

Report
Full investigation - *Ombudsman Act 1972*

Date complaint received	28 October 2011
Complainant	SA Ombudsman
Agency	District Council of Barunga West (the council)
Issues	<p>1. Two members of the council breached the conflict of interest provisions of the <i>Local Government Act 1999</i> in relation to two notices of motion at the council meeting of 11 October 2011</p> <p>2. The mayor of the council breached the conflict of interest provisions of the <i>Local Government Act 1999</i> in relation to two notices of motion at the council meeting of 11 October 2011</p>

Jurisdiction

This investigation is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

The original complaint attracted the protections of the *Whistleblowers Protection Act 1993*. I referred the second issue to the Anti-Corruption Branch of the South Australia Police pursuant to my obligations under section 5(5) of that Act. The Anti-Corruption Branch advised on 3 January 2012 that there was not sufficient evidence to warrant a criminal investigation.

I exercised my 'own initiative' powers of investigation under section 13(2) of the Ombudsman Act to investigate the first and second issue, in order to protect the identity of the original complainant under the Whistleblowers Protection Act.

Investigation

My investigation has comprised:

- assessing the information provided by the original complainant
- seeking and considering a written response from the council's Chief Executive Officer, Mr Nigel Hand (**the CEO**)
- separately interviewing the CEO and the Mayor of the council, Mr Dean Dolling (**the mayor**)
- obtaining documents from the Office of State/Local Government Relations, which included legal advice from the Crown Solicitor's Office
- considering the provisions of the *Local Government Act 1999*
- providing the council, the CEO and the mayor with my provisional report

- meeting with the mayor and considering his response to my provisional report
- receiving and considering the CEO's response to my provisional report
- receiving and considering the council's response to my provisional report
- preparing this report.

Response to my provisional report and comments

On 13 January 2012, I provided the mayor and the council with my provisional report in relation to the two issues in my investigation.

At a meeting with my office on 25 January 2012, the mayor expressed regret about his actions; however, he reiterated his view that he did not have a conflict of interest in relation to the relevant motions at the council's second meeting. He considered the matter was only of a procedural nature. He further commented that the reason why he sought to rescind the decision from the first meeting at the second meeting (Item 11.2) and put forward a different proposal, was that the Fishermans Bay development is a major project and it is healthy to have two or three minds from the council considering the issues, rather than just one. Further, he considered that there should be at least one member of council involved in dealing with the Fishermans Bay development, as it is councillors who are responsible to the ratepayers. I have amended the mayor's view below in the fourth dot point of paragraph 25 to reflect this.

The CEO responded individually by letter dated 31 January 2012 that he did not wish to comment on my foreshadowed recommendations in my provisional report, as these are the domain of the council. He also did not wish to respond to the issue concerning communications with the mayor from the Office of State/Local Government Relations.

Instead, the CEO commented on two points. The first was in relation to the first meeting, set out below in the third dot point of paragraph 25. The CEO provided my office with a copy of his report to the council for the first meeting, which reflects that the mayor communicated his wish to the CEO for elected member involvement in the council's discussions about Fishermans Bay. This wish appears to be reflected in the recommendation made by the CEO to the council:

For members consideration of assistance for the CEO at meetings involving Fisherman's Bay Management.

The CEO commented that he raised his concerns with the mayor at the time about his conflict of interest regarding Fishermans Bay Management, but the mayor had replied to him that 'it is about the procedure, not the decision'. I have not sought the mayor's response to this, as these comments are consistent with the view the mayor has expressed to my office.

The second was in relation to the fourth dot point of paragraph 25, in which I commented in my provisional report that the mayor did not wish other council staff to attend discussions with Fishermans Bay Management. The CEO responded that neither him nor the mayor have at any time sought to use staff in these discussions. I accept this comment, and I have amended the fourth dot point to reflect the CEO's views (and also those of the mayor which I have outlined above).

