

Report

Full investigation - *Ombudsman Act 1972*

Complainant	Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>
Agency	District Council of Tumby Bay (the council)
Ombudsman reference	2012/08745
Date complaints received	30 October 2012
Issues	Whether Cr Pam Brougham breached the conflict of interest provisions of the <i>Local Government Act 1999</i>

Jurisdiction

The original complaints attracted the protections of the *Whistleblowers Protection Act 1993*.

In order to protect the identities of the complainants, I commenced an 'own initiative' investigation under section 13(2) of the *Ombudsman Act 1972*.

I note that under the definition of 'administrative act' in section 3 of the Ombudsman Act, my jurisdiction extends to investigating 'an act relating to a matter of administration on the part of a person engaged in the work of ... an agency'. This provides the jurisdictional basis for me to investigate whether an elected member of a council failed to disclose a conflict of interest pursuant to the provisions of the *Local Government Act 1999*.

To the extent that some of the complaints were made after 12 months from the day on which the complainants first had notice of the matters alleged in the complaint, I consider that in the circumstances, it is proper to entertain the complaints (section 16(1) Ombudsman Act).

Investigation

My investigation has involved:

- assessing the information provided by the complainants
- seeking and considering a response from Cr Pam Brougham
- considering sections 73 and 74 of the Local Government Act
- considering the District Court of SA decisions of *Petrovski v Pain* [2013] SADC 6 and *Petrovski v Dolling* [2013] SADC 27; and the SA Local Government Association Guidelines on conflict of interest (**LGA guidelines**)
- communicating with the council's planning division
- providing Cr Brougham and the council with my provisional report for comment
- considering their responses, in particular, the response from Cr Brougham's legal representative
- considering the council's Code of Conduct for Elected Members (**the Code of Conduct**)
- 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

Responses to my provisional report

In response to my provisional report, Cr Brougham's legal representative, Mr Matthew Deller submitted *inter alia* that:

- There are other provisions to consider under the Local Government Act in my investigation such as sections 60, 62 and 63, and the council's Code of Conduct.
- Mr Laurie Collins (now the mayor) who was previously an Environmental Manager in the council, was aware of Cr Brougham's situation; and he had advised Cr Brougham that she and her husband were exempt from the proposed changes under the proposed Coastal Development Plan.
- Cr Brougham believed that she was not conflicted in her role as a council member in considering the proposed DPA. She was not aware, or did not understand at the relevant times, the nature of the more specific requirements of section 73(1) of the Local Government Act.
- It was not correct to say that the land owned by Cr Brougham and her husband is 'affected' by the proposed change in zoning under the DPA, as it specifically exempts their land.
- I have no evidence to suggest that the value of Cr Brougham's land would improve as a result of the proposed DPA.
- It appeared that I was proceeding on an 'assumption' only about a possible future matter, and possibly on the basis of my broader powers under section 7 of the *Royal Commissions Act 1917*. If I intend to make a finding on the basis of a possible future matter, Cr Brougham seeks to know the reasons why my assumption is said to be 'reasonable'.
- While there was, and is, a possibility that the value of the adjoining owners' land may be adversely affected by the proposed DPA, this would not necessarily involve an improvement in the value of Cr Brougham's land.
- From a factual and subjective point of view, Cr Brougham personally considered that the proposed DPA was irrelevant to her personal circumstances; and she was not voting for or against the adoption of the proposed DPA, but rather to facilitate greater consultation by the council - and this may have placed her in breach of other duties as a member.
- The council's 'statutory' Code of Conduct suggests that the only relevant conflict was where Cr Brougham would 'otherwise misuse her position to gain an advantage for herself'. Cr Brougham did not consider that by voting as she did on 11 September 2012, she was in breach of this provision in the Code of Conduct, or that she was conflicted.

¹ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR449 at 449-450 per Mason CJ, Brennan, Deane and Gaudron JJ.

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

- It cannot be said that objectively, Cr Brougham would, if the matter was decided in a particular manner, have had a reasonable expectation of receiving a direct or indirect personal benefit. As such, it was not reasonable to conclude that the value of her land would be affected as a result of any adoption of the proposed DPA.
- Alternatively, Cr Brougham was not in breach of the conflict of interest provisions of the Local Government Act, because of the availability of a defence in section 74(4a)(d).

