



OmbudsmanSA

## FINAL REPORT

### Full investigation - *Ombudsman Act 1972*

Complainant	The Ombudsman  Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>
Agency	Wakefield Regional Council
Ombudsman reference	2011/04690
Date complaint received	4 July 2011
Issues	<ol style="list-style-type: none"><li>1. Cr Darryl Pain failed to disclose an interest at council meetings</li><li>2. Cr Pain failed to bring an open mind to council deliberations</li><li>3. Cr Pain failed to properly complete the Register of Interests</li><li>4. Cr Pain failed to disclose an interest at the council meeting on 26 October 2011</li></ol>

### Jurisdiction

The complaint is fully within the jurisdiction of the Ombudsman.

This investigation stemmed from a disclosure made under the protections of the *Whistleblowers Protection Act 1993* (the original disclosure). In order to protect the identity of the whistleblower, I commenced an own initiative investigation under section 13(2) of the *Ombudsman Act 1972*.

I note that under the definition of 'administrative act' in section 3 of the Ombudsman Act, I am entitled to investigate 'an act relating to a matter of administration on the part of a person engaged in the work of ... an agency'. In my view this provides the jurisdictional basis for me to investigate whether a councillor failed to disclose a conflict of interest.

Two further matters are not referred to in the original disclosure which I received, but I have decided to exercise my powers under section 13(2) of the Ombudsman Act to conduct an own initiative investigation into them. These are that Councillor Darryl Pain (**Cr Pain**):

1. failed to properly complete the Register of Interests
2. failed to disclose an interest at the council meeting on 26 October 2011.

## Investigation

My investigation has comprised:

- assessing the information provided by the complainant
- seeking and considering a response from Cr Pain
- considering sections 73 and 74 of the *Local Government Act 1999 (the Act)*
- providing Cr Pain with my provisional report for comment, and consideration of the councillor's response
- preparing a revised provisional report
- providing Cr Pain and the council with my revised provisional report for comment, and consideration of the councillor's response
- preparing this final report.

## Response to my provisional report

In view of the nature of the allegations, and to afford Cr Pain procedural fairness, I sent Cr Pain a copy of my provisional report dated 3 November 2011. I asked him to respond with any comments or further information, prior to the report being forwarded to the council. Cr Pain responded via a letter from his lawyers dated 20 December 2011. I took into account the information received by Cr Pain's lawyers, and amended my provisional views as I consider appropriate in response to it in a revised provisional report dated 13 February 2012.

In response to my provisional report, Cr Pain's lawyers questioned my provisional view that Cr Pain is required to bring an open mind to council decisions. In their letter to me Cr Pain's lawyers questioned my authority to 'enquire into and express views on common law matters which are not in themselves the subject of any enforceable duty imposed on an Elected Member of a Council.'

Elected members are required to adhere to the common law. The Victorian Supreme Court considered the concept of apprehended bias in the context of a council decision in *Winky Pop Pty Ltd & Anor v Hobsons Bay City Council*. Kaye J said that a resolution has been passed in breach of natural justice if:

a fair minded and informed member of the public might entertain a reasonable apprehension that the councillor might not have brought an impartial and unprejudiced mind to the resolution of the issues considered by the council.<sup>1</sup>

Whilst only a limited class of people may enforce the requirements of procedural fairness, in my view there is a legitimate expectation that councillors will consider all matters fairly and impartially, and with an open mind.<sup>2</sup>

Section 13(1) of the Ombudsman Act empowers me to investigate any administrative act which is defined in section 3(1) to include

an act relating to a matter of administration on the part of an agency to which this Act applies or a person engaged in the work of such an agency...

It is my view that the decisions made by elected members relating to the sale of the property outlined in paragraph 11 below are administrative acts. In the event there is evidence establishing apprehended bias in relation to those decisions, a finding that an elected member acted contrary to law pursuant to section 25(1)(a) of the Ombudsman Act will follow.

<sup>1</sup> *Winky Pop Pty Ltd & Anor v Hobsons Bay City Council* [2007] VSC 468 at 66.

<sup>2</sup> For example, the council's Code of Conduct for Council Members requires councillors 'act in a fair, honest and proper manner and according to the law ...'

I note I am also required to report any evidence of breach of duty on the part of an elected member to the principal officer of the agency pursuant to section 18(5) of the Ombudsman Act. In my view, a finding of apprehended bias on the part of an elected member would constitute a breach of duty; the Wakefield Regional Council's Code of Conduct for Council Members includes a duty to 'act in a fair, honest and proper manner and according to the law.'

Where apprehended bias is shown on the part of an elected member, in some circumstances, a finding that the council as a whole did not bring an impartial mind to the relevant decisions may also follow.<sup>3</sup>

### Response to my revised provisional report

I sent Cr Pain and the council a copy of my revised provisional report dated 13 February 2012. I asked them to respond with any comments or further information, prior to the preparation of this final report.

Cr Pain provided no response to the revised provisional report.

The council responded via letter dated 29 February 2012. I took into account the information received by the council, and, in response, have amended my revised provisional views as I consider appropriate.

### Standard of proof

The standard of proof applied is on the balance of probabilities. However, in determining whether that has been met, in accordance with the *Briginshaw* principle I have borne in mind the nature of the allegations and the consequences if they were to be upheld. That decision recognises that questions of fact vary greatly in nature, and greater care is needed in scrutinising the evidence in some cases.<sup>4</sup> It is best summed up in the following statement of Dixon J:

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 to the reasonable satisfaction of the tribunal.<sup>5</sup>

## Final Views

### Background

1. Cr Pain is an elected member of the Wakefield Regional Council (**the council**). The original disclosure alleges in effect that in this capacity, Cr Pain failed to declare an interest in relation to the council's sale of the property at 39 North Street, Port Wakefield (**the property**), which was owned by the council and was once a works depot.
2. Cr Pain was elected to the council in November 2010.
3. Mr Richard Pain (**Mr Pain**), Cr Pain's father, was an unsuccessful mayoral candidate in the 2010 election.

<sup>3</sup> *McGovern v Kuringgai Council* (2008) NSWCA 209 (1 September 2008).