The council responded by letter dated 31 January 2012 (through the CEO) that after a confidential Special Meeting of the council on 24 January 2012 (which the mayor did not attend), the council resolved to respond to my foreshadowed recommendations in paragraphs 42 and 43 of my provisional report as follows:

- Rather than have the resolution or decision of the second meeting (Item 11.2) annulled in the District Court under section 74(5) of the Local Government Act, a less resource

intensive option would be for the council to rescind the decision. This can occur at the next council general meeting on 14 February 2012. Further, submissions to the Development Assessment Commission relating to Fishermans Bay Management freeholding application (which gave rise to the conflict of interest issue) are being finalised.

- In response to my foreshadowed recommendation at paragraph 43 that the council or the Minister for State/Local Government Relations lodge a complaint against the mayor to the District Court under section 263 and 264 of the Local Government Act, the council is not 'a public official' for the purposes of section 264 and is legally incapable of doing so.
- The council does not support any recommendation for such a complaint to be lodged.
- The council supports a proposal for the mayor to be required to attend an appropriate training course in relation to the conflict of interest provisions of the Local Government Act.
- Councillors Rooney, Weedon and Smith have not responded to my provisional report.

Background

1. Fishermans Bay is a private leasehold area consisting of 405 shack sites. It is owned by Fishermans Bay Management Pty Ltd (**FBM**) whose shareholders and directors are occupiers of the shack sites.
2. Ms Merle Hosking and her husband are directors and each is a 5% shareholder of FBM. I understand that Ms Hosking acquired her share in the early 1970s. In 1978, Ms Hosking's brother, Mr Dean Dolling, became a member of the council. Mr Dolling became the chairperson of the council in 2003.
3. By virtue of the provisions of section 51(1)(b) of the Local Government Act, I understand that the council has rebadged the chairperson's title to 'mayor'.
4. I am informed that in 1999, FBM lodged an application with the council to subdivide the land for the purpose of offering the occupiers of the shack sites the opportunity to purchase the freehold to the land. In February 2000, the council approved the subdivision (DA 344/D006/99). In the following years, the council considered several matters relating to Fishermans Bay and FBM, including extensions and conditions of the development approval, sewage treatment issues and an effluent disposal system.
5. During these years, I understand that the CEO and the mayor often discussed the question of whether the mayor had a conflict of interest under the Local Government Act when the council considered matters relating to FBM. It was the CEO's view that the mayor had such a conflict, and it was the mayor's view that he did not.

Conflict of interest provisions - Local Government Act 1999

6. Section 73(1) of the Local Government Act provides that a member of the council has an 'interest' in a matter being considered by 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).

7. A person is defined to be 'closely associated' with a member of council if *inter alia* 'that person is a body corporate of which the member is a director or a member of the governing body' or that person is a 'relative' of the council member (section 73(2)). The term 'relative' is further defined in section 4 to include a brother or sister - it does not extend to 'in laws'.
8. Section 74(1) of the Act provides that a member of a council who has an 'interest' must disclose that interest to the council. Further, section 74(4) provides that the 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.
9. Section 74(5) states:
- (5) The fact that a member or members of a council have failed to comply with this section in relation to a particular matter does not, of itself, invalidate a resolution or decision on that matter but, if it appears that the non-compliance may have had a decisive influence on the passing of the resolution or the making of the decision, the District Court may, on the application of the council, the Minister or a person affected by the resolution or decision, annul the resolution or decision and make such ancillary or consequential orders as it thinks fit.
10. Section 263 and 264 of the Local Government Act provide:
- 263—Grounds of complaint**
- (1) There are grounds for complaint under this Part against a member of a council if the member has contravened or failed to comply with section 74.
 - (2) Nothing in this Part prevents a person from making a complaint to the Ombudsman at any time under the *Ombudsman Act 1972*.
- 264—Complaints**
- (1) A public official or any other person may lodge with the District Court a complaint setting out the matters that are alleged to constitute the grounds for complaint against a member of a council under this Part.
 - (2) However, a person other than a public official cannot lodge a complaint without the written approval of a legally qualified person appointed by the Minister after consultation with the LGA.
 - (3) An apparently genuine document purporting to be an approval under subsection (2) will be accepted in any legal proceedings, in the absence of proof to the contrary, as proof that the approval has been given.
 - (4) The complaint must be lodged within a time prescribed by the rules of court.

