt with any such interest.

Material conflict of interest

18. The first issue to consider is whether Cr Charles had a material conflict of interest in Agenda Item 16.1.1 of the 18 December 2017 council meeting, for the purposes of section 73(1) of the Local Government Act and, if so, whether he breached sections 74(1)(a) and (b) of the Local Government Act.
19. To decide whether Cr Charles had a material conflict of interest, first, I must be satisfied that Cr Charles had an interest in Agenda Item 16.1.1, within the meaning of section 73(1) of the Local Government Act. That is, I must be satisfied that he would receive a benefit or suffer a loss of the type 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. Such benefit or loss should not be shared with all or a substantial proportion of the ratepayers, electors or residents of the council area.
20. The primary purpose of Agenda Item 16.1.1 was to have the final report and, in particular, the recommendations in that report presented to council. The Agenda Report accompanying Item 16.1.1 made four recommendations as set out in paragraph 7.
21. Cr Charles remained in the chamber during the council's consideration of the first recommendation in the Agenda Report, being to receive the final report and findings, and voted to receive the final report. Cr Charles left the chamber following the consideration of the first recommendation at the Mayor's insistence. He remained absent from the chamber while recommendations two, three and four were considered.
22. The issue I need to consider is whether Cr Charles had a material conflict of interest in the item when he remained in the chamber and participated in the council's consideration of the first recommendation.
23. The use of the word 'would' under section 73(1) indicates that there must be more than a possibility, and that it would be necessary to establish a clear link between the outcome of the vote and the member obtaining a benefit or loss.
24. It is arguable that council's receipt of the final report and findings could have had a negative impact on Cr Charles' reputation. However, I am not satisfied that there exists a clear link between the receipt of the final report and findings and Cr Charles suffering a loss or receiving a benefit as a result. That is, I am not satisfied that the result of the final report and findings being received was that Cr Charles **would** suffer a loss or that the result of the final report and findings not being received was that Cr Charles **would** gain a benefit.
25. In reaching this view I have had regard to the fact that Cr Charles was only in the chamber, and voted, when the council was receiving the final report and findings. My views may have been different had Cr Charles been voting to adopt the recommendations in the final report. While receiving the final report and findings may have resulted in a loss to Cr Charles, for example, a negative impact on his reputation, I cannot be satisfied that it **would** have resulted in a loss.
26. Therefore, my final view is that Cr Charles did not have a material conflict of interest in relation to the receipt of the final report and findings in Agenda Item 16.1.1 of the 18 December 2017 council meeting within the meaning of section 73 of the Local Government Act.

Actual conflict of interest

27. The second issue to consider is whether Cr Charles had an actual conflict of interest in relation to the receipt of the final report and findings in Agenda Item 16.1.1 of the 18 December 2017 council meeting, for the purposes of section 75 of the Local Government Act and, if so, whether he breached section 75A of the Local Government Act.
28. An actual conflict of interest, under section 75A(1)(a) of the Local Government Act, exists where there is a conflict between:
 - a member of council's interests (whether direct or indirect personal or pecuniary); and
 - the public interestthat might lead to a decision that is contrary to the public interest.
29. I am of the view that Cr Charles had a personal interest in receiving the final report in Agenda Item 16.1.1 because the report made findings about Cr Charles' conduct.
30. I consider that the public interest in the matter is that the public has the right to have a member of the council make an unbiased decision based on the interests of the ratepayers they are elected to represent, without the council member being influenced by their personal interest.
31. Given that I am of the view that Cr Charles had a personal interest in the matter, and there was a public interest in the matter, the question then is whether these interests were in conflict.
32. I do not consider that Cr Charles' personal interest was in conflict with the public interest. In reaching this view, I have taken into account that Cr Charles voted in favour of receiving the final report and, in accordance with a recommendation in the report, gave an apology shortly after Agenda Item 16.1.1 was introduced. Therefore, I do not consider that there is evidence that Cr Charles' interest conflicted with the interests of the council's ratepayers in that Cr Charles' actions were such that he was acting in his own interests.
33. Therefore, my final view is that Cr Charles did not have an actual conflict of interest in relation to the receipt of the final report and findings in Agenda Item 16.1.1 of the 18 December 2017 council meeting within the meaning of section 75 of the Local Government Act.

Perceived conflict of interest

34. I have also considered whether Cr Charles had a perceived conflict of interest in relation to the receipt of the final report and findings in Agenda Item 16.1.1 of the 18 December 2017 council meeting, for the purposes of section 75 of the Local Government Act and, if so, whether he breached section 75A.
35. A perceived conflict of interest, under section 75A(1)(b) of the Local Government 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.
36. I consider that an impartial, fair-minded person could reasonably perceive Cr Charles to have had a conflict of interest in the receipt of the final report given that the subject matter of the report relates to him, it makes findings about his conduct and makes recommendations that require him to take particular action. In my view, the fact that Cr Charles' voted to receive the final report does not change this.

37. The question then becomes whether Cr Charles appropriately dealt with his perceived conflict of interest in accordance with section 75A of the Local Government Act.
38. Section 75A(1) of the Local Government Act 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.
39. If a council member has an actual or perceived conflict of interest in respect of a matter they are not necessarily required to be excluded from participating in the discussion and voting in relation to that item, but are required to deal with the conflict of interest in a transparent and accountable way. To satisfy this obligation, section 75A(2) of the Local Government Act requires that the council member must inform the meeting of their 'interest in the matter' and whether or not they propose to participate in the meeting in relation to that matter. Section 75A(2)(a) does not require that the council member specify whether that 'interest' is an 'actual interest' or a 'perceived interest'.
40. Cr Charles did not inform the meeting of his interest in relation to the first recommendation in Agenda Item 16.1.1 or that he proposed to participate in the consideration and voting of that recommendation. He did not vacate the chamber and voted in relation to receiving the final report. While it may have been obvious to the other council members that Cr Charles had an interest in the final report, it is Cr Charles' duty to ensure that he complied with section 75A of the Local Government Act.
41. I acknowledge that Cr Charles apologised shortly after Agenda Item 16.1.1 was introduced in an attempt to comply with a recommendation in the final report. This apology, and his statement in the apology that he looked forward to attending the recommended training, shows a willingness to comply with the proposed recommendations. It also appears that there was genuine confusion on Cr Charles' part about how to appropriately deal with his interest.
42. In the interests of transparency and accountability, I consider that Cr Charles should have informed the meeting of his interest in the matter and should have stated why he thought it was appropriate for him to remain in the chamber and vote on the matter.
43. As such, my final view is that Cr Charles had a perceived conflict of interest in relation to the receipt of the final report and findings in Agenda Item 16.1.1 of the 18 December 2017 council meeting and did not deal with it in a transparent and accountable way.

Opinion

In light of the above, I consider that Cr Charles breached the conflict of interest provisions of the Local Government Act and Part 3 of the Code of Conduct in relation to the first recommendation of Agenda Item 16.1.1 of the 18 December 2017 council meeting. 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 the error, I recommend under section 25(2) of the Ombudsman Act that the council require Cr Charles to attend training relevant to conflict of interest provisions.

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, within two ordinary meetings of the council receiving my recommendations.

Final comment

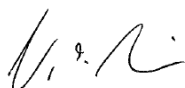
I now report Cr Charles' misconduct to the principal officer of the council, as required by section 18(5) of the Ombudsman Act.

In accordance with section 25(4) of the Ombudsman Act the department (or council) should report to the Ombudsman by 30 November 2018 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.

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



Wayne Lines
SA OMBUDSMAN

31 August 2018