

Amended Final Report
Full investigation - *Ombudsman Act 1972*

Complainant	Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>
Council member	Mayor Karen Redman
Council	Town of Gawler
Ombudsman reference	2018/06476
Date complaint received	19 June 2018
Issue	Whether Mayor Redman breached the conflict of interest provisions of the <i>Local Government Act 1999</i> and clause 3.13 of the Code of Conduct for Elected Members in relation to motion 2018:06:195 at the Special Council Meeting on 13 June 2018

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 1999* is taken to be an 'administrative act' for the purposes of the *Ombudsman Act 1972*.²

In order to protect the identity of the complainant, 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 complainant
- seeking a response from Mayor Redman
- seeking information from Deputy Mayor Tooley
- considering the minutes from the council meeting on 13 June 2018
- considering the *Local Government Act 1999* (the **Act**)
- considering the *Local Government Act (Local Government (General) Regulations 2013* (the **Regulations**)
- considering the Code of Conduct
- providing the council, the complainant and Mayor Redman with my provisional report for comment, and considering their responses
- preparing this report.

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

² *Local Government Act 1999* section 263A(4); *Ombudsman Act 1972* section 3.

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

The complainant provided a response to my provisional report on 31 August 2018. The complainant indicated that he was satisfied with my provisional report.

Mayor Redman provided a response to my provisional report on 31 August 2018. She indicated she had no further comments to make and she accepted my provisional findings. Mayor Redman also indicated her willingness to make a public apology immediately, prior to the release of my final report. However, I noted that given no objections had been received to my provisional report, my final report was likely to be finalised quickly. I therefore requested that Mayor Redman await the release of my final report.

As I have not received submissions objecting to my provisional report, this final report is in substantially the same terms as my provisional report.

Background

1. Mayor Redman was a Councillor at the Town of Gawler (**the council**) between 2010 and 2014 and has been the Mayor since 2014.
2. On 27 September 2016 the council nominated Mayor Redman to be a Board Member on the board of the Local Government Association (**LGA**). The meeting minutes of the council meeting on 27 September 2016 relevantly provide:

Item 8.7 - Local Government Association Board and President Nominations (CC16/175)

Moved by Deputy Mayor D Hughes
Seconded by Cr I Tooley
Motion No: 2016:09:359

That Council:

4. Notes the Local Government Association Board and President nominations information provided by the Local Government Association of SA.

5. Authorises CEO Henry Inat to complete the nomination forms with the nominees for the positions of Board Member and Deputy Board Member representing the Metropolitan Local Government Group.

6. Resolves that the following nominee be put forward LGA Board Member or Deputy Board Member:

Mayor Karen Redman

CARRIED UNANIMOUSLY

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. The LGA did not proceed with an election process for new Board Members as the vacancies were filled by the number of people nominated by their respective councils.
4. The sitting fee for a Board Member of the LGA is \$100 per meeting.
5. On 13 June 2018 Mayor Redman was appointed to the position of Vice President of the LGA. The LGA has one President and four Vice Presidents.
6. The sitting fee for a Vice President of the LGA is \$212.22 per meeting.
7. Mayor Redman described the process of her appointment as a Vice President of the LGA as follows:

On the 13th June 2018, there was a Special Board Meeting of the LGA Board specifically to deal with the most recent resignation of the Ex President Mayor Lorraine Rosenberg. The process entailed electing a new President (Cr Sue Clearihan who was at that time a Vice President) as per the relevant Constitution and then once that occurred, there was a need to elect a Vice President. I was nominated from the floor and I accepted the nomination. I then left the room and the matter was resolved by the Board accordingly.

I was advised immediately after this discussion that I had been elected to the Board as a Vice President. The meeting finished soon after. A media statement was sent out later that day at 4pm from the LGA. I advised the Elected member group of the Town of Gawler at 5.11 pm.

8. The media statement released by the LGA is titled 'Councillor Sue Clearihan appointed LGA President'.
9. The one page media announcement is centred on the new President and her focus for the future. However, the following line appears in the media statement:

Town of Gawler Mayor Karen Redman was appointed by the Board to fill the vacancy in the position of Vice President that was created by the appointment of Councillor Clearihan to the role of President.