The mayor of the council responded informally to my provisional report, and agreed with my views.

I have considered Mr Deller's submissions above, and have amended my views expressed in my provisional report as I consider appropriate.

Background

1. The council with its community has been engaged for some years in developing a General and Coastal Development Plan Amendment. The DPA is to change *inter alia* the boundary between land zoned for primary production and land zoned for coastal conservation, to ensure consistency with the Eyre Peninsula Coastal Development Strategy.
2. I understand that in 2008-2009, there were initial concerns about zone definitions, particularly the listing of dwellings as non-complying development. After consultation with the community and the state government, the proposed boundary was redefined, and the issue of allowing development on coastal allotments with pre-existing Land Management Agreements (**LMA**) was resolved. The revised plan then went back to the community for further consultation (in November 2009). The DPA is still progressing.
3. Cr Pam Brougham and her husband, Mr Peter Brougham jointly own parcels of land at allotment 3, Kiandra Road and allotment 4 both in the Hundred of Yaranyacka. The land is in the coastal area, and is within the area of the proposed DPA.
4. I understand that a pre-existing LMA allowing construction of a dwelling covers each of allotments 3 and 4 (**allotments 3 and 4**).

14 June 2011 meeting

5. On 14 June 2011, Cr Brougham participated and voted in a council meeting which considered issues relating to the zoning boundary of the DPA. The council made three resolutions, recorded in the minutes as 2c/62011, 3c/62011, 4c/62011. Respectively, these resolutions concerned:
 - suspending the meeting agenda for informal discussion with Mr Stewart Payne, a planning consultant regarding the DPA
 - receiving Mr Payne's report. In his report, Mr Payne sought the council's approval to submit the DPA to the minister for authorisation.
 - laying the DPA on the table until the next council meeting so that the council's CEO and Town Planning Officer could meet with the leader of the Coastal Ratepayers Association, Mr Glen Karutz and other concerned ratepayers to discuss the amendments being made to the DPA.

10 October 2011 meeting

6. On 10 October 2011, Cr Brougham participated in voting at a council meeting which resolved that the council would advise the Department of Planning and Local Government that the DPA would be put on hold as agreed by the representatives of the Coastal Ratepayers Association, until the completion of a pending review by the

department of a 'Coastal Policy module' (recorded at 29c/102011 of the minutes). Cr Brougham moved this motion.

11 September 2012 meeting

7. On 11 September 2012, Cr Brougham participated in voting in relation to two council resolutions concerning the DPA (recorded at 29c/92012 in the minutes) - the first, to lay the DPA on the table; and the second, to endorse the DPA and pursuant to section 25 of the *Development Act 1993* forward it to the Minister for authorisation. Cr Brougham seconded the first motion; and both were lost.

9 October 2012 council meeting

8. On 9 October 2012, Cr Brougham voted in a council meeting which resolved to:
- receive the Manager, Environmental Services reports Revocation of Community Land Classification (MES1/1012) and Tumbly Bay Coastal and General Plan Amendment (MES2/1012) (minutes reference 18c/102012)
 - endorse the Manager, Environmental Services to proceed in seeking ministerial approval to revoke the community land classification of the whole of allotment 11 Lipson Road (CT 5540/116) (minutes reference 19c/102012)
 - as a matter of urgency, invite the Minister for Planning to address the council on the DPA with the intent of discussing elected members' concerns (minutes reference 20c/102012).

The complaints

9. The original complaints to my office alleged *inter alia* that by virtue of her ownership of allotments 3 and 4, Cr Brougham had an 'interest' in the council's decisions set out above (**the relevant decisions**), within the meaning of section 73 of the Local Government Act. The complaints alleged that in relation to these decisions, Cr Brougham contravened section 74(1) and (4) of the Act by:
- failing to disclose this interest
 - proposing or seconding a motion, taking part in discussions, and taking part in the decision making process.

