

**Final Report**  
**Full investigation - *Ombudsman Act 1972***

<b>Complainant</b>	<b>Councillor Ken Liu</b>
<b>Council member</b>	<b>Councillor Joy Willson</b>
<b>Council</b>	<b>Kangaroo Island Council</b>
<b>Ombudsman reference</b>	<b>2017/02082</b>
<b>Council reference</b>	<b>E2018/301</b>
<b>Date complaint received</b>	<b>23 February 2017</b>
<b>Issues</b>	<b>Whether Cr Joy Willson 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 council agenda item 13.2 at the council meeting on 14 February 2017</b>

### **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**).<sup>1</sup> 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.<sup>2</sup>

The legislative scheme envisages that complaints in relation to Part 3 of the Code of Conduct (misconduct) be directed to my Office or the Office for Public Integrity for investigation.

The complaint was referred to my Office by the Mayor of the Kangaroo Island Council, Peter Clements on behalf of Cr Ken Liu pursuant to Part 3 of the Code which states as follows:

#### **Misconduct**

...

Any person may report an alleged breach of this Part to the Council, the Ombudsman, the Electoral Commissioner (for alleged breaches of Code 3.8) or the Office for Public Integrity. Alleged breaches of this Part made to a Council or to the Office for Public Integrity may be referred to the Ombudsman for investigation under Section 263 of the Local Government Act 1999, by the Council's Chief Executive Officer or by the Independent Commissioner Against Corruption, where he or she so determines.

...

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

---

<sup>1</sup> The Code of Conduct was gazetted on 29 August 2013.

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

## Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from Cr Willson
- seeking a response from the council
- considering the:
  - *Local Government Act 1999 (LG Act)*
  - *Local Government (Procedures at Meetings) Regulations 2013 (Meeting Regulations)*
  - *Local Government (General) Regulations 2013 (LG Regulations)*
  - Code of Conduct for Council Members (**Code of Conduct**)
  - council's Code of Conduct for Elected Council Members - Procedure
  - Council Member Training & Development Policy 2014
  - council's register for 2015/16 Elected Member Training (**member training register**)
  - council's Meeting Procedure Code of Practice (**Meeting Procedure**)
  - Local Government Association *Conflict of Interest Guidelines*
- providing the council member, the council and the complainant 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.<sup>3</sup> 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 ...<sup>4</sup>

## Response to my provisional report

In response to my provisional report Cr Liu advised me that he would provide no comment.

Cr Joy Willson responded to my provisional report and she made the following points:

- Trethewey Terrace is not a thoroughfare road linking Penneshaw with Cape Willoughby via Wright Road. While road reserves appear on the map, no such linkage exists. Trethewey Terrace services residential properties only
- that she prefers to use a sealed road, and so generally turns left onto Mansell St to access Pelican Street
- reiterated that she did not put the motion forward as a personal concern, but as a community concern, as the council had not taken action in regard to safety concerns for road users
- acknowledged seeking support from local users for her motion to include Trethewey Tce in budget deliberations but was aware that many users had previously notified the

<sup>3</sup> 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.

<sup>4</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

council of their concerns, as demonstrated by previous correspondence, (with the council reacting by grading the road (only to have the grading washed away by rain)) Cr Willson also stated that other road users did not need 'prompting' as several had already raised their concerns with the council

- in relation to my finding that Cr Willson was found not to have a material conflict of interest for her motion, Cr Willson stated:

I purposely did not include the Northern Section of Trethewey Terrace within my motion because I recognised, knowing the negativity of some Council members and the practice of using Codes of Conduct, as by any measure, being aligned with harassment and or bullying, I could be put on a Code.

- in relation to my views that a declaration of an interest would not necessarily preclude her from participating in the meeting and voting, Cr Willson stated:

Previously I have had to apologise to Council, which I was only too willing to do so, so as to acknowledge my not including my address on my returns. When giving this public apology I stated to the present Council my full Section/Lot address and my residential address on Trethewey Terrace, Penneshaw. Naively I assumed that the Council Members present, and if my memory serves me well we had a full Council attendance that day, would recognise that I was talking to the Terrace that our property abutted to.