10. Mayor Redman's email sent at 5.11pm on 13 June 2018 states:

Dear Members, Henry and Executive
A media statement was released from the LGA Board today after a Special Meeting was called in regard to the resignation of Mayor Rosenberg
For your information
Cheers
Karen

11. The email does not explicitly inform the elected members that Mayor Redman had been appointed as a Vice President of the LGA. However, the LGA media release is an attachment to the email. Whilst the title of the media release does not indicate that Mayor Redman had been appointed as a Vice President, this fact would be apparent to an email recipient who opened the attachment and read the media statement in full.
12. Another councillor at the council, Cr Hughes, used the reply all function to respond to the email. Cr Hughes' email, sent at 5.25pm, states:

Plus congratulations Mayor Redman on LGA Vice President role taking Councillor Clearihan vacancy.

13. A Special Council Meeting for the council commenced at 7.00pm on 13 June 2018. Mayor Redman advised my investigation that the Special Council Meeting was convened for the purpose of discussing the draft budget.
14. The meeting minutes record that Deputy Mayor Tooley brought a number of motions without notice. The final motion without notice is recorded thus:

9.11pm Cr D Hughes left the Conference Room
9.12pm Cr D Hughes returned the Conference Room

Moved by Deputy Mayor I Tooley
Seconded by Cr M Nicolson
Motion No: 2018:06:195

That staff investigate the value proposition of Councils contribution to the following bodies and provide a report to Council accordingly:

- Local Government Association
- RDA Barossa
- Gawler Business Development Group

LOST

The motion was Lost on the casting vote of the Mayor.

15. Mayor Redman did not declare any interest in the final motion without notice.
16. The Special Council Meeting was closed at 9.25pm.
17. On 19 June 2018 the complainant approached my Office. The complaint was that due to her new position as Vice President of the LGA, Mayor Redman should have declared a conflict of interest in the final motion without notice.

Evidence obtained by my investigation

18. Mayor Redman advised that council meetings are not recorded, so an audio recording of the meeting does not exist. Mayor Redman also advised that there are no other formal notes (such as handwritten notes taken by the minute-taker) as minutes are electronically typed in real time.
19. The meeting minutes of the Special Council Meeting on 13 June 2018 demonstrate that the Mayor voted on the final motion without notice. The minutes do not reflect whether the Mayor also participated in the debate.
20. The meeting minutes record that Cr Hughes returned to the room at 9.12pm and the meeting was closed at 9.25pm. There are no other motions for consideration between these times apart from the final motion without notice. It would therefore appear that there was some debate prior to the motion proceeding to a vote.
21. The final motion without notice was moved by Deputy Mayor Tooley. Deputy Mayor Tooley advised my investigation:
- he had come to the council meeting with the intention to put forward the following motion without notice: *'That council suspend any future payments to the Local Government Association (LGA), the Regional Development Association Barossa (RDAB) and the Gawler Business Development Group (GBDG) pending an investigation into the value for money and benefit, or otherwise, of such memberships.'*

- he had growing concern and dissatisfaction with the LGA and had previously circulated emails to this effect to the Mayor and elected members in the days leading up to the Special Council Meeting
- when he proposed the motion without notice with his original wording, Mayor Redman advised him that she could not accept the motion because the council may have binding and ongoing contracts or agreements with the organisations listed
- Mayor Redman consulted with the CEO, Mr Henry Inat, and then advised him that she could accept the motion if he modified the wording
- Mayor Redman assisted him with modifying the wording, which was as recorded in the meeting minutes, and he then moved the motion
- there was a period of debate with several contributors, including Mayor Redman
- as the mover of the motion, he spoke at the start and at the conclusion of the debate. In his commentary he made it clear that he believed the time had come for the council to seriously consider leaving the LGA and he believed many other councils were also considering leaving the LGA. He also gave examples of how he believed the council was not getting value for money from its \$33,000 annual LGA membership fee
- he wanted council staff to investigate and, if council staff reported back to the elected body that the council was not getting value for money, he wanted the council to leave the LGA
- debate on the motion concluded and the motion was put to a vote. Four members voted for the motion and four members voted against the motion
- Mayor Redman then declared her casting vote as the Mayor and the motion was lost
- the consequence was that there would be no investigation by council staff into the value of the council remaining a member of the LGA
- during the meeting, he knew that Mayor Redman was a Board Member of the LGA but he did not know at the time that she was a Vice President of the LGA
- he later learned that she was a Vice President of the LGA when he checked his emails.