Conflict of interest provisions of the *Local Government Act 1999*

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

73—Conflict of interest

- (1) A member of a council has an interest in a matter before the council if—
- (a) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, receive or have a reasonable expectation of receiving a direct or indirect pecuniary benefit or suffer or have a reasonable expectation of suffering a direct or indirect pecuniary detriment; or
 - (b) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, obtain or have a reasonable expectation of obtaining a non-pecuniary benefit or suffer or have a reasonable expectation of suffering a non-pecuniary detriment,

(not being a benefit or detriment that would be enjoyed or suffered in common with all or a substantial proportion of the ratepayers, electors or residents of the area or a ward or some other substantial class of persons).

11. Section 74(1) provides that an elected member who has an 'interest in a matter before the council' must disclose that interest to the council. Section 74(4) provides that the elected member must not:
 - (a) propose or second a motion relating to the matter; or
 - (b) take part in discussion by the council relating to that matter; or
 - (c) while such discussion is taking place, be in, or in the close vicinity of, the room in which or other place at which that matter is being discussed; or
 - (d) vote in relation to that matter.
12. The Local Government Act does not define the word 'matter' for the purposes of section 73 and section 74.
13. Section 74(4a)(d) provides that 'a member does not contravene this section if the interest was unknown to the member at the relevant time'.

Whether Cr Brougham breached the conflict of interest provisions of the *Local Government Act 1999*

14. What lies for my decision is whether Cr Brougham was conflicted in relation to the relevant decisions. I must first be satisfied that Cr Brougham had an 'interest in a matter' in relation to each of the relevant decisions, within the meaning of section 73(1) set out above. That is, I must be satisfied that by participating in the council's voting as she did, Cr Brougham would receive a benefit or suffer a detriment or would have a reasonable expectation of receiving a benefit or suffering a detriment of the type described in section 73. Such benefit or detriment should not be shared with all or a substantial proportion of ratepayers, electors or residents of the coastal area.
15. In the case of *Petrovski v Dolling*,³ the South Australian District Court emphasised that the legislation is confined to the type of interest referred to in section 73 and 'not to conflicts of interest at large'.⁴ The disclosure requirement in section 74 is confined to disclosure of the type of interest in a matter described in section 73.
16. Further, the court said that the question of whether a council's resolution gives rise to a section 73 interest, must be determined by a consideration of the terms of the resolution.⁵ In addition, the test is that the elected member 'would' receive a benefit or suffer a detriment or 'would have a reasonable expectation' of receiving a benefit or suffering a detriment. Speculation about the consequences of the matter being decided in a particular manner is not sufficient.

Opinion - second motion of 11 September 2012

17. In my view, the second motion of 11 September 2012 gave rise to a section 73(1) interest on the part of Cr Brougham. I consider that the 'matter' for the purposes of the section was progressing the DPA as it was drafted at the time, that is, endorsing the DPA and forwarding it to the Minister for authorisation. I consider that by progressing the DPA in this way, Cr Brougham had a reasonable expectation of receiving an indirect pecuniary benefit.
18. In my view, Cr Brougham's neighbours who did not have a pre-existing LMA over their land, would be disadvantaged by the proposed DPA progressing to ministerial authorisation. The proposed DPA prevented the neighbours from developing on their land. It is reasonable to expect that this disadvantage would serve to bolster either the

³ *Petrovski v Dolling* [2013] SADC 27 (5 March 2013).

⁴ *Ibid.*, [41].

⁵ *Ibid.*, [34].

value of Cr Brougham's land or her ability to sell her land, given the pre-existing LMA. This benefit to Cr Brougham is one that would not have been shared by a substantial portion of ratepayers or house owners along the coast.

19. My view above reflects my view expressed in my provisional report. On behalf of Cr Brougham, Mr Deller put several arguments to counter my view; and below, I set out a summary of his arguments and my thoughts in response. Mr Deller's arguments did not persuade me to resile from my view in my provisional report.