<sup>4</sup> see *Briginshaw v Briginshaw* (1938) 60 CLR 336. Applied in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449 at 449-450 per Mason CJ, Brennan, Deane and Gaudron JJ

<sup>5</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362

4. The complaint alleges that Cr Pain's interest in relation to the council's sale of the property arises because his father, Mr Pain, wished to purchase the property from the council.
5. The sale of the property by the council was the subject of an investigation by my office in 2010. Mr Pain made a complaint to my office alleging that the council acted contrary to its 'Competitive Tendering, Contracting, Purchasing, Sale and Disposal of Land and Other Assets Policy concerning the sale of the property. Mr Pain asserted to my office in the previous investigation that he approached the council with a view to purchasing the property several years ago.
6. The council commenced discussions with Summerfield Investments Pty Ltd (**Summerfield**) in late 2008 about Summerfield purchasing the property from the council.
7. Mr Pain continued to correspond with the council about the property and first expressed written interest in purchasing the property to the council on 27 July 2009, after Mr Pain discovered that the council was discussing the property with Summerfield.
8. On 3 March 2010 Mr Pain wrote to the council and made a formal offer for the property.
9. Mr Pain was told that his offer would 'be considered if negotiations with Summerfield Investments, as the initial party, fail'.<sup>6</sup>
10. The negotiations with Summerfield Investments were subsequently put on hold pending the investigation by my office. At the council meeting on 23 June 2010 the Chief Executive Officer's report was received and noted by the council. The report stated:

On 3/6/10 notification from the SA Ombudsman was received that, following consideration of a complaint against Council into its actions in the proposed selling of the property, the Ombudsman will be doing a full investigation. Therefore the property selling matter will be set aside until the Ombudsman's investigation has been completed and any recommendations arising considered.
11. Cr Pain was involved in council debate and decisions relating to the sale of the property, including items relating to:
  1. the review and amendment of the Council's Policy F9.4 Competitive Tendering, Purchasing, Sale and Disposal of Land and Other Assets Policy
  2. the method of sale
  3. soil testing, and
  4. the selection of the successful tender.
12. It is alleged that Mr Pain may have benefited from these council decisions.

*The review and amendment of the Council's Policy F9.4 Competitive Tendering, Purchasing, Sale and Disposal of Land and Other Assets Policy*

13. The minutes of the council meeting of 19 January 2011<sup>7</sup> record that Cr Pain moved a motion that the Council Policy F9.4 Competitive Tendering, Purchasing, Sale and Disposal of Land and Other Assets Policy, be reviewed following receipt of the awaited Ombudsman's report into the council's process in the proposed selling of the property. This motion was carried.

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<sup>6</sup> Agenda of Ordinary Meeting of the Wakefield Regional Council held on 23 June 2010.

<sup>7</sup> Minutes of Ordinary Meeting of the Wakefield Regional Council held on 19 January 2011.

14. On 23 February 2011, The Plains Producer (**the newspaper**) wrote:

Mr Pain, who intended to buy the property, lodged the complaint as he believed council did not adhere to its disposal of land policy.

15. Mr Pain was quoted as saying:

The policy should state all surplus land be sold through auction... This would be in the best interest of the community by obtaining the best value for the land and it would be open and transparent.

16. The results of my previous investigation into the disposal of the property were noted by the council at its meeting on 23 February 2011.

### *The method of sale*

17. The minutes of the council's meeting on 23 February 2011 record that a motion was moved by Cr Chapman that the property be offered for sale via open tender. An amendment to this motion was put by Cr Stevens that the property be offered for sale via public auction. The amended motion was lost and the original motion, that the property be offered for sale via open tender, was then put. Cr Pain voted against the motion that the property be sold by open tender and called for a division.
18. The minutes of the council's meeting on 23 March 2011 record that the tender call closing date was extended. The report to council from the Chief Executive Officer, states that this was to 'enable interested parties more time including soil testing (if desired).' The tender closing date was extended by four weeks to 15 April 2011.
19. At council's meeting on 23 March 2011 Cr Pain voted in relation to the following motion:

that council adopt the amendments to Policy F9.4, Competitive Tendering, Purchasing, Sale and Disposal of Land and Other Assets, as presented in the agenda document subject to the following points under the section sale and Disposal Options-

1. delete –
  - i. quotation – seeking quotations from two or more suppliers;
  - ii. selected tender – seeking tenders from a limited number of suppliers on the basis of, for example, location, previous performance, the result of an Expression of Interest process, and
2. reference to the value of \$250 be raised to the value of \$500.

### *Soil testing*

20. The report to council from the Chief Executive Officer (**the CEO**) re item 15.2 at the 23 March 2011 council meeting states:

External advertising of this tender has recently occurred following Council meeting 23 February 2011 to call tenders for the selling of this surplus Council property. However, one interest [sic] party, being one that had previously expressed interest in the property, has communicated concerns that the timeframe in the tender call (via Plains Producer and YP Country Times newspapers) of closing Friday, 18 March 2011 (at 5.00pm) is far too short for an opportunity to have soil testing occur and other considerations. It was also correctly pointed out that a public holiday occurring in that period restricts the number of business days even further, along with inadvertent delay in the tender call going on Council's website.

...

The party who expressed concerns about the tender timeframe also raised issues about Council's statutory obligations of due diligence over any possible site contamination, and whilst our actions thus far (including having concerned soil testing [sic] but for the high

quoted cost) are believed to be in-line with EPA guidelines, that will be reassessed to make sure.

21. I contacted the council on 31 October 2011 and it confirmed that the 'party' referred to in the report is Mr Richard Pain.
22. The council was aware that there was possibly contamination on the property. The council received legal advice from Wallmans Lawyers (which is attached to the 27 April 2011 agenda on the council's website)<sup>8</sup>. It was reported in the newspaper that the council CEO said that the council 'acted reasonably and appropriately in the circumstances in providing information within the tender documents relating to the history of the land.' ... 'It is then open to potential tenderers to lodge a tender having made a fully informed decision on the basis of the information available to them'.<sup>9</sup>
23. At council's meeting on 23 March 2011 Cr Pain seconded a motion that the council have soil testing done to the property.<sup>10</sup>

#### *The selection of the successful tender*

24. The minutes of the council's meeting on 27 April 2011 record that Cr Pain voted against the motion that the tender be awarded to Summerfield. The motion stated:

That Council, in considering the three Tenders received for the purchase of Council's former works depot at 39 North Street, Port Wakefield, selects the tender from Summerfield Investments Pty Ltd for \$143,000.00. (GST inclusive), for reason of being the highest tender, and authorises the Mayor and Chief Executive Officer to sign documentation and affix the common seal in order for the sale of the property to be finalised.<sup>11</sup>

Cr Pain called for a division.

25. The above motion, that the tender from Summerfield be selected, was passed, with six voting for the motion and three against it.