Mayor Redman's response to my investigation

22. Mayor Redman relevantly told my investigation:

The complaint is that at the Special Council meeting on 13 June 2018, I participated in the debate on, and voted on, a motion for the Town of Gawler to investigate the benefits of remaining a member of three organisations, one of which was the Local Government Association (LGA). The complaint is that I may have had a conflict of interest in this motion which it is alleged I failed to declare, based on my position both as a Board Member of the LGA and a Vice President of the LGA.

...

My understanding of the Act is as follows:

A material conflict of interest, under section 73(1) of the Local Government Act 1999, exists where a person listed under section 73(1)(a)-(i), eg a Mayor, would gain a benefit or suffer a loss (whether directly or indirectly, pecuniary or non-pecuniary) depending on the outcome of the consideration of the matter.

The use of the word 'would' under section 73(1) indicates that there must be a clear link between the effects of the member's vote and that member then obtaining a benefit or loss. I think this link could be made out if my Council was deciding to leave the LGA, as it would be anticipated that I would probably not be able to remain for long as an LGA Board member.

Therefore, my understanding is that I would have a material conflict of interest within the meaning of section 73(1) of the LGA Act if the motion was *to leave the LGA* rather than investigate the value of membership.

If the link between my LGA Board membership and a motion to leave the LGA could be demonstrated to be more remote and not a clear link confirmed, then I would at least have an *actual or perceived* interest. If this was the case, then my understanding of the legislation is that I am exempt from this conflict provision because of the provisions in 75(3)(a)(v) of the Local Government Act ie that I gained the position on the Board as a direct result of being nominated by my Council.

Further, the policy reason behind this provision is (again my understanding) that, when the connection between the members interest (sic) and the motion is more tenuous, it should be taken as common knowledge that the member is in a position as a result of nomination by the Council, so the potential harm of private interest interfering with deliberation over the public good is mitigated.

Significantly, the motion that was debated and subject to this complaint, is only to investigate the value of membership of the LGA, effectively. An investigation into the value or otherwise of the LGA has no bearing on my interest as an office bearer and board member, as I understand the legislation. Therefore I do not believe I had a Material Conflict of Interest on the matter under investigation as I understand the legislation.

I also do not believe I had an Actual or Perceived Interest for the reasons given above as I understand the legislation.

I had no reason, given my understanding of the relevant sections of the Act, to declare an interest in the matter under discussion at the Special Council Meeting of 13th June 2018.

...

Other relevant Information

The Special Council meeting was convened for the purpose of discussing the draft budget. The motions without notice that Cr Tooley put forward were accepted unseen by me on the basis that they were related to budget discussions and in the spirit of these 'evolving' discussions on our draft budget. Deputy Mayor Tooley had asked to put forward a series of motions that he stated were related to the budget bid process during the draft budget discussions and I suggested he do this via motions without notice, which he happily accepted. I have previously discouraged this practice of motion without notice and instead encouraged motions on notice to ensure adequate time for all, including the wider community, to properly consider motions and their implications. Even so, the discussions had on these motions were directly after Council had noted the draft budget and, as I understand, directly related to the Draft Budget.

The final Budget was eventually endorsed at the end of June (a subsequent meeting). My understanding of the legislation has been that for these matters ie budget matters, I am exempt under the Local Government Act (Local Government (General) Regulations 2013) as follows, specifically 8AAA Sub Section (f):

8AAA—Conflicts of interest—ordinary business matters etc

(1) For the purposes of sections 74(6) and 75A(6) of the Act, the following matters are prescribed:

- (a) the preparation, discussion, conduct, consideration or determination of a review under section 12 of the Act;
- (b) the preparation, discussion, adoption or revision of a policy relating to allowances and benefits payable to members if the policy relates to allowances and benefits payable equally to each member (rather than allowances and benefits payable to particular members or particular office holders);
- (c) the preparation, discussion, adoption or alteration of a training and development policy under section 80A of the Act;
- (d) the preparation, discussion, adoption or amendment of a strategic management plan under section 122 of the Act;
- (e) the adoption or revision of an annual business plan;
- (f) the adoption or revision of a budget;

For the reasons provided above I did not declare a conflict for this particular matter.

Relevant law

23. Section 73 of the 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 employer 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.

(3) A member of a council who is a member, officer or employee of an agency or instrumentality of the Crown, will be regarded as having a material conflict of interest in a matter before the council if the matter directly concerns that agency or instrumentality but otherwise will not be regarded as having an interest in a matter by virtue of being a member, officer or employee of the agency or instrumentality.