Mr Deller's arguments and my response

The council's Code of Conduct and the LGA Guidelines

20. Mr Deller notes the statutory responsibilities of elected members under sections 60 and 62 of the Local Government Act. He also notes the Code of Conduct made by the council pursuant to section 63 (issued 29 November 2010), in particular paragraph 3.1. This outlines the responsibility of a council member to *inter alia* act conscientiously, with reasonable care and in good faith; have due regard for conflict of interest; not to misuse their position to gain an advantage for themselves or others; and the like.
21. Mr Deller submits that the Code of Conduct is a statutory code, and its terms 'are general in nature', and in different terms to section 73(1) of the Local Government Act. He argues that there is a 'strong inference from the terms of the Code that on the question of any conflict of interest, the relevant practical consideration was the question, subjectively, of gaining an advantage.' This 'is much narrower' than the criteria set out in section 73(1) of 'receiving or having a reasonable expectation of receiving a direct or indirect pecuniary benefit, which may well be an objective test.'
22. In response, I agree that section 73(1) involves 'an objective test'; however, the council's Code of Conduct does not and cannot override the specific provisions of section 73(1). In saying this, I also note the possible legislative consequences in section 74(4), (5a) and (5b) of the Local Government Act for a council member failing to declare a section 73 interest under section 74 (in the circumstances outlined in the sub-sections). More significantly, section 267(1) of the Act expressly provides an avenue of complaint through the District Court if a member has contravened or failed to comply with section 74. The outcome of such a complaint can include the court reprimanding the member; suspending the member from office; or imposing a fine. Such outcomes are enforceable.
23. The Local Government Act provides for no direct consequence of a council member's breach of their council's code of conduct; and any outcome of a complaint about such breach is not enforceable. (See the council's policy 2.26 - Complaint Handling, issued October 2011.)
24. I note that the council itself considers that its Code of Conduct is a 'public declaration of the **principles of good conduct and standards of behaviour**' that the council members 'have agreed to demonstrate'; and that the 'standards in the Code of Conduct are **in addition to** any statutory requirements of the *Local Government Act 1999* or any other relevant Act or Regulation applicable to Council Members in the performance of their role and responsibilities'.⁶ (my emphasis)
25. Furthermore, in relation to conflict of interest, I note that the council's Code of Conduct reminds council members that they must have... **due regard to the laws dealing with conflict of interest** in relation to all our duties' (my emphasis).

⁶ Council policy 2.26 - Complaint Handling, issued October 2011.

26. In light of the above, it seems to me that the council itself does not consider that the Code of Conduct overrides the provisions of section 73 and 74 of the Local Government Act.
27. Mr Deller also notes my reference and weight given to the LGA guidelines which provide that elected members should be alert to perceptions of conflict of interest, and act accordingly. He submits *inter alia* that these guidelines do not have any statutory status and 'do not constitute a relevant code of conduct' for the purposes of section 63. I agree with Mr Deller's submission; and I refer to the guidelines later in my report and my recommendation for legislative change.

Cr Brougham's views and lack of awareness or understanding of section 73(1)

28. Mr Deller submits that Mr Laurie Collins (now the mayor) who was previously an Environmental Manager in the council, was aware of Cr Brougham's situation; and he had previously advised Cr Brougham that she and her husband were exempt from the proposed changes under the proposed Coastal Development Plan (the DPA) because of the existence of the LMA and also conditional development approvals at the time.
29. He submits that Cr Brougham believed that she was not conflicted in her role as a council member in considering the DPA because:
- she wished to facilitate consultation by the council with interested parties (she was not motivated by personal interest)
 - of the existence of the LMA and conditional development approvals
 - the DPA was only at the proposal stage.
30. He submits that Cr Brougham 'was not aware, or did not understand at the relevant times, the nature of the more specific requirements of section 73(1) of the Local Government Act'.
31. Further, Cr Brougham did not consider that by voting as she did on 11 September 2012, she was conflicted or that she was in breach of the Code of Conduct.
32. I have no reason to disbelieve Cr Brougham's views. However, while Cr Brougham's views may explain her reasons for not declaring her interest, they are not exculpatory and do not provide a 'defence' to her breach of section 74(1) and (4).