#### *Cr Pain's initial response*

26. In view of the nature of the allegations, I asked Cr Pain, via letter dated 22 July 2011, to provide me with a response to the allegations by way of a statutory declaration.
27. I asked Cr Pain to include the following in the statutory declaration:
  1. the nature of his father's involvement with the property, and the reasons why he did not declare an interest in relation to these items.
  2. comments on whether he considered that he had brought an open mind, free from undue influence, to the council's considerations of items.
28. Cr Pain failed to provide me with a response to the two items above in a statutory declaration as requested.
29. Cr Pain responded via letter dated 23 September 2011. In the letter, Cr Pain outlined why he voted in the manner that he did at the relevant meetings in relation to the sale of

<sup>8</sup> Agenda of 27 April 2011 Wakefield Regional Council.

<sup>9</sup> *The Plains Producer*, 4 May 2011, p4.

<sup>10</sup> Minutes of Ordinary Meeting of the Wakefield Regional Council held on 23 March 2011.

<sup>11</sup> Minutes of Ordinary Meeting of the Wakefield Regional Council held on 27 April 2011.

the property. As to the question of why he did not declare an interest in relation to these items, Cr Pain responded as follows:

Though my father had submitted a tender for the Property at 39 North Street Port Wakefield I believe that no conflict existed due to:-

1. Council having both legal (Norman Waterhouse lawyers and Wallmans) and Consultative advice in the form of the Golder and Associates reports recommending further intrusive testing be carried out (none which has been carried out) and my own conversations with the EPA into the possible legalities. I have not accepted a report by anyone [sic] source or person in relation to this matter, this in due course helped me to be impartial and diligent by proceeding to ask the questions and to vote in the manner in which I did, to represent council and the communities [sic] interests.
2. Though perceived conflicts of interest with my father submitting a tender for the above property has brought cause to your investigation, the fact his tender and that of Mr Enrico Votino were non-compliant (this was supported by the table submitted to council and reaffirmed by the CEO on the night of the council meeting), meant that council in following its own information package supplied, could not have considered these tenders. These tenders could only have been considered if council was to re-tender this property with the removal of Section 5 parts A & B (of the Information Package being removed) to provided and [sic] open and transparent tender process. should this have been requested by council, then I would have had to consider my position as to a conflict of interest under section 73 of the Local Government Act.

...

The perceived conflict of interest, I believe, may seem valid from a lay observer's perspective, but councillors or staff of council should have understood the validity of the tendering process. Not all tenders were conforming which was confirmed in both table form and by the CEO on the night. If this complaint was lodged by a councillor/s, the question of concern that I now hold is, was the complainant fully aware of what they were voting for, weather [sic] they understood the process of this tender, issues related to this site in the form of possible contamination, legalities and open transparent processes of council.

30. As to the question of whether he considered that he had brought an open mind, free from undue influence, to the council's considerations of items, Cr Pain responded as follows:

I believe that I have "maintained an open mind, free of undue influence, to council's considerations of items" and by no mean [sic] an "empty mind" by way [sic] information that I have supplied.

#### *Cr Pain's response to the provisional report*

31. Cr Pain's lawyers wrote, in response to my provisional report, as follows:

In our submission, Mr Pain's [Cr Pain's] participation in the deliberations of the Council at these meetings was entirely appropriate and no circumstances arose in which it was incumbent upon him to disclose a conflict of interest, nor was the[sic] ever any actual or potential conflict of interest in fact.

32. The response states that:

On our instructions, the first time that our client became aware that his father had expressed interest in acquiring the former works depot was when our client read the Ombudsman's report on a complaint by our client's father published on 19 January 2011 and circulated to Elected Members by the Chief Executive Officer on 10 February 2011.

We are instructed that our client did not discuss the content of that report of the Ombudsman, nor his father's interest in the property, with his father at any time between 10 February 2011 and the conclusion of the Council meeting on 23 February 2011.

### Whether Cr Pain failed to disclose an interest at council meetings in relation to the sale of the property

33. The first issue is whether the nature of the relationship between Cr Pain and his father was such as to require him to declare an interest. Under section 73 of the Act, he would have had an interest in the item being considered by the council if:
- either he or a person with whom he 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
  - either he or a person with whom he 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.<sup>12</sup>
34. Section 74 of the Act requires that a member who has an interest in a matter within these terms must disclose it to the council, and must not participate in a council's debate on the matter. This includes proposing or seconding a motion, participating in discussion, being present in the room, and voting on the matter.
35. In this case, the first question is whether Cr Pain's father was a person 'closely associated' with him. Under section 73(2) of the Act:
- (2) A person is closely associated with a member of a council—
- (g) if that person is a relative of the member.

Paragraph (c) of the definition of 'relative' in section 4 of the Act includes a parent, and I therefore conclude that Cr Pain's father is 'closely associated' with him for the purposes of section 73.

36. The second question is whether Cr Pain's father would have been affected in the manner specified by the council's decision on the item.
37. Cr Pain's response says that he 'acknowledges that by reason of sub-section (73)(2)(g) of the Act, our client's father is and was at all relevant times a person "closely associated" with him.' However, the response rejects the suggestion that Cr Pain's father would have been affected in the manner specified by the council's decision on the item, submitting as follows:

... There was no business or matters the subject of decision which was capable of permitting our client's father to obtain or to have a reasonable expectation of obtaining a direct or indirect pecuniary benefit or a non-pecuniary benefit (not being a benefit that would be enjoyed in common with or a substantial proportion of the ratepayers, electors or residents of the area or some other substantial class of persons).

Therefore, for the purposes of the business transacted by the Council in respect of this issue on 23 February 2011, our client did not have an interest in the matter and therefore had no obligation under section 74(1) to make disclosure of any interest.

<sup>12</sup> For simplicity of reference, in the remainder of this report I have summarised these provisions as stating that an elected member has an interest if they are 'affected in the manner specified'.

38. I disagree with this submission. Based on the evidence as to the extent of Mr Pain's interest in purchasing the property, I consider that, as Cr Pain's father was interested in purchasing the property for business reasons, he may have obtained a pecuniary benefit from any council decisions relating to the sale of the property.

39. The submission in response to my provisional report gives the following reason as to why Cr Pain believes that there was no relevant item at the 23 February 2011 council meeting:

The relevant business transacted at the meeting on 23 February 2011 arose from the Chief Executive Officer's report dated 10 February 2011 which enclosed the Ombudsman's report on the earlier complaint and recommended that the Council invite offers from all three parties who had expressed an interest in purchasing the property.

