

CONFIDENTIAL MINUTES

OF THE ORDINARY MEETING HELD ON WEDNESDAY 12TH JANUARY 2011

110114

CONFIDENTIAL ITEMS

1. Ombudsman SA – Preliminary Investigation of Complaint

Council has received correspondence from the Ombudsman SA on the 15th December, 2010 in regard to the Preliminary investigations of complaint.

In accordance with Section 83(5) I indicate that if Council so determines the item may be considered in confidence pursuant to Section 90(2) and 90(3) (g) "matters that must be considered in confidence in order to ensure that the Council does not breach law, order or direction of the court or tribunal constituted by law, any duty of confidence, or other legal obligation or duty"

INTO CONFIDENCE.

Moved Cr. Toogood/Seconded Cr. Pfeiffer that:-

a) pursuant to Section 90(2) of the Local Government Act, 1999, an order be made that the public, except the Acting Chief Executive Officer and Minute Secretary be excluded from attendance at the meeting for Council to discuss this matter in confidence.

b) That Council is satisfied that it is necessary that the public be excluded to enable the Council to consider the item at the meeting on the following grounds; 90(3) (g) "matters that must be considered in confidence in order to ensure that the Council does not breach law, order or direction of the court or tribunal constituted by law, any duty of confidence, or other legal obligation or duty)"

c) The Council is satisfied that on this basis the principle that the meeting be conducted in a place open to the public has been outweighed by the need to keep the information and discussion confidential.

CARRIED.

On the 17th December, 2010 each Elected Member was forwarded (via post) a copy of a Confidential Memo dated the 15th December, 2010 and entitled "Provisional views by the Ombudsman" and attached to the Confidential Memo was a copy of the SA Ombudsman entitled "Provisional Report" – Ombudsman Reference – 2010/00012.

Since distributing the Confidential Memo and Provision Report, I have spoken to Council's Work Manager Peter Broughill and verbally informed him of the Ombudsman's comments in his draft report to the comments made to Ian Farley. Whilst he had no issue with my account of this incident when advising the Ombudsman, he claims he should have been given an opportunity to personally advise the Ombudsman of this incident in his own words. I have since written to the Ombudsman advising him of the Works Manager's feedback and requested that the Ombudsman gives consideration for meeting personally with the Works Manager before finalizing his report.

Given the positive responses or comments in the remainder of the report, it is my recommendation to Council that unless there is an obvious flaw in the report which might reflect poorly against Council, that Council's response be that it notes the provisional review and other than the matter referred to the Ombudsman by the Chief Executive Officer, no further comment is necessary from Council.



1. Ombudsman SA – Preliminary Investigation of Complaint - Continued

Moved Cr. Nickolls/Seconded Cr. Toogood that Council advises the Ombudsman that it has no matters to be noted by the Ombudsman other than Council correspondence forwarded directly with him by the Chief Executive Officer in response to the Works Manager's request relating to the Ian Farley complaint.

CARRIED.

Moved Cr. Pfeiffer/Seconded Cr. Sexton that under the provisions of the Section 91(7) of the Local Government Act, 1999 having considered this agenda item in confidence under Section 90 (2) and (3)(g) of Act the Council orders that the item and the minutes relating to the matter be retained in confidence until the 14th December 2011 Council meeting and that this order be reviewed every 12 months.

CARRIED.**2. December 2010 Mid Term Chief Executive Officer's Performance Review Report**

In accordance with Section 83(5) I indicate that if the Council so determines the item may be considered in confidence pursuant to Section 90(2) and 90(3) (a) "information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead)"

INTO CONFIDENCE.

Moved Cr. Sexton/Seconded Cr. Dunsford that:-

a) pursuant to Section 90(2) of the Local Government Act, 1999, an order be made that the public, except the Acting Chief Executive Officer and Minute Secretary be excluded from attendance at the meeting for the Council to discuss this matter in confidence.

b) That Council is satisfied that it is necessary that the public be excluded to enable the Council to consider the item at the meeting on the following grounds: Section 90 (3) (a) of the Act, information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

c) The Council is satisfied that on this basis the principle that the meeting be conducted in a place open to the public has been outweighed by the need to keep the information and discussion confidential.