265—Hearing by District Court

- (1) On the lodging of a complaint, the District Court may conduct a hearing for the purpose of determining whether the matters alleged in the complaint constitute grounds for action against the member of the council under this Part.
- (2) Without limiting the usual powers of the District Court, the District Court may during the hearing—
 - (a) allow an adjournment to enable the Ombudsman or another person to investigate or further investigate matters to which the complaint relates; and
 - (b) allow the modification of the complaint or additional allegations to be included in the complaint subject to any conditions as to adjournment and notice to parties and other conditions that the District Court may think fit to impose.

Legal advice from Norman Waterhouse Lawyers

11. In December 2004, the CEO requested a legal opinion from Norman Waterhouse Lawyers about the matter. It appears that the opinion was sought on the basis of the mayor's relationship to his brother in law, Ms Hosking's husband. The lawyers concluded that the mayor did not have a conflict of interest, as the definition of 'closely associated' and 'relative' in section 73(2) and section 4 of the Act did not cover 'in laws'. Further, the lawyers considered that FBM was not a person with whom the mayor was 'closely associated', as he was not a member or director of the governing body of FBM.
12. The council obtained a further opinion from Norman Waterhouse Lawyers in May 2006, with the agreement of the mayor. This opinion included consideration of the mayor's relationship to Ms Hosking. The opinion suggested that while Ms Hosking was a 'close associate' and 'relative' of the mayor for the purposes of the Local Government Act, there was no conflict of interest for the mayor when the council decided matters which impacted on FBM. This was because it was FBM, as distinct from Ms Hosking, who might receive a benefit or suffer a detriment as a result of a council decision within the meaning of section 73(1) of the Act.
13. The opinion did comment, however, that the mayor should nonetheless carefully consider the question of perception, as it was likely that the community would view him as having a conflict because of his sister's and brother in law's connection with FBM.
14. I understand that during this time, the mayor continued to vote in council meetings in relation to matters concerning FBM.

Legal advice from the Crown Solicitor's Office

15. In early 2007 as a result of a whistleblower disclosure to the Minister for State/Local Government Relations about the mayor's alleged conflict of interest, an investigation was conducted by the Government Investigations Unit. Based on this investigation, advice was subsequently provided by the Crown Solicitor. The Crown Solicitor found that the mayor was conflicted when he voted on the council in relation to matters concerning FBM.

Letter from the Office of State/Local Government Relations

16. Accordingly, by letter dated 9 November 2007, the Executive Director of Community and Local Government Relations from the Office of State/Local Government Relations then wrote to the mayor. He advised that Ms Hosking had a reasonable expectation of receiving an indirect pecuniary benefit as a result of matters concerning FBM being decided in a particular way by the council, for the purposes of section 73(1) of the Local Government Act. This benefit was an increase in the value of her shareholding in FBM;

and it was not a benefit shared with a substantial portion of ratepayers within the meaning of section 73(1).

17. The Executive Director concluded and informed the mayor:

... based on the evidence obtained, I consider that you have a conflict of interest with respect to matters concerning FBM. You should not have taken part in discussions and voting with respect to those matters.

After due consideration, I have decided against instructing the Crown Solicitor to prepare a complaint to the District Court pursuant to sections 263 and 264 of the Act. In making this decision, I note that many of the decisions concerning FBM occurred several years ago. Furthermore, I note that since 9 May 2006, you have been relying on the legal advice [from Norman Waterhouse Lawyers] that you obtained, and you were not to know that the advice was incorrect.

Having said that, I put you on notice that any further contravention of or failure to comply with section 74 of the Act may result in a complaint being lodged in the District Court. With that in mind, in particular, I warn you that you must avoid taking part in discussions and voting in matters relating to FBM that arise at council meetings. You must excuse yourself from the meeting and, while discussion of FBM matters is taking place, you must not be in or in the close vicinity of, the room in which the matter is being discussed.

18. I understand that from that time until October 2011, the mayor declared a conflict of interest before meetings of the council which were to consider matters relating to FBM.