The council's Chief Executive Officer, Mr Andrew Boardman responded to my provisional report and those points relevant to my consideration and findings are outlined below. Mr Boardman:

- agreed that Cr Willson had a direct personal interest in the matter under consideration
- made no comment in relation to my view that Cr Willson did not have a material conflict of interest
- provided his views about the likely course of travel Cr Willson would take when leaving her property on Trethewey Terrace
- noted that Cr Willson has alternate entry and exit points from her property and on that basis Mr Boardman disputes my view that Cr Willson would be a regular user of Trethewey Terrace or that an upgrade to Trethewey Terrace would provide her safer access to her property
- submitted that he did not consider that my views and assessment of Trethewey Terrace as a thoroughfare was correct and sought to explain the road use habits of residents on Trethewey Terrace (i.e. that they would generally drive north and not south)
- submitted that he did not agree with my classification of holiday homes in the vicinity of Trethewey Terrace as businesses for the purposes of establishing traffic volumes in the area
- provided a copy of a map in which he identified Cr Willson's property and those in the near vicinity which stood to gain a benefit from the upgrade to Trethewey Terrace
- submitted that he did not consider that the upgrade would result in an increase in property values or that Cr Willson's canvassing of support for the upgrade to Trethewey Terrace was about an increase in property values
- noted that it was the council's intent to upgrade the road, but that due to other council priorities, however, the roadworks have been deferred
- stated that, in light of his submission, Mr Boardman did not agree with my view that the substantial proportion test under section 75(4) of the Local Government Act was not met
- agreed with my views that, as a resident of Trethewey Terrace, Cr Willson had a perceived conflict of interest and ought to have had that interest recorded in the council meeting minutes
- considered that Cr Willson could have remained in the meeting for 'participation and voting'.

I have carefully considered the submissions to my provisional report from Cr Willson and Mr Boardman which, to a certain extent, reiterate the previous responses to my investigation. Therefore, whilst both submissions do not raise further information that would cause me to change my view, where appropriate, my report has been amended accordingly.

## Background

1. Cr Joy Willson is an elected member of the Kangaroo Island Council (**the council**).
2. Mayor Peter Clements referred to my Office a letter of complaint he received from council member Cr Ken Liu in which it was alleged that during the council meeting on 14 February 2017 (**the council meeting**) Cr Willson participated in discussions about an agenda item in relation to an upgrade to Trethewey Terrace, Penneshaw, in relation to which she had a conflict of interest. In forwarding the complaint, Mayor Clements stated as follows:

I am of the understanding that in accordance with Clause 2.15 of the [Code of Conduct] I am required to do this.

To assist you in assessing this matter I make the observation that in relation to the alleged undeclared Conflict of Interest I am confident that the Notice of Motion proposed by Cr Willson had the greater community benefit in mind and do not see any material benefit by Cr Willson.

3. In his complaint to Mayor Clements on 19 February 2017 Cr Liu stated as follows:

I received a phone call from a Penneshaw ratepayer after the February Council meeting enquiring about Council's decision on item 13.2 of the meeting agenda - a '*notice of motion*' proposed by Cr Joy Willson to upgrade Trethewey Terrace from South Terrace to Mansell Street. It was alleged that Cr Willson may have a conflict of interest in the matter, as she currently owns a property situated at or near the corner of Mansell Street and Trethewey Terrace, where if the motion to bring forward the road construction program on this section of road succeeded, Cr Willson will certainly have gained a considerable benefit from the road surface and drainage upgrade, but it would be minimal.

I have subsequently inspected the Member Return submitted by Cr Willson on 17 February 2017 and noted that she has confirmed her ownership of this property situated at Lot 1 Trethewey Terrace, Penneshaw.

Although Cr Willson's notice of motion was defeated, she did not disclose her interest in the matter before the Council, moved the motion, took part in the debate and voted for the motion, in which she may have breached Section 74 of the *Local Government Act 1999* and Clause 3.13 of [the Code of Conduct] - "*Council members must be committed to making decisions without bias and in the best interests of the whole community and comply with the relevant conflict of interest provisions of the Local Government Act 1999*".