CARRIED.

Attached as Appendix A is the Chairperson's (Councillor Brian Toogood) of the CEO Performance Review Committee reported entitled "An Overview of the CEO Performance Appraisal" as per Council's decision at the Special Council Meeting held on the 15th December, 2010 as follows:-

"Moved Cr. Pfeiffer/Seconded Cr. Dunsford that the December Mid-term Chief Executive Officer Performance Review Report be tabled at the January 2011 Council meeting.

CARRIED."

Moved Cr. Sexton/Seconded Cr. Dunsford that the Chairperson's (Councillor Brian Toogood) of the CEO performance Review Committee reported entitled "An Overview of the CEO Performance Appraisal" be received (attached as Appendix A)

CARRIED.

Moved Cr. Sexton/Seconded Cr. Toogood that under the provisions of the Section 91(7) of the Local Government Act, 1999 having considered this agenda item in confidence under Section 90 (2) and (3)(a) of Act the Council orders that the item and the minutes relating to the matter be retained in confidence until the 14th December 2011 Council meeting and that this order be reviewed every 12 months.

CARRIED.




OmbudsmanSA

Enquiries: Barbara Ley
Telephone: (08) 8226 8699
Ombudsman reference: 2010/00012
Agency reference:

Final Report

Date complaint received	26 October 2009
Agency	Southern Mallee District Council
Complainant	Mr Ian Farley, Ms Marilyn Smith, Mr Adrian Wait, Mr Paul Carling, and Mr Richard Howard (members of the Geranium Ratepayers Association)
Allegation	The council has failed to provide adequate services with respect to: <ul style="list-style-type: none">• road maintenance in the Geranium area• roadside tree-trimming• the purchase of a new tractor• the cost of constructing the Lameroo Caravan Park• the works manager's conduct during a council meeting held in June 2009• responding to residents' concerns

Aspects of allegation within jurisdiction

Subject to the following comments, the complaint is fully within the jurisdiction of the Ombudsman.

First, in making the complaint, the Geranium Ratepayers Association (the **GRA**) provided a copy of a petition signed by 67 residents supporting a submission lodged with the council to adjust the council's boundary, so as to move the Geranium area to an adjoining council. I have no jurisdiction to consider changes to council boundaries, and I have considered the issues documented in the petition only insofar as they are relevant to this complaint.

Second, the complaint raised a number of policy issues relating to the council's allocation of resources for functions such as road maintenance funding and tree-trimming. As a result of a 1990 Supreme Court decision¹, my office is not able to investigate policy issues, or to 'second guess' validly made council decisions. However, in the course of this investigation I have considered some administrative acts which underpinned the creation of policy positions on these issues by the council.

¹ *City of Salisbury v. Biganovsky* (1990) 54 SASR 117

Investigation

My investigation has comprised:

- assessing the information provided by the GRA
- meeting with the council's Chief Executive Officer (the CEO) Mr Rod Ralph, on 20 November 2009
- seeking a written report from the council
- assessing the council's response
- considering the council works manager's road grading reports for 2007-2010
- considering the *Local Government Act 1999* and the council's Road Vegetation Management Plan
- preparing a provisional report and inviting the parties' comments
- considering the parties' comments
- conducting a conciliation on 19 April 2011. Notes of this conciliation prepared by my officer are at Attachment A
- preparing this report.

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.² 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.³

Responses to provisional report

The council's Chief Executive Officer responded to my provisional report by letter dated 17 December 2011. He noted the report, and indicated that the council's works manager had sought to meet with me to explain the context of the remarks he had made, which were one of the issues of complaint.