The first meeting - 13 September 2011

19. Prior to consideration of relevant agenda items at its meeting on 13 September 2011 (**the first meeting**), the council moved into confidence under section 90(2) of the Local Government Act in relation to Item 14.4.3. The minutes record that this item dealt with 'Fisherman's Bay Management (FBM) Free-holding application'.
20. The minutes of that meeting further record that the mayor declared an interest under section 73 of the Local Government Act, 'as his sister is a Director of Fishermans Bay Management, the applicant for Development DA 344/D006/99 and 344/D007/10'. The mayor left the meeting.
21. It is also written in the minutes that Councillors Weedon, Rooney and Smith also declared an interest, as they were members of the council's Development Assessment Panel (**the DAP**) 'which may need to consider DA 344/D006/99 and 344/D007/10 [which concerned FBM] in the future'. These councillors also left the meeting.
22. The following motion was moved by Councillor Kerley, seconded by Councillor Rowlands, and carried at the first meeting:

That the CEO be empowered to work through the Fisherman's Bay free-holding land division and seawall levee matters with the assistance of the planning consultants, lawyers and staff as required.

The second meeting - 11 October 2011

23. At the next council meeting of 11 October 2011 (**the second meeting**), the mayor put forward two Notices of Motion at item 11. The agenda dated 6 October 2011 stated:

Motion with Notice

Any members may submit a Notice of Motion to the Council for consideration by the members. In accordance with the provisions of the Local Government Act and

Regulations this must be forwarded to the Chief Executive Officer at least five clear days prior to the meeting, to enable it to be included with the Agenda.

11.1 Mayor Dolling

That the following motion from the Council's meeting of 13th September 2011 be rescinded:

"That the CEO be empowered to work through the Fisherman's Bay free holding land division and seawall levee matters with the assistance of the planning consultants, lawyers and staff as required."

11.2 Mayor Dolling

"That the Chief Executive Officer is accompanied by at least one councillor, at all discussions with Fishermans Bay Management and associated lawyers, regarding the free holding negotiations of Fishermans Bay."

24. The minutes of the second meeting record that the mayor and Councillors Rooney and Smith did not declare an interest in relation to Items 11.1 and 11.2, entitled 'Fishermans Bay Free-holding and Levee'. (Councillor Weedon was absent from the meeting.) The minutes show that:

- Cr Rowlands raised a point of order that the mayor had a conflict of interest, and the mayor ruled against this point of order
- Cr Rowlands objected and moved that 'The two motions placed on notice by Mayor Dolling are unacceptable and be withdrawn as they are in breach of the conflict of interest provisions in the Local Government Act Sections 73 and Section 74'. Councillor Kerley seconded the motion and this motion was not accepted by the mayor.
- the mayor then moved the other motion that the motion from the first meeting 'That the CEO be empowered to work through the Fisherman's Bay Free-holding land division and seawall levee matters with the assistance of the planning consultants, lawyers and staff as required', be rescinded. This was seconded by Councillor Smith, and carried 4 votes to 3
- Mayor Dolling then moved the motion which was seconded by Councillor Rooney 'That the Chief Executive Officer is accompanied by at least one councillor, at all discussions with Fishermans Bay management and associated lawyers, regarding the free-holding negotiations of Fishermans Bay'. This was also carried by 4 votes to 3.

My investigation

25. In the earlier stages of my investigation, the mayor contacted my office and arranged to meet with my deputy. At that meeting, the mayor stated in summary that:

- the council received two legal opinions from law firms about conflict of interest issues relating to him and FBM. One suggested that he did not have conflict in such matters under the Local Government Act, and the other said that he did because of his sister was a director of FBM. He recalled that Mr Michael Kelledy (of Wallmans Lawyers) gave him advice about perceptions of conflict of interest and that he should be mindful of this
- he did not seek any advice, including legal advice prior to his actions at the second meeting
- at the first meeting in relation to Item 14.4.3, he declared an interest because he noted that the item concerned FBM. He did this without reading the

recommendation. He would not have declared a conflict of interest had he read the recommendation, because the item only dealt with a 'procedural' matter - namely who from the council would deal with FBM. The item did not deal with the actual negotiations with FBM