To ensure that I have complied with Clause 2.15 of the [Code of Conduct]...I hereby make this report to you for the appropriate action.

4. At the council meeting Cr Willson moved the following motion:

### **13.2 Cr Joy Willson - Trethewey Terrance [sic] Penneshaw**

Moved Cr J Willson

That Trethewey Terrace, Penneshaw, between Mansell Street and South Terrace be included in the 17/18 Budget for drainage installation and re-sheeting as a high priority.

Seconded Cr L Turner

5. Cr Willson's motion was amended as follows:

Moved Cr P Denholm  
1st Amendment  
That Trethewey Terrace, Penneshaw, between Mansell Street and South Terrace be included for consideration in the 17/18 Budget for drainage installation and re-sheeting as a high priority.

Seconded Cr L Tydeman

CARRIED. 6 For 1 Against

Minute: C45:2017

Motion as Amended

Moved Cr P Denholm  
That Trethewey Terrace, Penneshaw, between Mansell Street and South Terrace be included for consideration in the 17/18 Budget for drainage installation and re-sheeting as a high priority.

Seconded Cr L Tydeman

CARRIED. 6 For 1 Against

Minute: C46:2017

6. The minutes for the council meeting show that Cr Willson did not declare a conflict of interest for agenda item 13.2 or for any other matter before the council.

7. On 24 March 2017 I wrote to Cr Willson to advise that I had received a complaint from Mayor Clements in which he referred to a complaint he had received from Cr Liu, alleging that a "Penneshaw ratepayer" considered Cr Willson had a conflict interest for agenda item 13.2 that being 'Trethewey Terrance [sic] Penneshaw'. In my letter I sought Cr Willson's views about the allegations that at the council meeting she had a conflict of interest in relation to agenda item 13.2.

8. In her letter dated 5 March 2017, received by my Office on 7 April 2017, Cr Willson responded as follows:

- whether at the meeting of the council on 14 February 2017 you declared a conflict of interest for item 13.2

No I did not declare a conflict of interest in item 13.2 - Notice of Motion I placed within the Council Agenda [sic] My intention in placing this Notice of Motion...was to have Trethewey Terrace Penneshaw, between Mansell Street and South Terrace, put forward to a budget workshop for consideration to be put into the 17/18 Council budget.

- whether at the meeting of the council on 14 February 2017 you participated in a vote or discussion on item 13.2 in its initial and amended forms

Yes I did participate in the discussion and vote under meeting procedure guidelines. Into the discussion and preamble I brought [sic] to the Councils [sic] attention of the several notifications that had been placed on Trethewey Terrace by users of that road...During the course of that meeting it was suggested by a Councillor that it could be seen as being for self interest. My answer to him was that I was not that devious...I had ratepayers contact me re the road over a period of time, and as shown I also have been notifying Council over a period of time.

I would also like to state that I have highlighted in yellow my notifications on Mansell Street (2) and Frenchman's Terrace (2). I would point out that I can also use these roads to access my property.

- whether you have an interest in a property located at or near the corner of Mansell Street and Trethewey Terrace, Penneshaw

Yes I have joint ownership with my husband, a property situated at Lot 1 Trethewey Terrace, Penneshaw (residential address 42 Trethewey Terrace). Attachment "D"

will show you where our property is and the location of the area referred to under the Notice of Motion [13.2].

We are the 4th Driveway south of Mansell Street.

- whether you consider that you had an interest in agenda item 13.2 and, if so, the nature of that interest. If not, why not

...bringing forward to Council not only my concerns but concerns of other users of the road.