(4) In this section—

agency or instrumentality of the Crown includes—

- (a) an administrative unit of the Public Service;
- (b) a body corporate comprised of, or including or having a governing body comprised of or including, a Minister or Ministers of the Crown or a person or persons appointed by the Governor or a Minister or other agency or instrumentality of the Crown.

24. Section 74 of the 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.

25. Section 75 of the Act defines the circumstances in which an elected member has a 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.

26. Section 75A of the Act sets out what an elected member is required to do if they have a material 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.

27. Regulation 8AAA relevantly provides:

8AAA—Conflicts of interest—ordinary business matters etc

(1) For the purposes of sections 74(6) and 75A(6) of the Act, the following matters are prescribed:

...

(f) the adoption or revision of a budget;

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

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.

Whether Mayor Redman breached the conflict of interest provisions of the *Local Government Act 1999* and clause 3.13 of the Code of Conduct for Elected Members in relation to motion 2018:06:195 at the Special Council Meeting on 13 June 2018

29. I have given consideration to whether Mayor Redman had a material, actual or perceived conflict of interest in relation to motion 2018:06:195 at the Special Council Meeting on 13 June 2018 (**the final motion without notice**).

Section 73 - Material conflict of interest

30. The first issue I have considered is whether Mayor Redman had a material conflict of interest in the final motion without notice, for the purposes of section 73(1) of the Act.
31. To determine whether Mayor Redman had a material conflict of interest, I must be satisfied that she had a relevant interest in a matter in relation to the final motion without notice. That is, I must be satisfied that either she, or an associated person as defined by section 73(1) of the Act, would receive a benefit or suffer a detriment of the type described in section 73(1): either a direct or indirect personal or pecuniary benefit or detriment depending on the outcome of the consideration of the matter at the meeting.
32. Such a benefit or detriment should not be shared with all or a substantial proportion of the ratepayers, electors or residents of the council area.⁵
33. I note that the final motion without notice was lost. However, if the final motion without notice had been carried, the consequence would have been that the council administration would have investigated the value proposition of the council's contribution to three bodies, one of which was the LGA. The council administration would then have reported back to the elected body.
34. The District Court of South Australia has emphasised that the legislation is confined to the type of interest referred to in section 73(1) and not to conflicts of interest at large.⁶ Although the section has since been amended, I consider that the remarks of the District Court are relevant.
35. Further, the District Court said that the question of whether a council's resolution gives rise to a section 73(1) interest must be determined by considering the wording of the motion.⁷ In addition, the test is whether the council member 'would' receive a benefit or suffer a detriment. Due to legislative changes, the test no longer includes whether the council member 'would have a reasonable expectation' of receiving a benefit or suffering a detriment.
36. 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 that member then obtaining a benefit or suffering a loss.

⁵ *Local Government Act 1999* section 73(2).

⁶ *Petrovski v Dolling* [2013] SADC 27 at [41].

⁷ *Petrovski v Dolling* [2013] SADC 27 at [34].

37. I do not consider that Mayor Redman, nor any other classes of person described under section 73(1), would have obtained a benefit or suffered a detriment if the motion without notice had been carried or because the motion without notice was lost. If the motion had been carried and the council administration had investigated and recommended to the elected body that the council cease membership of the LGA, such recommendation would need to be effected by a separate vote of the Council. I consider that such connection with Mayor Redman is tenuous and does not meet the threshold of a clear link between her casting vote and obtaining a benefit or suffering a loss.
38. In my view, Mayor Redman did not have a material conflict of interest in the final motion without notice.

Section 75A(1)(a) - Actual conflict of interest

39. The second issue I have considered is whether Mayor Redman had an actual conflict of interest in the final motion without notice, for the purpose of section 75 of the Act.
40. Section 75(2) defines an actual conflict of interest as being a conflict between a council member's interest (whether that interest be direct, indirect, personal or pecuniary) and the public interest that might lead to a decision that is contrary to the public interest.
41. I consider that, in these particular circumstances, the public interest was in the decision being made in the best interests of the community having regard to the appropriate use of public money, rather than on the basis of an individual's interest.
42. I must consider whether Mayor Redman had a relevant interest, in light of all the information before me.
43. I consider that Mayor Redman had both a personal and a pecuniary interest in remaining both a Board Member of the LGA and a Vice President of the LGA. I note that Board Members are entitled to a sitting fee and Vice Presidents are entitled to a sitting fee more than double that of a Board Member. I also consider that Mayor Redman had a personal interest given the position of Vice President of the LGA is position of some prestige.
44. A possible outcome of the final motion without notice being passed was that the council administration would investigate the benefits of the council remaining a member of the LGA and would recommend that the Council should consider leaving the LGA. If the Council were to vote to leave the LGA, Mayor Redman would not be able to continue being either a Board Member or a Vice President and thus would no longer receive sitting fees.
45. Mayor Redman therefore had an indirect pecuniary interest in the outcome of the final motion without notice.