- he wanted a member of the council (not himself) to attend FBM negotiations with the CEO, as Fishermans Bay is a major project and it is council members who are responsible to the ratepayers. Further, it is healthy to have two or three minds from the council considering the issues, rather than just one. This is why he moved the motion to rescind the first meeting's resolution at Item 14.43 and moved a new motion to have a councillor attend FBM negotiations with the CEO.
 - he did not have a conflict of interest in relation to the matters at the second meeting, and that is his business in any event. The item related to procedural matters with FBM, and not matters of substance.
26. I comment that at the meeting with my deputy, the mayor did not mention any advice from the Crown Solicitor's Office, nor the letter of warning that he received from the Executive Director in the Office of State/Local Government Relations which I have outlined above.
27. By letter dated 6 December 2011, the CEO provided a brief response to my office and arranged to meet with my deputy in relation to my investigation. The CEO confirmed the events at the second meeting. He also advised that at the second meeting, he informed council members (including Councillors Rooney and Smith) that the Minister of Planning had agreed to appoint the Development Assessment Commission as the relevant planning authority to consider development applications in relation to FBM. The DAP would therefore no longer have a role FBM development matters.
28. On 15 December 2011, my deputy met with the CEO and received copies of relevant documentation. This documentation led my office to understand that there had been an investigation by the Government Investigations Unit in relation to the mayor's conflict of interest issues.
29. My office then obtained documentation from the Office of State/Local Government Relations, including copies of the advice from the Crown Solicitor's Office about the matter and the letter from the Executive Director to the mayor which I have outlined in paragraphs 15 and 16 above.

Whether Councillor Rooney's and Smith's involvement in Items 11.1 and 11.2 at the second meeting was in breach of the conflict of interest provisions of the Local Government Act

30. I accept the CEO's advice that by the time of the second meeting, the DAP was no longer involved in Fishermans Bay development matters and that the Development Assessment Commission had become the relevant planning authority. Without commenting on whether these councillors and (Councillor Weedon) had an interest for the purposes of section 73(1) of the Local Government Act in relation to the first meeting, I do not consider that Councillors Rooney and Smith had an interest which required disclosure at the second meeting in relation to Items 11.1 or 11.2 at the second meeting.

Opinion

31. In my opinion, in not declaring a conflict of interest at the second meeting in respect of Items 11.1 and 11.2, Councillors Rooney and Smith did not act in a way which was

unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

Whether the mayor's involvement in Items 11.1 and 11.2 at the second meeting was in breach of the conflict of interest provisions of the Local Government Act

32. I do not agree with the opinion of Norman Waterhouse Lawyers of May 2006 which I have summarised in paragraph 12 above. I consider that the mayor has at least a potential conflict of interest where the council considers matters relating to FBM, by virtue of his relationship with Ms Hosking.
33. Whether the mayor had an interest in Items 11.1 and 11.2 at the second meeting under section 73(1) of the Local Government Act depends on whether Ms Hosking (as a person 'closely associated' with the mayor) would have had a reasonable expectation of receiving a direct or indirect pecuniary or non-pecuniary benefit if the items were decided in a particular manner.
34. In my view, the mayor did have a conflict of interest. I consider that the mayor's sister as a shareholder and director of FBM, stood to gain an indirect pecuniary or non-pecuniary benefit in relation to the outcomes of the motions in Items 11.1 and 11.2 (the latter in particular). At the very least, it seems to me that the motions were concerned to facilitate discussions with FBM and progress the FBM freeholding process. Indirectly, Ms Hosking stood to benefit from this. This was not a benefit shared with a substantial portion of ratepayers within the meaning of section 73(1).
35. As such, the mayor should have disclosed his interest and absented himself from the second meeting under section 74 of the Act, as he did before Item 14.4.3 at the first meeting. Further, the mayor should not have proposed the notices of motion, taken part in the discussions, or voted in relation to the items - as required by section 74(4) of the Act.

Opinion

36. In this regard, I consider that the mayor's actions were contrary to law, within the meaning of section 25(1)(a) of the Ombudsman Act.