- whether you consider that by participating in a vote on a motion for item 13.2, you complied with the conflict of interest provisions of section 74 of the *Local Government Act 1999* and Clause 3.13 of the Code of Conduct

I do not consider that I was acting in self interest. Evidence shows that I have been pursuing this road consideration for some two years. Evidence shows that other users have been frustrated by Councils [sic] lack of consideration of this road for any upgrade. I represent Kangaroo Island as a Councillor not just Penneshaw that just happens to be where I live. I find it hard to comprehend that I should not participate in any discussion and or resolution that fall within the area of Penneshaw or even the Dudley Peninsula. If this were the case the Council would be very light on for quorums due to the fact that individuals would have to leave the room if their "area" was up for discussion and or vote.

9. Cr Willson provided to my Office a Google map printout upon which she illustrates the location of the proposed works raised in her motion for which it is alleged she has a conflict of interest and the location of her residence ie Lot 1 (no. 42) Trethewey Terrace.
10. Cr Willson has provided to my Office a council document that records correspondence from Cr Willson to the council about the condition of Trethewey Terrace for the period, 23 October 2015 to 7 February 2017. Furthermore, Cr Willson provided a council document that records the receipt of communication from concerned persons about the condition of Trethewey Terrace for the period 2 February 2016 to 20 January 2017. This information demonstrates the ongoing issues with Trethewey Terrace that have been raised with the council directly by Cr Willson or on behalf of concerned persons.
11. Cr Willson has also provided to my Office a copy of emails to her from concerned persons about the condition of Trethewey Terrace including an email dated 31 March 2017 from Ms Jayne Bates, former Mayor of the council, in which Ms Bates raises the condition of Trethewey Terrace and seeks her assistance 'to resolve the storm water issues before another winter sets in'. I do note however, those emails from concerned persons appear to be in response to an email dated 31 March 2017 from Cr Willson's private email account to undisclosed recipients in which she asked the following:
 

Hi All,

I am seeking confirmation from users of Trethewey Terrace that something needs to be done to make the road safe and navigable. If you agree could you please forward, a.s.a.p. your reasons for agreeing to the above.

Thanks in anticipation,

Joy
12. The council's member training register for 2015/2016 states that Cr Willson attended the 'Wallman Lawyers Training on Amendments to Local Government Act 1999 & Conflict of Interest Provisions'. The council has advised my Office that there 'have been no training sessions to date in 2017.'

---

## Relevant law

13. 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.
- (2) A member of a council will not be taken to have a material conflict of interest in a matter to be discussed at a meeting of the council—
- (a) if the relevant benefit or loss would be enjoyed or suffered in common with all or a substantial proportion of the ratepayers, electors or residents of the council area; or
  - (b) on account of an interest under subsection (1) of a relative of the member, other than the member's spouse or domestic partner, if the member does not know, and could not reasonably be expected to know, of the interest.

14. 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.

15. 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.

16. 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 kind prescribed by regulation for the purposes of this section.

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

3.13 Council members must be committed to making decisions without bias 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 Willson 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 council agenda item 13.2 at the council meeting on 14 February 2017**

*Section 73(1) -Material Conflict of Interest*

18. To determine whether Cr Willson had a material conflict of interest, I must be satisfied that she had an interest in a matter to be discussed under agenda item 13.2 in either original or amended forms within the meaning of section 73(1) of the Local Government Act. I must be satisfied that Cr Willson would receive a benefit or suffer a loss of the type described in section 73(1); 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 (as set out in section 73(2)(a) of the Local Government Act).