On 28 January 2011, the complainant provided detailed comment on my provisional report. The nature of these comments was such that I considered it appropriate to convene a conciliation conference with the council. This occurred on 19 April 2011, and notes of the conference are attached as Attachment A to this report.

²see *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

³ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362

Final Views

Background

1. Over a number of years, the GRA has communicated regularly with the council in an attempt to achieve what it sees as improvements to service delivery, and responsible cost effective use of ratepayers' money.
2. The GRA claims that the council has not addressed its complaints, in that the council:
 - carries out less road maintenance in the Geranium area compared to other council wards
 - fails to maintain the unsealed roads in the area, which indicates the council is not carrying out its functions in accordance with section 7 of the *Local Government Act 1999*
 - only grades some of its roads once a year compared to the Coorong District council, which patrols and grades their roads six times a year
 - fails to undertake road pothole repairs, and to trim back roadside trees, thus causing safety problems for residents driving on council roads
 - where roadside trees are trimmed, leaves branches on the side of the road, thus attracting vermin and presenting a fire risk
 - should have repaired an existing tractor, rather than purchasing a new one at a cost of \$80 000
 - incurred unnecessary costs to construct the Lameroo Caravan Park

The GRA also alleges that the works manager's behaviour during a council meeting in June 2009 was unacceptable, and that the council generally has failed to respond to residents' concerns.

3. On 4 December 2009 I sought specific comments in the form of a report from the council on the matters which are the subject of the complaint. On 23 December 2009 the council's CEO advised my office as follows:

(Road Maintenance)

.... Council engaged a consultant to independently audit pavement condition which results in a rating condition between 0-10 for different levels of pavement status, with 0 being the highest rating and 10 the lowest. (Appendix B)

....

Council has been conscious that until recently, dry and extended periods of no rain has (sic) increased complaints about either potholes or a need for an unsealed road to be graded

....

This Council has several 7.0 metre pavement width roads due to the road class assigned to them within our overall network of unsealed roads. There are circumstances where construction methods used for unsealed roads may mean a higher crown in the middle of the road and potential concern about high cambers. Council has been advised via the Geranium Ratepayers Group that some drivers of heavy vehicles (being semi trailers or larger and especially those carrying stock) drive their vehicles in the middle of the road and are therefore straddling the camber.

....

It is the case by having a slightly higher camber on roads prone to pot holding (sic) that this assists with the need to get water from rain events off the actual road pavement as quickly as possible as the dual effect of water lying on the roads and vehicle traffic is one of the major reasons for pot holing occurring if not addressed by either preventative measures or increased maintenance follow up.

....

On one hand the Council is accused of disproportionate funding for Geranium over the years when it has historically split the road budget equally between the 4 wards of Council. Bearing in mind the principle pursuant to Section 7 of the Local Government Act, Council is now moving towards a more priority based funding of those roads identified as requiring maintenance and re sheeting. Due to the closer proximity of rubble pits to roads which have been re-sheeted in the Geranium area, it is the case that Council's cost per kilometre to re-sheet a road is considerably less than other roads throughout the council area simply because of greater distances to any rubble pit sources. All other costs to undertake re-sheeting costs remain unchanged and this is why many consider the claims by the complainants of unacceptable standards for unsealed roads as quite unique as the Geranium area receives the best value for its dollar spent on sheeting programs. As more roads have been re-sheeted in the Price Cotton Ward including the Geranium area than the other 3 Wards, this has meant this district has benefited from better quality roads. Quite rightfully, the Council is now trying to address this imbalance by now having a more global re-sheeting program and concentrating on those roads having higher priority overall for re-sheeting, and the focus no longer being on the cost to do it as this prejudices those areas which are further from the rubble pits and may not be as cost effective to undertake as roads within the Geranium area. Using the historical funding split, the criteria of equity and fairness is not met by Council when approving the roads budget.

.....