The expected benefit to Cr Brougham under section 73(1)

33. Mr Deller submits that I have no evidence to suggest that the value of Cr Brougham's land would improve as a result of the proposed DPA, and that it appeared that I was proceeding on an 'assumption' only about a possible future matter and possibly on the basis of my broader powers under section 7 of the *Royal Commissions Act 1917* (which provides that a commission is not bound by the rules of evidence).
34. While there was, and is, a possibility that the value of the adjoining owners' land may be adversely affected by the proposed DPA, Mr Deller submits that this would not necessarily involve an improvement in the value of Cr Brougham's land. To the extent that any improvement in value of Cr Brougham's land might occur, this would predominantly be a consequence of the previous existence of the LMA and conditional development approvals, rather than the proposed DPA.
35. While it is the case in my investigations that I am not bound by the rules of evidence and that I am able to inform myself as I think fit,⁷ in my view, what is a 'reasonable

⁷ Section 18 *Ombudsman Act 1972*.

expectation' of obtaining a benefit or suffering a detriment can only ever be a predictive opinion.

36. I note the Administrative Appeals Tribunal case of *Re Actors Equity Association of Australia* (No 2) (1985) 7 ALD 584 (at 590). In this case, the tribunal considered an exemption under the *Freedom of Information Act 1982* which provides that a document is exempt from disclosure if its release 'could reasonably be expected to have an adverse effect' on a party's business affairs. The tribunal commented at 590:

... we are in the field of predictive opinion. The question is whether there is a reasonable expectation of adverse effects. It is to that question that the witness's evidence had to be directed, and their assertions are incapable of proof in the ordinary way. What there must be is a foundation for a finding that there is an expectation of adverse effect that is not fanciful, imaginary or contrived, but rather is reasonable, that is to say based on reason, namely 'agreeable to reason: not irrational, absurd or ridiculous'. ... This is not very much to ask of evidence of an expectation of an adverse effect on a business.

37. I note that the SA District Court accepted this passage as being a correct statement of the law in relation to a mirror provision in the South Australian *Freedom of Information Act 1991*.⁸
38. While it relates to different legislation, I consider that the passage above aptly describes the basis on which the reasonableness of expectation can be considered under section 73(1) of the Local Government Act.
39. In my view, the expectation that Cr Brougham would indirectly obtain a pecuniary benefit by voting to progress the proposed DPA on 11 September 2012, is not 'irrational', 'absurd' or 'ridiculous'. I agree with Ms Philpot's email to Mr Deller of 17 May 2013, that 'It is reasonable to predict that the valuation of [Cr Brougham's] land would improve given the proposed development limitations on neighbouring land' in the proposed DPA.'
40. I do not entirely agree with Mr Deller's comment that any improvement in the value of Cr Brougham's land would predominantly be a consequence of the previous existence of the LMA and conditional development approvals, rather than the proposed DPA. In my view, at its lowest, it is reasonable to expect that the proposed DPA would be a contributing factor (because of the limitations it placed on neighbouring property owners' ability to develop on their land).

Defence under section 74(4a)(d) of the Local Government Act

41. Mr Deller submits that Cr Brougham was not otherwise in breach of the conflict of interest provisions of the Local Government Act, because of the availability of a defence under section 74(4a)(d).
42. He submits that section 74(4a)(d) imports a requirement of a 'subjective lack of knowledge of the fact or matter giving rise to the alleged "interest in a matter" for the purposes of section 74(1) and (4)...'. Thus, Cr Brougham did not have the 'requisite personal knowledge of an "interest in a matter"'.
43. I do not agree with Mr Deller. I also note that Mr Deller submits that Cr Brougham 'was not aware of, or did not understand at the relevant times, the nature of the more specific requirements of section 73(1)'.

⁸ *Ipex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54.