19. At the council meeting council members were asked to consider a motion under agenda item 13.2 that the council include, as a high priority, the re-sheeting and drainage works for Trethewey Terrace, between Mansell Street and South Terrace Penneshaw, in the council's budget for 2017/18. Cr Willson was the initiator of the motion and voted to move the motion, however, Cr P Denholm moved the motion in amended form which stated in part that the proposed works should 'be included for consideration in the 17/18 Budget'. Cr C Tydeman seconded the motion after which the council members resolved to accept the motion.
20. It does not appear to be in dispute that Cr Willson owns a property in close proximity to the proposed road works and that she did not declare a conflict of interest for agenda item 13.2. It is also apparent that it is beyond dispute that if the road works were undertaken the result would be beneficial in terms of improving drainage, drivability and safety of the road.
21. I now need to determine whether Cr Willson would have, directly or indirectly gained a benefit or suffered a loss (whether of a personal or pecuniary nature) dependent upon the outcome of the consideration of agenda item 13.2 either in the original or amended form.
22. I note that the legislative changes to the conflict of interest provisions of the Local Government Act omitted the words 'a reasonable expectation' and the current provisions provide the test as being only whether the council member 'would' receive a benefit or suffer a detriment of the type described in section 73(1). Speculation about the consequences of the matter being decided in a particular manner is not sufficient.
23. The use of the word 'would' under section 73(1) indicates that there must be more than a strong possibility, and that it is necessary to establish a clear link between the effects of the member's vote and subsequently obtaining a benefit or loss.
24. On 8 February 2018 the council's Chief Executive Officer, Mr Andrew Boardman advised my Office that the council had approved the inclusion of Trethewey Terrace in the council's 2017/18 Annual Business Plan. The council has scheduled to commence the works in two stages: stage 1 in 2017/18 and stage 2 in 2018/19 financial years.
25. That said, in my view, the wording of the motion in both its original and amended form did not guarantee the implementation of the upgrade to Trethewey Terrace. The original motion as moved by Cr Willson would have resulted in the upgrade being included in the 2017/2018 budget 'as a high priority'. This suggests that at the time it was probable that the upgrade would have proceeded. It is also possible, however, that it was only one priority amongst others and may have not been undertaken in that year. This is even more obviously the case in respect of the amended motion. Therefore prior to the council resolving to approve the works for Trethewey Terrace, there is no basis on which to form a view that the original or amended motion if passed would have resulted in the upgrade proceeding. As a result, I am not able to conclude that at the time the motions were considered and voted on it was evident that Cr Willson would stand to gain a benefit or suffer a loss depending on whether the motions were passed or not.
26. My view remains unchanged from that intimated in my provisional report; that Cr Willson did not have a material conflict of interest for the purposes of section 73(1) of the Local Government Act in relation to agenda item 13.2.

*Section 75A(1)(a) - Actual Conflict of Interest*

27. The second issue to consider is whether Cr Willson had an actual conflict of interest in agenda item 13.2 at the council meeting for the purpose of section 75 of the Local Government Act; and if so, whether she breached section 75A of the Local Government Act.
28. An actual conflict of interest, under 75A(1)(a) of the Local Government Act, exists where there is a conflict between:
  - a council member's interests (wherever direct or indirect, personal or pecuniary); and
  - the public interest
 that might lead to a decision that is contrary to the public interest.

*Did Cr Willson have an interest?*

29. Given that Cr Willson's property was in close proximity to the scheduled works, I am of the view that Cr Willson had an indirect, personal interest in agenda item 13.2 at the council meeting.
30. The motion proposed an upgrade to Trethewey Terrace which would, irrespective of Cr Willson's normal course of travel, provide Cr Willson with safer access to her property affronting Trethewey Terrace (which is in close proximity to the scheduled works) should she have cause to use Trethewey Terrace.

*Was the 'substantial proportion' test in section 75(4) of the Local Government Act met?*

31. Mr Boardman provided his view as to whether Cr Willson had a conflict of interest as follows:
 

So if a conflict of interest is being suggested for Cr Willson because she stayed in the room when the budget was being determined then this is simply not the case. Any canvassing carried out by Cr Willson during proceedings would have been in support of the general condition of the road for residents and the lack of stormwater control in the lower section. There is considerable public interest from every resident in that area to have the road sorted out and she would gain no direct benefit from any of the works. Cr Peter Denholm lives on a sealed road - Pelican - so he gets no benefit either. I note that Cr Willson would very likely not use the lower section - particularly if Mansell St east gets sealed - her route to the town would be out of her drive, left into Mansell, right in Pelican, left on Warrawee then right on Cheopis and left onto Frenchmans OR out of her drive onto Trethewey - left onto Warrawee - right onto Cheopis and then left onto Frenchmans
32. In putting forward the motion for item 13.2, Cr Willson forwarded the following preamble to her motion in an email to Mr Boardman, in an email dated 6 February 2017 of her reasons for the motion as follows:
 