Does section 75(3)(a)(v) of the Act apply?

46. Section 75(3)(a)(v) of the Act provides that a member of a council will not be regarded as having a conflict of interest by reason only of the member having been nominated or appointed as a member of a board, if the member was nominated for appointment by a council.
47. I accept that Mayor Redman was nominated to be a Board Member of the LGA by the Council at the council meeting on 27 September 2016 and therefore section

75(3)(a)(v) applies such that she did not have a conflict of interest by reason of being a Board Member of the LGA.

48. However, section 75(3)(a)(v) does not apply to Mayor Redman being appointed to be a Vice President of the LGA. Mayor Redman has indicated that she was appointed to be a Vice President by the LGA, not by the Council.
49. Therefore I consider that Mayor Redman had an interest in remaining in the position of Vice President of the LGA.
50. I comment that Mayor Redman appears to have genuinely believed that section 75(3)(a)(v) of the Act was applicable and she was therefore exempted from having to declare a conflict.

Does Regulation 8AAA(1)(f) apply?

51. Section 75A(1) of the Act provides that if a member has an actual or perceived conflict of interest in a matter, the member must deal with the conflict of interest in a transparent and accountable way.
52. Section 75A(6) of the Act provides that section 75A does not apply to a matter of ordinary business of the council of a kind prescribed by regulation for the purposes of this section.
53. Regulation 8AAA(1)(f) provides that the adoption or revision of a budget is a matter prescribed for the purposes of section 75A.
54. Therefore if the final motion without notice could be characterised as 'the adoption or revision of a budget', then section 75A would not apply and Mayor Redman could not be said to have breached the Act by failing to declare an actual or perceived conflict of interest.
55. I do not consider that the final motion without notice could be characterised as the adoption or revision of a budget. The fact that a Special Council Meeting was convened for the purposes of discussing a *draft* budget does not necessarily mean that every motion at the Special Council Meeting is prescribed for the purposes of regulation 8AAA.
56. The final motion without notice proposed that the council staff investigate the value of the council remaining a member of three organisations. This is not the adoption or revision of a budget.
57. Therefore in my view regulation 8AAA(1)(f) is not applicable in this case.

Did Mayor Redman's interest conflict with the public interest?

58. Section 75 of the Act provides that a conflict of interest is a conflict between a member's interest and the public interest that might lead to a decision that is contrary to the public interest.
59. It is not necessary to demonstrate that a decision was actually made by the Council that was contrary to the public interest.
60. I consider that Mayor Redman's interest did conflict with the public interest. Mayor Redman's interest was in remaining as Vice President of the LGA and the public interest was that the Council make a decision as to the Council's future with the LGA, in possession of all of the relevant facts, and that the decision made by the council

was in the interest of the council and the community as a whole, having regard to the appropriate expenditure of public money.

61. My investigation is disadvantaged by not having access to an audio recording of the Special Council Meeting on 13 June 2018. Evidence obtained from an audio recording demonstrating the precise words used during the debate on a motion, and who spoke those words, can be enlightening evidence that would assist me to form a view. However, such evidence does not exist in this case. I comment that the council may wish to consider making an audio recording of council meetings in the future.
62. The Act does not provide that members with an actual or perceived conflict of interest must abstain from voting and leave the chamber. The purpose of the Act is to ensure transparency by ensuring that members publicly declare any actual or perceived conflict of interest.
63. After declaring an actual conflict (that is, a conflict that *might* lead to a decision being made that is not in the public interest), if a member is able to provide an explanation of how the member will ensure that the final decision made will be in the public interest, the member may not be required to immediately leave the chamber. For example, depending on the circumstances and the nature of the conflict, the member may:
- participate in the debate, but leave the chamber prior to the vote taking place
 - refrain from participating in the debate, but vote
 - both participate in the debate and vote.
64. For example, if a member declares an actual conflict of interest, appropriately explains how he or she intends to deal with it, deals with the conflict in an appropriate and transparent way, and proceeds to vote in a manner that is contrary to their personal interest, it is unlikely that the member would find themselves in breach of the Act or the Code.
65. Given my view that Mayor Redman's interest was in conflict with the public interest, I must now consider whether this was a conflict that might lead to a decision that is contrary to the public interest.
66. In my view, this was such a conflict. Given Mayor Redman's personal and pecuniary interest in the outcome of the motion without notice, I consider that there was a danger that Mayor Redman may vote in a manner that is consistent with her own interest, rather than a manner that is consistent with the public interest.
67. I wish to emphasise that I am not concluding that Mayor Redman did subjectively choose to vote in her own interest. The test is whether the undeclared conflict *might* lead to a decision that is contrary to the public interest. Given Mayor Redman's position of power, in which she is able to provide the casting vote and thus finally determine the outcome of a motion, I consider that there was a real danger that the outcome of the vote *could potentially* have led to a decision that was contrary to the public interest, regardless of how Mayor Redman actually voted.
68. In this case, when the final motion without notice was moved, I consider that Mayor Redman had a conflict between her own interest and the public interest that might lead to a decision that is contrary to the public interest. Mayor Redman should therefore have declared that she had an interest in the motion and explained how she intended to deal with that interest.
69. In all the circumstances, my view is that Mayor Redman had an actual conflict of interest in the final motion without notice and breached section 75A(2) of the Act by failing to act in a transparent and accountable manner.