Whilst reference to Section 7 of the Act has been referred to as grounds for this Council failing to perform its functions as a Council properly in respect of providing safe road conditions, this is not supported by any proof or validation by any documentation or reference to any engineering standards.

....

It is noted that reference has often been made to Coorong District Council and the patrol grading of their roads of 6 times per year and that it is their demand that all Geranium roads must therefore be graded by the Southern Mallee District Council to the same level of frequency. I can confirm after discussions with Coorong District Council elected members and staff, that this statement is quite misleading. It is not the case that Coorong District Council grades all roads 6 times per year. Whilst some of their major roads are graded up to six times per year, it is also the case that other roads of less priority only receive no more than 2 grades per year

(Tree Trimming)

....From time to time however, there are circumstances where the requirements to tree trim is not brought (sic) to Council's notice until generally a farmer is required to bring a wide piece of farming equipment down a particular road. Council is always responsive to requests for tree trimming for such purposes. It is however not the case that Council indiscriminately trims trees for the sake of doing it without reason. Council has given its endorsement to a Roadside Vegetation Management Plan in collaboration with the Native Vegetation Council....

....

It is with the undertaking that Council has in respect of its Roadside Vegetation Management Plan that I make the following comments to the three dot points in relation to tree trimming.

First dot point Council will maintain sufficient clearance between its unsealed roads and that of adjacent native vegetation so as to be compliant with its Roadside Vegetation Management Plan.

Second dot point Controlled tree trimming will be maintained and will take into account its Road Management Vegetation Management Plan

Third dot point Council will not remove cut branches unless obligated to in accordance with its Roadside Vegetation Management Plan or after taking its advice from its Fire Prevention Officer.

(Replacement of a council tractor)

.... Council's Plant and Machinery budget for the purchase of new plant can extend out to 5 years. In reviewing future costs to be incurred, Council then attempt-to (sic) to flatten this expenditure so that the years with abnormally high expenditure are offset by either bringing some items either forward or deferring for another year. It is the case that Council's plant and machinery budget is considerably higher in 2010/11 than in 2009/10 and so for prudent financial budgeting purposes only, the SAME tractor was chosen as the item to be changed over one year earlier than previously agreed some 4 years ago. It must be noted that this is not a one off decision, but simply one of several over the years to take advantage of change over costs depending on what type of plant it is. As the tractor is a vital piece of plant to Council's re-sheeting program, it is essential that it is reliable and due to an age factor and possible part replacement concern, the Committee and in turn the Council supported the argument for its purchase being bought (sic) forward. This purchase has not occurred to date and it is likely that the replacement tractor will be acquired in March 2010. This by default means that technically only a difference of about 4 months between expenditure in March and that which could have happened in July 2010....

(Cost of construction of the Lameroo Lakeview Caravan Park)

.... Unfortunately the council is not in the business of building caravan parks and whilst it obviously saved money by undertaking much of its construction by having the caravan park constructed using sub-contractors under supervision by Council's Works Manager, there were additional costs incurred that were not originally forecasted. The caravan park's total cost is now just over \$300,000 and represents an approximate budget over-run of 20% which is not excessive given that project management savings were achieved by this work being done 'in house'. Using a general rule of thumb of 10% for contingencies and 7% for supervisory overheads, I don't accept that this project was such a 'blow out' as claimed.

(Council and staff member conduct)

.... The resident in this instance is Ian Farley, one of the complainants to this complaint. Mr Farley directed a query to the Works Manager Peter Broughill at the public meeting addressing budget considerations prior to the ordinary Council meeting. His query was as to why Council's Works Supervisor from the Lameroo region, Mr Graeme Richardson didn't drive the road plant more frequently. The Works Manager responded on the following basis. He initially explained that the Works Supervisor did both administration and supervision of outdoor staff and works being undertaken. He pointed out that the role of the Work's Supervisor was subject to the Australian Works Union agreement in that employees had different roles which they were required to undertake. By way of an analogy, it is the case that the Works Manager then made a comparison along the line as stated in the complaint to demonstrate the different works level

....