I have over the course of two years been seeking a resolution to the condition of Trethewey Terrace, Penneshaw between Mansell Street and South Terrace. This road services at least 6 homes along that stretch of street with giving access to another 4 homes further past Mansell Street. From time to time the street has been graded but along comes rain and the large washouts which populate this street appear again. I understand that this street has not a high a priority on the Asset Management Plan but it is not safe to negotiate 90% of the time with vehicles needing to travel on the wrong side of the road to negotiated [sic] the washouts. I am not asking for a sealed road just a road that has some drainage so the insitu [sic] drains actually collect the water and dispurse [sic] it in a proper manner in lieu of running down someones [sic] driveway, and a reasonable open surface road.
33. Cr Willson stated that although she had an interest in a property on Trethewey Terrace,

the motions that she proposed at the time were to address safety concerns for a specific section of the road, not directly adjacent to her property. I quote from Cr Willson's response as follows:

The enclosed attachments will show that certainly I can access the area of Trethewey Terrace put on Notice [sic], but I may also point out that I do not need to utilise that section of Trethewey Terrace to access our property and also the documents will show, together with those marked Attachment "E", that I was acting as a Councillor for Kangaroo Island, bringing forward to Council not only my concerns but concerns of other users of the road.

I would also like to state that I have highlighted in yellow my notifications on Mansell Street (2) and Frenchman's Terrace (2). I would point out that I can also use these roads to access my property.

Attachment "D" will show you where our property is and the location of the area referred to under the Notice of Motion.

We are the 4th Driveway south of Mansell Street.

Into the discussion and preamble I bought [sic] to the Councils [sic] attention of the several notifications that had been placed on Trethewey Terrace by users of that road. I have included as Attachment "B" my notifications to Council re: Trethewey Terrace over a period of just over two years. Attachment "C", enclosed, shows notifications by other users of the road. During the course of the meeting it was suggested by a Councillor that it could be seen as being for self-interest. My answer to him was that I was not that devious. I would also say to you, I am not that devious. I had ratepayers contact me re the road over a period of time, and as shown I also have been notifying Council over a period of time.

34. Having reviewed the attachments provided by Cr Willson, it does appear that the now scheduled upgrade is isolated to a section of Trethewey Terrace that is north of the Mansell Street intersection and that her property access driveway is some 50 or more metres south of that intersection. It also appears that the upgraded section is one of three ways of accessing Cr Willson's property by road. In other words, she is not solely reliant on that section of Trethewey Terrace to access her property.
35. While a map of the area appears to suggest that Trethewey Terrace is a thoroughfare road that links Penneshaw to Cape Willoughby Road via Wright Road, according to Mr Boardman and Cr Willson, Trethewey Terrace is not a through road. Mr Boardman stated:

Trethewey Terrace may well run south round to meet Wright Rd but Wright Rd terminates at this junction heading south towards Cape Willoughby Rd – the track that can be seen on the map is a private access road to the property that wraps right around the southern periphery of Penneshaw - it is not a trafficable road. No one living on Trethewey Tce would turn south out of driveways unless they were visiting someone to the south – all would drive north to the junction of Trethewey and Mansell, turn left and drive 120m on reasonable quality unsealed road to the junction of Pelican St and Mansell St, turning right to join Pelican Street -which is the entrance to the sealed road network.

36. It is also fair to say that since the driveway access to Cr Willson's property does front onto Trethewey Terrace and that if she so chooses to use the upgraded section of Trethewey Terrace, Cr Willson will benefit from the upgrade.
37. On the one hand, I accept that:
- Trethewey Tce, north of the Mansell Street intersection, is not the only way to access Cr Willson's property
  - the southern part of Trethewey Terrace terminates and becomes a private access road for which residents along Trethewey Terrace may only need to travel north rather than south
  - Cr Willson received emails from other ratepayers about the issue.