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

70. For completeness I have considered whether Mayor Redman had a perceived conflict of interest in the final motion without notice, for the purpose of section 75 of the Act.
71. A perceived conflict of interest, under section 75A(1)(b) of the 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. A perceived conflict of interest is a matter of perception and does not require the council member to have an actual conflict of interest.
72. Courts have generally imbued the fair-minded observer with detailed knowledge. The fair-minded person must be properly informed as to the nature of the proceedings and the matters in issue.⁸ The fair-minded person must be aware of, and take account of, the circumstances of the particular case at hand. The hypothetical fair-minded person is not unduly sensitive or suspicious.⁹
73. I have considered the knowledge that the fair-minded person could be expected to have regarding Mayor Redman's interest in the final motion without notice. Given the LGA had released a media statement at 4.00pm and the Special Council Meeting convened at 7.00pm the same day, I consider that the fair-minded person could be expected to know that Mayor Redman was a Vice President of the LGA. I also consider that the fair-minded person could be expected to know that Mayor Redman would receive a sitting fee of \$212.22 per meeting of the LGA.
74. In my view, a fair-minded person in possession of all of the information that was publicly available and relevant could reasonably perceive that Mayor Redman had a conflict of interest in relation to the final motion without notice, due to having an indirect pecuniary interest that conflicted with the public interest and might influence her decision.
75. Section 75A(1) of the Act requires a council member who has a perceived conflict of interest to deal with that conflict of interest in a transparent and accountable way. At a minimum, the council member must inform the meeting of their perceived interest in the matter.¹⁰
76. Mayor Redman did not declare any conflict of interest in relation to the final motion without notice.
77. Therefore it is my view that Mayor Redman had a perceived conflict of interest in the final motion without notice and breached section 75A(2) of the Act by failing to act in a transparent and accountable manner.

Conclusion

In light of the above, I consider that Mayor Redman breached section 75A(1) of the Act and clause 3.13 of Part 3 of the Code of Conduct by failing to declare an actual or perceived conflict of interest and deal with that conflict of interest in a transparent and accountable way. As section 63 of the Act requires compliance with the Code of Conduct, I also consider that Mayor Redman acted in a manner that was unlawful within the meaning of section 25(1)(a) of the Ombudsman Act.

⁸ *Singh v Minister for Immigration and Border Protection* [2017] FCCA 1706 at [65].

⁹ *Johnson v Johnson* (2000) 201 CLR 488 at [53].

¹⁰ *Local Government Act 1999* section 75A(2).

Recommendation

To remedy this error, I recommend under section 25(2) of the Ombudsman Act and section 263B(1)(b) of the *Local Government Act 1999* that Mayor Redman be required to provide a verbal apology at a public council meeting.

Final comment

I now report Mayor Redman's breach of the Code of Conduct to the principal officer of the council, as required by section 18(5) of the Ombudsman Act.

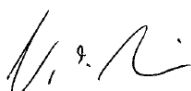
In accordance with Part 3 of the Code of Conduct for Council Members, this report must be provided to a public meeting of the council within two ordinary meetings of the council receiving my report.

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by 9 November 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.

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



Wayne Lines
SA OMBUDSMAN

4 September 2018