The Minutes reveal that the first item the subject of a decision by the Council was to do no more than receive the Chief Executive Officer's report and to note it. The receipt and noting of that report could not possibly give rise to an interest for the purposes of Section 73(1) of the Act.

The second item of business was a motion put by Cr Lamond, seconded by Cr Wood, that, consistent with the recommendation of the Chief Executive Officer, the Council resolve to invite offers from only the three parties who had expressed an interest in purchasing the property. Whilst hypothetically that motion could have given rise to an interest for the purposes of Section 73(1), no such interest was capable of arising in this instance because, as the Minutes reveal, Crs Lamond and Wood withdrew their motion before it was put to a vote.

As the Minutes reveal, what next occurred was that Cr Chapman put an alternative motion, seconded by Cr Reid, that the Council offer the former works depot for sale by open tender.

Before that motion was put to a vote, Cr Stevens moved an amendment to Cr Chapman's motion to the effect that, rather than the former works depot being offered for sale by open tender, it instead be offered for sale by public auction. That motion was seconded by Cr Kipling.

The Minutes correctly record that a division was called by Cr Pain. What the Minutes do not clearly reveal is that the division called by Cr Pain was in respect of the amendment moved by Cr Stevens. The Minutes are also misleading when they record that Crs Pain, Stevens and Kipling voted against the motion. What in fact occurred was that Crs Pain, Stevens and Kipling voted in favour of the amendment moved by Cr Stevens to Cr Chapman's motion and Crs Tiller, Smith, Lamond, Ottens, Wood, Reid and Chapman voted against the amendment on the division. The amendment was lost. That amendment having been lost, Cr Chapman's motion that the land be offered for sale by open tender (rather than public auction) was put to the vote. That motion was passed unanimously. ...

In our submission, the only motions in which our client participated in voting were the motion and the amendment with respect to whether the land would be sold by open tender or public auction. Either way, the Council was contemplating permitting anyone, not just the three interested parties, to have an opportunity to purchase the land. Neither the motion that was carried, nor the amendment that was lost, were capable of giving Mr Pain's father any benefit of any kind. The irony is that, had the motion recommended by the Chief Executive Officer that offers be invited only from the three parties who had previously expressed interest not been withdrawn, it was capable of conferring a benefit on Mr Pain's father by narrowing the class of potential purchasers. But, as the enclosed newspaper article reveals, Cr Pain spoke against that motion, quite appropriately in our submission.

40. I disagree with the submission. As per the wording of section 73(1) of the Act, Cr Pain has an interest in a matter before the council if his father 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. [my emphasis]

41. Cr Pain was aware of his father's interest in purchasing the property and, in my view, the 'matter' as per section 73(1) is the sale of the property. In my opinion, all motions relating to the sale of the property could, if they were decided in a particular manner, lead to his father being affected in the manner specified. In my view it is not the intended purpose of the section that it be interpreted as referring to each 'motion' rather than the broader 'matter', being the sale of the property. Even if I am wrong in this analysis, had the motion recommended by the CEO (that offers be invited only from the three parties who had previously expressed an interest in purchasing the property) not been withdrawn it was capable of conferring a benefit on Mr Pain's father by narrowing the class of potential purchasers. It is not relevant that Cr Pain spoke against that motion. Cr Pain participated in voting in relation to the matter when, in my view, he should have declared a conflict of interest.
42. The submission in response to my provisional report includes the following reason as to why Cr Pain believes that he had no conflict of interest to declare at the 23 March 2011 council meeting:

We emphasise that as at the date of this meeting our client was unaware if his father had submitted or intended to submit a tender for the land (although was aware that he had previously expressed interest) and was unaware that his father had raised any concerns with respect to contamination of the land.
43. The submission says that Cr Pain voted in favour of the motion to have soil testing done on the property 'because he was concerned that, regardless of the identity of the ultimate purchaser of the land, the Council could be exposed to a claim by that purchaser in the event that the site was latter discovered to be extensively contaminated.' The submission further states:

Our client voted in favour of Cr Kipling's motion only because he was concerned as to the potential exposure of the Council to liability and because he considered that it was in the interests of any prospective purchaser, the identities of none of which had been disclosed at that point in time, that they have the opportunity of purchasing the land on a fully informed basis.
44. The response to my provisional report has noted that at this time Cr Pain was aware of his father's interest in purchasing the property. There is no evidence to indicate that Cr Pain had any reason to believe that his father was no longer a potential purchaser of the property.
45. Accordingly, it is my view that the reasons that Cr Pain voted in favour of the motion are not relevant to the question of whether, according to the Act, Cr Pain should have declared a conflict of interest in the matter. Whilst Cr Pain claims that he did not know that his father was the party who had raised issues with the council about any possible site contamination, he did know that his father had expressed interest in purchasing the property. Clearly, any decisions relating to soil contamination on the property could, if they were decided in a particular manner, lead to his father being affected in the manner specified, as a potential purchaser of the property.
46. In my view, when the matter of the sale of the property was raised, Cr Pain should have realised that decisions relating to the sale of the property could, if they were decided in a particular manner, lead to his father being affected in the manner specified. Accordingly, under section 73(1), Cr Pain should have declared his conflict of interest and not participated in these decisions.

47. The response to my provisional report includes the following reason as to why Cr Pain believes that he had no conflict of interest to declare at the 27 April 2011 council meeting:

Prior to this meeting the Chief Executive Officer had distributed a report to Elected Members outlining the results of the tender process for the former works depot which closed on 15 April 2011.

The report disclosed that only one of the tender submissions conformed with the tender criteria, that of Summerfield Investments Pty Ltd.

The tender submitted by our client's father was for a sum less than that nominated by Summerfield Investments Pty Ltd and was non-compliant because it had not addressed GST or settlement timing. It is the case that the report disclosed that our client's father's submission had requested that soil testing be undertaken on the site. However, it cannot follow from the fact that our client participated in deliberations with respect to possible contamination of the site at the meeting on 27 April 2011 that our client did so in order to benefit, or in the reasonable expectation of benefiting, his father. This is because our client's father's submission was non-complying and was therefore automatically rejected.

It is to be noted that the Minutes of the meeting of 27 April 2011 do not disclose any challenge to the Chief Executive Officer's determination that the only complying tender submission was that of Summerfield Investments Pty Ltd. At no time was there any suggestion by any Elected Member at the meeting that any prospective purchaser other than Summerfield Investments Pty Ltd would be offered the right to acquire the land. All of the discussions at the meeting on 27 April 2011 assumed that Summerfield Investments Pty Ltd was the successful tenderer.