44. In my view, Cr Brougham was apprised of all of the facts - her ownership of allotments 3 and 4 and the proposed rezoning. The assertion that she did not subjectively know that she had an interest in the (second) motion and decision of 11 September 2012 cannot relieve her of culpability under section 73(1). I consider that section 73(1) and the 'reasonable expectation' of receiving a benefit or suffering a detriment requires an objective assessment. Mr Deller also appears to accept this interpretation in his response.
45. In light of my views above, I consider Cr Brougham had a conflict of interest in relation to the second motion and decision of 11 September 2012. By failing to declare this interest and voting, Cr Brougham was in breach of section 74(1) and (4) of the Local Government Act, and acted in a manner that was contrary to law within the meaning of section 25(1) of the Ombudsman Act.
46. One of the means by which a council's elected members are able to inform themselves in relation to their responsibilities such as conflict of interest, is through training programs offered by the LGA and other professionals.
47. I am informed in this instance that the council's elected members attended training on three occasions in the past 15 months, by Wallmans Lawyers on 19 September 2011; Mr John Comrie on 4 Sept 2012; and by Norman Waterhouse Lawyers on 11 Oct 2012. I am advised that all three sessions covered elected members' obligations under the Local Government Act, and that Cr Brougham attended these sessions.
48. I nonetheless make a recommendation under section 25(2) of the Ombudsman Act that Cr Brougham receive further training in elected member conflict of interest.
49. Under section 18(5) of the Ombudsman Act, I also intend to report Cr Brougham's breach to the mayor of the council.

Opinion - the remaining relevant decisions

50. I do not consider Cr Brougham had an interest and was conflicted in relation to the other relevant motions and decisions, pursuant to section 73(1) of the Local Government Act. I express some disquiet about this, as I consider that 'the ordinary person in the street' would perceive that Cr Brougham was so conflicted.

Perceived conflict of interest

51. A perceived conflict of interest is one which a fair minded and informed member of the public might perceive as existing. A perceived conflict of interest may not relate to what is in reality a potential or an actual conflict of interest; and it may only ever be a 'perception' of a conflict of interest. Concerns about an elected member's perceived conflict of interest may also lead to suggestions that the member has acted with bias in their decision making. In my view, the management of perceived conflicts of interest is just as important for community trust and integrity of a council, as management of actual conflicts.
52. I note the comments of the South Australian District Court in the decision of *Petrovski v Pain*⁹ emphasising the importance of the role of elected members and their responsibility to properly discharge their public duties in relation to conflict of interest:
The business of local council is an important one. Those who are elected to council must take their responsibilities and obligations seriously so as to reassure the public, who

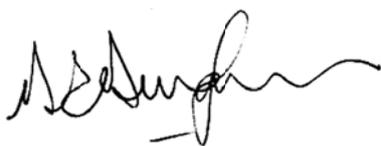
⁹ *Petrovski v Pain* [2013] SADC 6, [52].

elected them that they are acting in a proper manner in the discharge of their public duties. This is particularly relevant in relation to any conflict of interest that may arise.

53. I note also that the LGA guidelines provide that elected members should be alert to perceptions of conflict of interest, and act accordingly:

It is not relevant whether the affected person thinks that he or she would actually be influenced - the important question is whether the impartial observer could form the opinion that in the given set of circumstances, the affected person could be influenced by the nature of his or her possible or perceived interest.¹⁰

54. The LGA recommends that in the circumstances above, the affected council member should declare their interest and withdraw from voting on the particular matter which lies for decision.
55. I agree with the LGA's position; and I consider it accords with community expectations. In my view, the Local Government Act should be amended to reflect these expectations. I have already referred to this issue in my report on my investigation into the City of Charles Sturt in 2011 in response to a parliamentary referral concerning the St Clair Land Swap.¹¹
56. In light of this, my view is that while Cr Brougham's actions in relation to the remaining relevant motions and decisions were not in breach of the Local Government Act, they were 'in accordance with ... a provision of an enactment ... that is or may be unreasonable' within the meaning of section 25(1)(c) of the Ombudsman Act.
57. I recommend under section 25(2)(d) of the Ombudsman Act that the Local Government Act be amended to address perceived conflicts of interest on the part of elected members.



Richard Bingham
SA OMBUDSMAN

15 July 2013

¹⁰ Local Government Association of South Australia, Conflict of Interest Provisions – Guidelines and Examples, March 2007, updated October 2010, p15.

¹¹ <http://ombudsman.sa.gov.au/publications/reports>