38. On the other hand, I note that:

- arguably there is a greater benefit to those with property on Trethewey Tce which is different to the benefit to other road users (which could possibly include, as raised by Cr Liu, a positive (although arguably marginal) impact on property values)
- Trethewey Terrace is not a main thoroughfare and on that basis is less likely to be significant to the population of Kangaroo Island as a whole
- presumably there are community members who want upgrades to their own roads prioritised (and on that basis those community members would not share the same interest in Trethewey Tce as Cr Willson)
- the relevant interests have to be held in common with all or a substantial proportion of ratepayers, electors or residents of Kangaroo Island as a whole, which is a large area
- the emails received from other ratepayers were, in effect, solicited by Cr Willson, which weakens her argument that there was an authentic community concern about the condition of Trethewey Terrace.

39. On balance, I am not satisfied that the 'substantial proportion' test in section 75(4) of the Local Government Act has been met.

*Did Cr Willson's interest conflict with the public interest?*

40. In considering whether Cr Willson's own interests conflicted with the public interest, I must firstly determine what the public's interest in this matter is.

41. In my view, the relevant public interest in relation to agenda item 13.2 was that road upgrades be appropriately prioritised on the basis of community need rather than individual interest. In my view, there was a conflict between that public interest and Cr Willson's indirect personal interest in the upgrade which might have led to a decision that was contrary to the public interest.

42. On that basis, I am satisfied that Cr Willson had an actual conflict of interest in relation to agenda item 13.2 for the purposes of section 75(2) of the Local Government Act.

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

43. For completeness, I have also considered whether Cr Willson had a perceived conflict of interest for the purposes of section 75 of the Local Government Act.

44. Pursuant to section 75A(1)(b) of the Local Government Act, a perceived conflict of interest arises where a council member could be reasonably taken, from the perspective of an impartial, fair-minded person, to have a conflict of interest in the matter. A perceived conflict of interest is a matter of perception and does not require the council member to have an actual conflict of interest.

45. In my view, the following facts would be imputed to the impartial, fair-minded person:

- Cr Willson owned property on Trethewey Terrace
- Cr Willson can access the relevant portion of Trethewey Terrace (but does not necessarily need to)
- Cr Willson had been raising the issue of Trethewey Terrace with the council for some time and clearly had a strong view about it
- other users of the road had expressed concerns to Cr Willson about the state of Trethewey Tce (albeit after prompting by Cr Willson).

46. I consider that an impartial, fair-minded person who was apprised of those facts could reasonably take Cr Willson to have had an actual conflict of interest in the matter. I consider, therefore, that Cr Willson 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 or perceived conflict of interest*

47. As Cr Willson did not inform the meeting of her indirect personal interest in agenda item 13.2, I consider that she did not comply with the requirement in section 75A(1) of the Local Government Act to deal with her actual and perceived interest in a transparent and accountable way (including the requirement in section 75A(2) to inform the meeting of her interest and how she proposed to deal with it).
48. I simply note that Cr Willson's interest would not have necessarily precluded her from participating in the meeting or voting. The fact of that interest did, however, at the very least, require that she disclose her ownership of property on Trethewey Terrace.
49. In failing to comply with the conflict of interest provisions under the Local Government Act, my view remains that Cr Willson breached Clause 3.13 of the Code of Conduct.

### **Opinion and Recommendation**

In light of the above, my final view is that Cr Willson breached the provisions of section 75A of the Local Government Act and Clause 3.13 of Part 3 of the Code of Conduct, and thereby acted in a manner that was unlawful within the meaning of section 25(1)(a) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act and section 263B(1)(b) of the Local Government Act that the council require Cr Willson to:

1. issue a public apology to the Council within two ordinary meetings of the council after receiving this report, for failing to appropriately deal with the conflict of interest at the meeting of 14 February 2017
2. undertake training in relation to conflicts of interest.

### **Final comment**

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 11 June 2018 on what steps have been taken to give effect to my recommendation/s 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 in the District Court.

As required by section 18(5) of the *Ombudsman Act 1972*, a copy of my report has been sent to the Principal Member of the Council.

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



Wayne Lines  
**SA OMBUDSMAN**

2 May 2018