The debate at the meeting revolved around whether a contract should be entered into with Summerfield Investments Pty Ltd immediately without enquiries being made of the EPA or soil testing being carried out and/or whether the terms of the tender prevented the Council from inserting a condition into a Contract of Sale to Summerfield Investments Pty Ltd excluding liability for contamination.

The Minutes of the meeting of 27 April 2011 are again inaccurate in that they only record voting on a motion put by Cr Reid and seconded by Cr Lamond that the Mayor and the Chief Executive Officer be authorised to execute a contract for the sale of the land to Summerfield Investments Pty Ltd for the price it nominated.

In fact what occurred was that Crs Kipling, Stevens and Pain posed a motion that until confirmation was received from the EPA that it was in order for the Council to enter into an unconditional sale of suspected contamination land to a third party, the Council ought defer executing the contract with Summerfield Investments Pty Ltd. No Elected Member opposed the sale or [sic] land to Summerfield Investments Pty Ltd.

...

Our client's father having been excluded prior to any deliberations of the Council on the subject of the sale of the former works depot as a prospective purchaser, it follows that our client had no interest to disclose prior to participating in the deliberations which followed.

48. Again, I disagree with the submission. The question of whether a councillor should declare a conflict of interest is one that needs to be addressed prior to the elected members' deliberations about the matter. It is not relevant whether the deliberations actually made a decision directly relating to any pecuniary or non-pecuniary benefit or detriment. What is relevant is whether, before the deliberations commenced, it could be seen that decisions relating to the sale of the property could, if made in a particular manner, lead to his father being affected in the manner specified.

49. In my view, it would have been reasonable for Cr Pain to determine that any decisions relating to the Summerfield tender could, if they were decided in a particular manner, lead to his father being affected in the manner specified. At the time that Cr Pain should have turned his mind to the issue of whether he should declare a conflict of interest, he did not have the benefit of knowing what exact path the deliberations and discussions of the elected members would take. It is my view that it would be reasonable to consider that the deliberations could have rejected Summerfield as the successful tender. Such a decision would, obviously, be to Mr Pain's benefit, as there is no indication that he was not still interested in purchasing the property.
50. Accordingly, it is my view that, under section 73(1), Cr Pain should have declared his conflict of interest and not participated in these decisions.
51. In addition, I note that under section 73(1) of the Act, a councillor is not required to declare an interest if a benefit or detriment '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.' I understand that the council had received three expressions of interest in relation to the property, and I do not consider that this amounts to 'a substantial class of persons' within the meaning of this section.
52. My final view therefore is that Cr Pain's failure to disclose an interest at the relevant meetings breached section 74(1) and (4) of the Act. Consequently my final view is that his action was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.
53. Under section 18(5) of the Ombudsman Act, I must report any breach of duty or misconduct on the part of a member of a council to the mayor, as its principal officer. In this case, I note my intention to report to the mayor Cr Pain's failure to declare an interest in the items.

### **Whether Cr Pain brought an open mind to the council's deliberations**

54. The complaint also raises the question of whether Cr Pain brought an open mind to council deliberations, or acted under the influence of unelected members of the public, namely his mother and father. As outlined above, Cr Pain and his mother and/or father have been involved in making public comments to 'The Plains Producer' and/or have asked questions to the council in relation to a number of council issues.
55. This raises the common law rules of natural justice (or procedural fairness), which require that public officers should make decisions free from any bias. This means that decision-makers must bring an impartial and unprejudiced mind to all matters which affect directly the interests of an individual, and they must approach this administrative decision making with an open mind to ensure that they act fairly and impartially. The test for determining if a public officer has an apprehended bias is:
- whether a fair-minded, lay observer might reasonably apprehend that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the question which must be decided.<sup>13</sup>
56. I accept that that the concept of maintaining an open mind does not require that a decision-maker should have an 'empty' mind, and that it is not reasonable or practicable to expect that a person will have no pre-existing personal views or preferences.

<sup>13</sup> *Johnson v Johnson* [2000] HCA 48 at 11.

57. In summary, my view is that public officers are entitled to hold and express views, but what is important is that they should be able to reconsider them in light of all the evidence and arguments presented when making decisions which directly affect the interests of an individual.
58. I consider that it is important that the community can be assured that decisions made by its representatives are made in the public interest, not because of a personal relationship.
59. Cr Pain and his mother and father have been involved in making public comments to 'The Plains Producer' and have asked questions to the council in relation to numerous council issues including, but not limited to, the following:
- the sale of the property
  - the Port Wakefield Community Wastewater Management Scheme Project (CWMS)
  - the council's allocation of the proceeds of the sale of the property
  - the upgrade of North Street, Port Wakefield
  - the availability of council meeting agenda's on the council's website.
60. Cr Pain was quoted in the newspaper as commenting about the sale of the property on 2 March 2011:
- If we only negotiate with three people, we've gone back to breaching our own policy again.<sup>14</sup>
61. It was reported that Cr Pain 'publicly opposed the sale of the land without approval from the Environmental Protection Authority (EPA) with concerns of contamination...'<sup>15</sup>
62. Both Cr Pain and Mr Pain were vocal in campaigning that proceeds of the sale of the property should go to the Port Wakefield Community Management Committee (**the CMC**). The local newspaper said that 'Cr Pain suggested 'the profits from the sale could be utilised on projects previously made unavailable due to budget constraints', including the Port Wakefield CMC.<sup>16</sup> Cr Pain was reported again in the newspaper a month later suggesting that money from the sale of the depot land should go to the CMC and other community projects.<sup>17</sup>
63. The minutes of the council meetings on 15 December 2010,<sup>18</sup> 19 January 2011,<sup>19</sup> 23 February 2011<sup>20</sup> and 27 April 2011<sup>21</sup> record that Mr Pain asked questions during public question time regarding the CWMS.
64. On 8 June 2011 a letter from Mr Pain to the editor was published in the newspaper.<sup>22</sup> In the letter, Mr Pain said that his concerns with the council included the amount the council budgeted to give to the CMC. The letter refers to costs associated with the CWMS.
65. In an article published in the newspaper on 29 September 2010 Mr Pain 'provided a detailed statement to 'The Plains Producer' which outlined his reasons for challenging the incumbent mayor'. In the statement, Mr Pain reportedly:

<sup>14</sup> *The Plains Producer*, 2 March, p4.

<sup>15</sup> *The Plains Producer*, 4 May 2011, p4.