Council has engaged the services of Tony Lawson of Tony Lawson Consulting a well accredited specialist in local government governance matters. This consultant has been engaged to undertake a performance appraisal of elected members as a Council. Further to this, elected members agreed to the undertaking of a follow up survey to dig a bit deeper into the issues so that professional advice could be sought and then fed back to members.

(Council has been unresponsive)

.... Whilst I am unable to speak for the previous Chief Executive Officer, I can assure the Ombudsman that in my time; all written complaints have been assessed and responded to in a timely manner. A request for Council staff and elected members to be present at either road side meetings or at a venue have occurred and to now claim that Council has been unresponsive is misleading to say the least. There has been a higher level of cooperation to engender goodwill and to right the wrongs of the past with the complaints as either individual members of the public or as members of the Geranium Ratepayers Association. My staff and Elected Members are very conscious of the need to treat each and every one of their complaints in a fair and independent manner and I believe this has been achieved overall in the last 30 months.

.....

I note that it is now claimed that the level of complaints may be greater as it is inferred that complaints may be reduced to verbal due to time constraints. I wish to point out that Council in such circumstances then revert to reducing that verbal complaint to a written Customer Action Report which is filled out by a staff member receiving the complaint orally.

.....

A search of Council's correspondence register however revealed only three letters on behalf of the Geranium Rate Payers Association and 2 further letters under the individual signatory of one of the 5 Members of that Association. All five letters were received between 3 July 2009 and 27 October 2009.

Whether the council reasonably maintains council roads in the Geranium area

4. The GRA claims that the council has not properly maintained its roads in the Geranium area over a protracted period of time, and this has resulted in its residents being placed at risk when driving on the roads. In particular, the GRA claims that the council only grades some of its roads once a year, compared to the Coorong District Council which patrols and grades its roads six times a year. It claims also that the lack of action taken by the council to maintain its roads indicates the council is not carrying out its functions pursuant to the principles set out in section 7 of the *Local Government Act 1999*.
5. Section 7 of the *Local Government Act 1999* states:

7—Functions of a council
The functions of a council include—

 - (a) to plan at the local and regional level for the development and future requirements of its area;
 - (b) to provide services and facilities that benefit its area, its ratepayers and residents, and visitors to its area (including general public services or facilities (including electricity, gas and water services, and waste collection, control or disposal services or facilities), health, welfare or community services or facilities, and cultural or recreational services or facilities;
 - (c) to provide for the welfare, well-being and interests of individuals and groups within its community;
 - (d) to take measures to protect its area from natural and other hazards and to mitigate the effects of such hazards;
 - (e) to manage, develop, protect, restore, enhance and conserve the environment in an ecologically sustainable manner, and to improve amenity;
 - (f) to provide infrastructure for its community and for development within its area (including infrastructure that helps to protect any part of the local or broader community from any hazard or other event, or that assists in the management of any area);
 - (g) to promote its area and to provide an attractive climate and locations for the development of business, commerce, industry and tourism;
 - (h) to establish or support organisations or programs that benefit people in its area or local government generally;
 - (i) to manage and, if appropriate, develop, public areas vested in, or occupied by, the council;
 - (j) to manage, improve and develop resources available to the council;
 - (k) to undertake other functions and activities conferred by or under an Act.
6. I note that section 7 specifies the functions which a council may carry out. It does not confer a specific obligation to provide services to a particular standard, nor does it provide any offence for failing to carry out a particular function. However, it is of course a matter of good public administration for a council to provide services effectively and efficiently to its constituents.
7. In this case, it appears to me that the following factors are relevant to a consideration of whether the council has met its obligation to provide road maintenance services effectively and efficiently to the Geranium area:

-
- historically the council has distributed its road maintenance budget equally across the four council wards. However, the council now carries out its road maintenance program simply by identifying roads throughout its area which require maintenance, irrespective of which ward the road is situated in
 - roads in the council area received varying levels of maintenance, as the council considered appropriate. For example, the works manager's report 2007 to 2010 indicates that the Lutze Road was not graded in 2010. However, the Parrilla Road was graded eleven times and the Heinzl Road four times throughout 2010
 - maintenance costs can vary according to a number of factors. For example, the cost to re-sheet the Geranium North Road in the 2008 - 2009 financial year was \$42,800, and the same road was re-sheeted in the 2009 - 2010 financial year at a cost of \$29,779
 - the council has advised me that the cost per kilometre to re-sheet roads in the Price Cotton and Geranium wards has been less than in other wards, as their council roads are closer to the council rubble pits
 - in relation to roads in the Geranium area, the council received two complaints from residents, one in 2003 and the second in 2004, relating to potholes on Parrilla Road and wild oats over-growth at the Heinzl Road corner
 - in recent times the council has carried out a review of its network of unsealed roads across wards, and has engaged an independent auditor to review and make recommendations on the status of road pavement conditions of sealed council roads.
8. In summary, it appears to me that the council has maintained its carriageways on a needs basis, and in accordance with its Roadside Vegetation Management Plan. Hence, some roads have been graded several times a year and others which are less utilised by residents have not been graded. More recently, the council has taken steps to review its road network to ensure that the available funds are spent appropriately.
9. At the conciliation convened in response to my provisional report, members of the GRA provided examples of instances in which they consider that road maintenance has been unsatisfactory. In some examples which they gave, it appears to me that driver behaviour may also have been an issue, and this is not something which is within the control of the council. I trust that the council will take on board the views expressed by the ratepayers at that conciliation, in formulating its works and road maintenance programs.
10. However, having considered all the information available to me, including the points made at the conciliation, I have formed the view that I should not make any finding of administrative error in the way the council has maintained roads in the Geranium area. I reiterate the point made above, namely that my office is not able to investigate policy issues, or to 'second guess' validly made council resource allocation decisions. The allocation of the road maintenance budget is properly a policy matter for the elected council, and I have found no evidence that this responsibility has been exercised in a way which is unreasonable. It appears to me that potholes have been repaired as regularly in the Geranium area as in other wards, and that the council is reasonably grading its roads when and where necessary.
11. This being the case, it is my final view that the council's road maintenance practices cannot be described as unlawful, unreasonable or wrong within the meaning of the *Ombudsman Act 1972*.

Whether the council's roadside tree-trimming practices are reasonable

12. The GRA claims that the council's lack of tree-trimming places residents at risk when travelling on council roads, and that where branches have been trimmed back from the side of the road the council has not removed the branches. This can be a potential fire risk.

13. The council's Roadside Vegetation Management Plan states that:

2.3 Verge maintenance for road safety

Verge management of roads within the Southern Mallee District Council predominately involves clearance of vegetation from the edge of the carriage way for road safety reasons. At present verge clearing occurs infrequently within the area. When verge clearing is required the council aims to maintain road verges such that a safe passage for vehicles is provided and that conservation values of native vegetation within the road verge are maintained.

....

2.11 Bush fire hazard reduction

The Southern Mallee District Council is required to manage vegetation within road reserves to comply with its responsibility towards bushfire prevention under the Fire and Emergency Services Act 2005, and to conserve native vegetation as required under the Native Vegetation Act, 1991.

14. I note the council has not received a reported traffic incident regarding the non trimming of tree branches or the non removal of trimmed branches from the side of council carriageways, and that it appears to me that no specific incidents of this nature were raised at the conciliation. However, there have been other instances in which the issue has been raised by residents. For example, on 31 July 2009 Ms Marilyn Smith (a member of the GRA) was advised by the council that:

Council is required to comply and meet with Native Vegetation Council legislation and adhere to agreed conditions set out by them in our NVC agreement.