Aggravating features of the mayor's conduct

37. While I consider that the mayor's breach of section 74 may be at the lower order, in my opinion, there are distinct aggravating features in relation to his conduct.
38. One aggravating feature arises in light of the Crown Solicitor's advice and the written warning from the Executive Director of Community and Local Government Relations from the Office of State/Local Government Relations which I have referred to above. The mayor effectively ignored the warning:

... you must avoid taking part in discussions and voting in matters relating to FBM that arise at council meetings. You must excuse yourself from the meeting and, while discussion of FBM matters is taking place, you must not be in or in the close vicinity of, the room in which the matter is being discussed.
39. Despite this and the Executive Director putting the mayor on notice that any further contravention of section 74 of the Local Government Act may result in a complaint being lodged against him with the District Court (paragraph 17 above), the mayor did

not seek any advice before the second meeting (especially legal advice) before he proposed and voted on the notices of motion.

40. A further aggravating feature is that in his conduct in relation to items 11.1 and 11.2, the mayor breached each of the provisions of section 74(1) and (4) of the Local Government Act and not only voted on a matter in which he had a conflict of interest, but also put forward the notices of motion in relation to the matter. With this and the voting results at 4-3 for both items, the mayor also effectively achieved a reversal of a council decision which concerned the very matter in which he had a conflict of interest.

Opinion

41. In my opinion, the mayor is either unable or unwilling to appreciate his conflict of interest in matters concerning the FBM. In view of this and the aggravated features of the mayor's conduct, I consider that the mayor acted in breach of his statutory duty to act 'with reasonable care and diligence in the performance and discharge of official functions and duties' within the meaning of section 62(2) of the Local Government Act. In this regard, the mayor acted contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

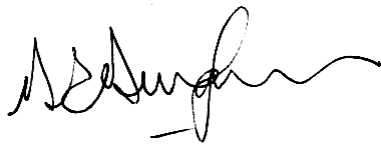
Recommendations

42. I consider that the mayor's 'non-compliance' with section 74(1) and section 74(4)(a)-(d) of the Local Government Act had a 'decisive influence on the passing of the resolution or the making of the decision' in relation to items 11.1 and 11.2, within the meaning of section 75(5) of the Act. I have reached this view based on:
- the mayor's failure to declare an interest under section 74(1)
 - the fact that it was the mayor who proposed the notices of motion in Items 11.1 and 11.2
 - the fact that the outcome of the voting in relation to both items was 4-3.¹
43. The council's proposed option of rescinding the decision from the first meeting is an appropriate step to remedy the mayor's failure to comply. The council has advised that steps are already underway to ensure this occurs. As such, I see no reason to make a recommendation under the Ombudsman Act to this effect.
44. However, in view of the mayor's breaches of Section 74 and 62(2) of the Local Government Act and the aggravating features of his conduct, I recommend under section 25(2) of the Ombudsman Act that the Minister lodge with the District Court a complaint against the mayor under section 263 and 264 of the Local Government Act. In recommending this, I am mindful of the council's lack of support for a recommendation to this effect. I also acknowledge the council's view that the council itself cannot be considered to be a public official who may lodge such a complaint within the meaning of these provisions (however, I consider that the CEO is such a person).
45. A proposal that the mayor attend conflict of interest training as suggested by the council, would be an inadequate recommendation, given my concerns about the mayor's multiple breaches of the Local Government Act and the aggravated features of his conduct. Further, the mayor had been put on notice by the Executive Director in the Office of State/Local Government Relations that '... any further contravention of or failure to comply with section 74 of the Act may result in a complaint being lodged in the

¹ I note that a chairperson has a deliberative vote on a question arising for decision at a council meeting - *Local Government Act 1999*, section 86(7).

District Court' and that with this in mind the mayor should 'avoid taking part in discussions and voting in matters relating to FBM that arise at council meetings'.

46. I am not persuaded that my recommending that the mayor undergo further training in the conflict of interest provisions of the Local Government Act would serve any productive purpose.

A handwritten signature in black ink, appearing to read 'Richard Bingham', with a long, sweeping flourish extending to the right.

Richard Bingham
SA OMBUDSMAN

7 February 2012