<sup>16</sup> *The Plains Producer*, 4 May 2011, p4.

<sup>17</sup> *The Plains Producer*, 1 June 2010, p2.

<sup>18</sup> Minutes of Ordinary Meeting of the Wakefield Regional Council held on 15 December 2010.

<sup>19</sup> Minutes of Ordinary Meeting of the Wakefield Regional Council held on 19 January 2011.

<sup>20</sup> Minutes of Ordinary Meeting of the Wakefield Regional Council held on 23 February 2011.

<sup>21</sup> Minutes of Ordinary Meeting of the Wakefield Regional Council held on 27 April 2011.

<sup>22</sup> *The Plains Producer*, 8 June 2010, p6.

highlighted the Evans land-use debacle and the handling of Port Wakefield's Community Wastewater Management Scheme (CWMS) as main concerns of residents... Residents concerns relate to the debt council has, the cost to council in the Evans matter and how council is handling Port Wakefield CWMS.<sup>23</sup>

66. Cr Pain apparently also stated the same concerns, with the newspaper reporting the following on 7 October 2010:

Mr Pain and Mr Kipling said council's "irresponsibility" in the Evans land-use debacle and the lack of consultation in Port Wakefield's CWMS are other main concerns they have with council.<sup>24</sup>

67. The minutes of the council meetings on 23 March 2011<sup>25</sup> and 27 April 2011<sup>26</sup> record that Cr Pain's mother, Mrs Glenda Pain, asked questions during public question time regarding the North Street, Port Wakefield upgrade project.
68. The minutes of the 23 February 2011<sup>27</sup> council meeting record that Cr Pain asked questions on notice about the North Street, Port Wakefield upgrade project.
69. Both Cr Pain and Mrs Pain expressed concern about the availability of council meeting agendas on the council's website.
70. On 23 February 2011 a letter to the editor from Mrs Pain was published in the local newspaper:

Since 2002 Wakefield Regional Council (WRC) has placed its monthly meeting agenda with reports and recommendations on the internet for public access.

...  
The posting of agendas on Friday enabled ratepayers and/or others (although with limited time) to peruse items that would be discussed and possibly voted on by our councillors at the meeting the following Wednesday. It also enabled ratepayers and/or others some time to discuss with their councillor any issues or ideas they had about an agenda item. This is how ratepayers have input into their council! This is how the council becomes aware of ratepayers opinions!

...  
Why has our council now decided to withdraw the agenda reports and recommendations from the public? It makes one suspicious about what is in the agenda for tonight's meeting (Wednesday) that they do not want the public to know about before the meeting.<sup>28</sup>

71. The minutes of the 23 February 2011<sup>29</sup> council meeting record that Cr Pain asked a question without notice requesting that the entire February and March ordinary council meetings agendas be listed on the council's website.
72. It is alleged that Cr Pain is under the influence of his parents and is not acting fairly and impartially in the best interests of the community.
73. In my view, Cr Pain's response to me dated 23 September 2011 demonstrates that Cr Pain is unaware that the test for whether he is able to consider matters with an open mind is an objective one, and that it does not matter whether he personally believed that he would consider the matters on their merits. The test to be applied is whether a

<sup>23</sup> *The Plains Producer*, 29 September 2010, p1.

<sup>24</sup> *The Plains Producer*, 7 October 2010, p2.

<sup>25</sup> Minutes of Ordinary Meeting of the Wakefield Regional Council held on 23 March 2011.

<sup>26</sup> Minutes of Ordinary Meeting of the Wakefield Regional Council held on 27 April 2011.

<sup>27</sup> Minutes of Ordinary Meeting of the Wakefield Regional Council held on 23 February 2011.

<sup>28</sup> *The Plains Producer*, 23 February 2011, p3.

<sup>29</sup> Minutes of Ordinary Meeting of the Wakefield Regional Council held on 23 February 2011.

fair-minded lay observer might reasonably apprehend that Cr Pain might not have brought an impartial and unprejudiced mind to his decision-making responsibilities.

74. The NSW Court of Appeal in *McGovern v Kuringgai Council* (2008) NSWCA 209 (1 September 2008) distinguished between apprehended bias cases based on pre-judgment and those based on a conflict of interest. Spigelman CJ held at paragraph 23:

The “open to persuasion” test is an appropriate formulation for bias by pre-judgment, to which the dual “might” test of apprehended bias must be applied; that is, that an independent observer might reasonably apprehend that the decision-maker might not be open to persuasion.

75. His Honour continued at paragraph 26:

A conflict of interest requires a different analysis as to the relationship, as reasonably perceived, between the interest and the decision. Questions of fact and degree do not arise in the same way. In a pre-judgment case it is necessary to consider the degree of ‘closure’ of the allegedly closed mind. Where a relevant conflict of interest is established the reasonable apprehension follows almost as of course.

76. In light of the weight of the evidence listed above, I do not consider that there is enough evidence to reach a conclusion of apprehended bias on the basis of pre-judgment. Cr Pain is entitled to share the same views as his parents and I accept that it is not reasonable or practicable to expect that a person will have no pre-existing personal views or preferences.

77. However, I am satisfied that Cr Pain had a conflict of interest in respect of the motions as to the method of sale on 23 February 2011 and as to the selection of the successful tender on 27 April 2011, and that these interests are sufficient to conclude that a fair-minded lay observer might reasonably apprehend that Cr Pain was not prepared to consider the matters on their merits.

78. Therefore, my final view is that in this respect Cr Pain acted in a way which is contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act. It is also my final view that in doing so Cr Pain was in breach of his duty under the Code of Conduct for Council Members to ‘act in a fair, honest and proper manner and according to the law’. Pursuant to section 18(5) of the Ombudsman Act I am obligated to report this to the principal officer of the agency.

79. I have noted above that in some cases a finding of apprehended bias on the part of one elected member may result in a finding that the council as a whole was affected by apprehended bias.<sup>30</sup> Given that the relevant motions (which Cr Pain voted against) were passed by council, I am satisfied that the council was not affected by apprehended bias.

### **Whether Cr Pain properly completed the Register of Interests**

80. Section 65 of the Act requires that elected members must submit a primary return in accordance with Schedule 3 of that Act, within 6 weeks after election. Thereafter elected members must lodge an ordinary return within 60 days after 30 June each year in accordance with Schedule 3 (sections 65 and 66).
81. These returns must contain information such as elected members’ sources of income; positions they hold in companies; assets; debts and ‘any political party, any body or

<sup>30</sup> *McGovern v Kuringgai Council* (2008) NSWCA 209 (1 September 2008) at paragraphs 31-48.

association formed for political purposes or any trade or professional organisation' of which they are a member.

82. Elected members must disclose 'any other substantial interest whether of a pecuniary nature or not of the member or of a person related to the member of which the member is aware and which he or she considers might appear to raise a material conflict between his or her private interest and the public duty that he or she has or may subsequently have as a member'<sup>31</sup>
83. This information is maintained on a Register of Interests by the CEO of the council (section 68).
84. There are sanctions for providing false or misleading information in a return, in section 69 of the Act:

**69—Provision of false information**

A member of a council who submits a return under this Division and Schedule 3 that is to the knowledge of the member false or misleading in a material particular (whether by reason of information included in or omitted from the return) is guilty of an offence.

Maximum penalty: \$10 000.

85. I have sighted a copy of the primary return relating to Cr Pain's disclosures made as at 11 January 2011, following his election to the council.
86. Cr Pain recorded \$20,000 under paragraph 1 of the primary return, which requires a council member to:
1. Provide a statement of any income source that you have or a person related to you has or expects to have in the period of 12 months after the date of the primary return.
87. Cr Pain has not recorded the income source on the primary return as required.
88. I have also sighted a copy of the register relating to Cr Pain's disclosures made as at 29 August 2011, the ordinary return.
89. Cr Pain recorded \$18,000 under paragraph 1 of the ordinary return, which requires a council member to:
1. Provide a statement of any income source of a financial benefit that you have or a person related to you has received, or was entitled to receive during the return period.
90. Cr Pain has not recorded the income source on the ordinary return as required.
91. Schedule 3 of the Act provides definitions of 'income source', 'financial benefit' and 'person related to a member' as:

***income source***, in relation to a person, means—

- (a) any person or body of persons with whom the person entered into a contract of service or held any paid office; and
- (b) any trade, vocation, business or profession engaged in by the person.

***financial benefit***, in relation to a person, means—

- (a) any remuneration, fee or other pecuniary sum exceeding \$1 000 received by the person in respect of a contract of service entered into, or paid office held by, the person; and

<sup>31</sup> Clause 2(3)(h) Schedule 3 Local Government Act.

- (b) the total of all remuneration, fees or other pecuniary sums received by the person in respect of a trade, profession, business or vocation engaged in by the person where that total exceeds \$1 000, but does not include an annual allowance, fees, expenses or other financial benefit payable to the person under the Act;

*a person related to a member* means—

- (a) a member of the member's family;  
 (b) a family company of the member;  
 (c) a trustee of a family trust of the member.

92. Cr Pain failed to record the source of the income he has listed on both the primary and ordinary returns.

93. Further, Cr Pain failed to disclose his assets. The council assessment records show that Cr Pain's assets include three Port Wakefield properties, as follows:

A12231 - 26 North Street, Port Wakefield - Darryl Ian Pain and Suzanne Marie Pain  
 A13215 - 12 Edward Street, Port Wakefield - Darryl Ian Pain  
 A2905 - 14 Edward Street, Port Wakefield - Darryl Ian Pain

94. Cr Pain's response to my provisional report, via letter from his lawyers dated 20 December 2011, includes the following:

We are instructed that our client is self-employed and earns infrequent income from various sources doing "odd jobs". Cr Pain did not record the income source on the primary return because to have identified every single person or entity who paid him small amounts of money to do an "odd job" from time to time would be onerous and, arguably, would infringe the third parties' right to privacy.

If the Ombudsman considers that it would be incumbent upon our client to identify each and every person from whom he provided serviced, then it would have to follow that an Elected Member of a Council who is a proprietor of a small retail outlet, such as a delicatessen, would have to identify each and every customer who purchased goods from his shop over a 12 month period and the amount of each transaction. A similar obligation would be cast upon a self-employed operator of a lawn mowing round.

These illustrations demonstrate why the Ombudsman's interpretation of the definition of "income source" in Schedule 3 of the Act is incorrect. Our client did not at any time enter into any contract of service with any person or body of persons.

95. It is not my view that an elected member should identify every single person or entity that pays them a small amount of money. One of the reasons that an elected member is required to record their income source is to assist in the detection of potential conflicts of interest. If a person is earning an income from doing 'odd jobs' then this would be considered a 'trade' as per the definition of income source in Schedule 3 of the Act. Accordingly, in my view, Cr Pain should have stated that his income was obtained from self-employment.
96. Therefore, I consider that Cr Pain failed to accurately complete the 2011 primary and ordinary returns. Accordingly, my final view is that in this respect Cr Pain acted in a way which is contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.
97. I recommend that the apparent failure of Cr Pain to lodge an accurate return in 2011 in relation to declaring income source and assets be referred for consideration by the Director of Public Prosecution.
98. Under section 18(5) of the Ombudsman Act, I must report any breach of duty or misconduct on the part of a member of a council to the mayor, as its principal officer. In

this case, I note my intention to report to the mayor Cr Pain's failure to accurately complete the returns.

### **Whether Cr Pain failed to disclose an interest at the council meeting on 26 October 2011**

99. During the course of my investigation it came to my attention that Cr Pain voted in relation to a matter concerning his father at a council meeting on 26 October 2011.
100. I decided to exercise my powers under section 13(2) of the Ombudsman Act to conduct an own initiative investigation into whether Cr Pain failed to disclose an interest at this meeting and breached section 74(1) and (4) of the Act.
101. In item 15.1 of the 26 October 2011 council meeting, headed Port Wakefield CWMS - R I Pain, it was moved:

That Council:

1. advise Mr R I Pain that the correspondence is at an end and as such Council does not intend to engage further in correspondence dealing with the Port Wakefield CWMS;
2. and further, advise the SA Ombudsman, Minister of Local Government and the Local Government Association of SA of Council's decision.<sup>32</sup>

102. Cr Pain voted against the motion and called for a division.
103. Further, I understand that Cr Pain played an active part in the debate about the item.
104. The question is whether Cr Pain's father would have received, or would have a reasonable expectation of suffering a non-pecuniary detriment from the council's decision on the item.
105. The item directly concerned Cr Pain's father, a person who is closely associated with him for the purposes of section 73(2) of the Act.
106. In my opinion, I consider that Cr Pain's father would have suffered a non-pecuniary detriment from the council's determination that it would no longer engage in further correspondence with Mr Pain about the Port Wakefield CWMS.
107. I note that, at the same meeting, Cr Pain declared an interest in the next item, item 15.2. The minutes record the following:

6.52pm Cr Pain declared an interest due to the report involving his father and left the meeting.

108. Item 15.2 was headed 'Section 270 Review of Council Decision - As requested by Mr R I Pain'. This item concerned a request made by Mr Pain for an internal review of a council decision under section 270 of the Act and council policy A9.5, Internal Review of Council Decisions. The request from Mr Pain was for a review of the legality of the Council's decision to declare a Service Charge for the CWMS. The council, in accordance with its policy for Internal Review of Council Decision, had forwarded the request to Wallmans Lawyers for independent review. In this agenda item, the council moved to adopt the report and recommendations from Wallmans Lawyers.
109. It is my view that Cr Pain's failure to declare an interest in item 15.1 of the 26 October 2011 meeting, but declaring an interest in item 15.2 of the same meeting, highlights a lack of understanding by Cr Pain as to how to identify and manage conflicts that may arise.

<sup>32</sup> Minutes of Ordinary Meeting of the Wakefield Regional Council held on 26 October 2011.

110. Cr Pain's lawyers responded to my provisional view that that he failed to disclose an interest in item 15.1 of the 26 October 2011 meeting as follows:

On 13 October 2011 the Acting Chief Executive Officer distributed an Agenda Item Report informing Council of a request by Mr Richard Pain for an independent contract review and audit of the Port Wakefield Community Wastewater Management Scheme ("CWMS") for a referral to the Institute of Arbitrators and Mediators.

We are instructed that Mr Pain's grievance regarding the Port Wakefield CWMS was not isolated and that a significant proportion of the local community had expressed strong misgivings about the CWMS for some considerable period of time. Indeed, before our client was elected to the Council, he had been a spokesman for a large group of disaffected residents who were dissatisfied with the Council's management of the CWMS and had been elected having campaigned on that issue.

We are instructed that our client acknowledges that he engaged in debate on the Chief Executive Officer's report at the Council meeting on 26 October 2011. His participation in the debate was confined to discussion as to whether the Council ought to agree to an independent contract review and audit of the Port Wakefield CWMS for referral to the Institute of Arbitrators and Mediators. We are instructed that our client did not engage in debate regarding the Acting CEO's recommendation that no further communication be entered into with Mr Pain regarding this issue.

In our submission, debate regarding management of dispute with multiple residents regarding the CWMS was not an issue in respect of which Mr Pain had any interest not shared by other residents. Accordingly, there was no interest of the kind described in section 74 of the Act arose on that issue.

However, our client accepts that a section 74 interest did arise with respect to the CEO's recommendation that no further communication be engaged in with his father.

Mr Pain believed at the time that a motion was moved that the Council resolve to decline Mr Richard Pain's request that the CWMS dispute be referred to arbitration/mediation. Our client believed that he was voting against that motion and did not understand that the only motion before the Council was in respect of the termination of further communications with Mr Richard Pain. Our client recognises that the Chief Executive Officer's recommendation and the Minutes are contrary to his understanding of what occurred at that meeting. ...

If our client transgressed Section 75 of the Act, it was inadvertent. So much is demonstrated by the fact that our client properly declared his interest before the next Agenda item which concerned his father and left the meeting while the next Agenda item was debated.

111. In my view, the motion that was moved for item 15.1 was clearly about Cr Pain's father and this is the item that Cr Pain voted on. The question of whether the issue of management of any disputes regarding the CWMS was one shared by other residents or not is not a question that is of relevance in this instance.
112. I acknowledge that Cr Pain says that if he did breach the Act in this instance, he did so in error. However, councillors have a duty to act in the public interest and to avoid conflicts of interest. Given that Cr Pain was aware of this investigation at the time of the 26 October 2011 meeting, it is of concern to me that Cr Pain has not displayed that he is alert to, nor has an understanding of, the requirements of the conflict of interest provisions of the Act.
113. Further, I have been informed by the council that on 28 September 2011 Cr Pain attended a training workshop, run by Wallmans Lawyers, for senior staff and elected members. the training workshop related to a number of matters and included conflict of

interest. I was informed by the council that Cr Pain 'took an active part in the workshop asking question and clarification on eh conflict of interest provisions of the Act.'<sup>33</sup>

114. In my view, in the interests of the integrity of the system, it is crucial that councillors understand conflicts of interest and their obligations to either avoid them, or to manage them when they do exist.
115. My final view therefore is that Cr Pain's failure to disclose an interest in item 15.1 of the 26 October 2011 meeting breached section 74(1) and (4) of the Act. Consequently my final view is that his action was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

## Opinion

In light of the above, I consider that Cr Pain acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the *Ombudsman Act 1972*.

In failing to disclose interests at the council meetings of 23 February 2011, 23 March 2011, 27 April 2011 and 26 October 2011, Cr Pain has acted in a manner which is contrary to sections 74(1) and (4) of the *Local Government Act 1999*.

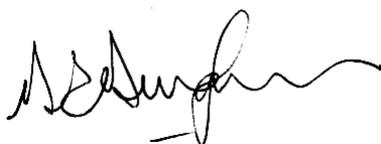
In failing to accurately complete the 2011 primary and ordinary returns Cr Pain has acted in a manner which is contrary to section 69 of the *Local Government Act 1999*.

In this situation it would be usual for me to make a recommendation, under section 25(2)(f) of the *Ombudsman Act 1972* that the council should facilitate appropriate conflict of interest training for the councillor. However, in these circumstances I consider that the council has already provided adequate training for Cr Pain. At the time of the meeting on 26 October 2011 Cr Pain was aware of the conflict of interest provisions of the *Local Government Act 1999* and was aware that my investigation was taking place. However, Cr Pain still breached the provisions, demonstrating that he has little regard to the provisions of the Act.

I recommend that the apparent failure of Cr Pain to lodge an accurate return in 2011 in relation to declaring income source and assets be referred for consideration by the Director of Public Prosecution.

I recommend that the *Local Government Act 1999* be reviewed and amended to provide a penalty or suspension where an elected member continually breaches the conflict of interest provisions.

Under section 18(5) of the *Ombudsman Act 1972*, I must report any breach of duty or misconduct on the part of a member of a council to the mayor, as its principal officer. Accordingly, I will advise Mayor Maitland of the Wakefield Regional of my final views.



Richard Bingham  
SA OMBUDSMAN

16 March 2012

<sup>33</sup> Letter from the Mayor to the Ombudsman, dated 29 February 2012.