15. As noted above, the council CEO has advised me that the council, in accordance with its Roadside Vegetation Management Plan, clears vegetation from the edge of carriageways for road safety reasons, or when requested to do so. In order to ensure that carriageways do not become a potential fire hazard, the council obtains advice from its fire officer as required by the *Emergency Services Act 2005*.
16. From the materials available to me, I have no evidence of an administrative error in the way the council has carried out this responsibility. In the same way as for the road maintenance issue, the allocation of resources to this task is a policy matter for the council, and in the absence of an administrative error, not one which I am able to query. This being the case, my final view is that the council's tree trimming and fire prevention practices in relation to maintaining and clearing its council road carriage ways are not unlawful, unreasonable or wrong within the meaning of the *Ombudsman Act 1972*.

Whether the council's decision to purchase a new council tractor was reasonable

17. The GRA believes that the council needs to be more responsive, accountable and cost effective in the way it makes its financial management decisions so as to not burden rate payers with added financial costs. In particular, the GRA believes that it would have been more prudent of the council to have repaired an existing council tractor instead of spending ratepayers' money to purchase a new one.
18. The CEO has advised that the council decided some four years ago to replace the old council tractor, to take advantage of change over costs and alleviate concerns about ongoing part replacement costs. I understand that the actual changeover took place in March 2010 instead of July 2010, some four months earlier than initially planned.
19. I also note that the council wrote to Ms Marilyn Smith on 17 August 2009 to advise her that:

I draw to your attention that it wasn't the case that the minor maintenance matters caused Council to consider the replacement of the SAME tractor in this financial year. The reason to bring forward the purchase of a new tractor from next year's plant and machinery budget was to soften the much higher expenditure to occur in the following year for items of plant and machinery.
20. I accept that issues such as the replacement of large capital items will attract attention from ratepayers who are conscious of controlling council costs. In my view this is entirely appropriate, and councils should be cautious in managing these issues.
21. However, based on the materials which I have available, and the comments made by the parties at the conciliation, I have concluded that the council's decision to replace the council tractor on the basis that it wanted to balance the burden of its machinery expenditure budget for the following year was reasonable, and does not demonstrate any administrative error. Therefore, my final view is that the council's decision to purchase a new tractor was not unlawful, unreasonable or wrong within the meaning of the *Ombudsman Act 1972*.

Whether the cost of constructing the Lameroo Caravan Park was reasonable

22. The GRA claims that additional costs incurred in constructing the Lameroo Caravan Park amount to an unacceptable burden on the ratepayers.
23. The council CEO has advised me that:

The caravan park's total cost is now just over \$300,000 and represents an approximate budget over-run of 20% which is not excessive given that project management savings were achieved by this work being done "in house".
24. I note that the CEO has acknowledged that the council did not forecast some of the added costs to construct the Lameroo Caravan Park due to its lack of experience in construction of such a project. In my view, this is unfortunate, and I agree with the GRA that any such additional imposition on ratepayers is unacceptable. However, I accept that the council took the project on with good intentions, and that in the case of relatively small rural and regional councils there will always be a judgment to be made as to whether a particular project is sufficiently large or difficult as to warrant the additional expense of outside consultancy skills.
25. On balance, my final view is that whilst the cost overruns are unfortunate, they are not of such a level as to warrant a finding of administrative error, within the meaning of the *Ombudsman Act 1971*. In forming this view, I have taken account of the fact that

offsetting savings were achieved by managing the project in-house, and that in my experience a cost over-run of the order of 20% is not uncommon for projects of this type.

Whether the council works manager behaved appropriately during a council meeting on 10 June 2009

26. The GRA claims that comments made by the works manager at a council meeting on 10 June 2009 were unacceptable, as his response referred disrespectfully to other council staff members. The background to this aspect of the complaint appears from the report provided to me by the council CEO, as quoted in paragraph 3 above.
27. During the meeting, the following exchange occurred between one of the complainants and the council works manager:
- Q. How many hours do supervisors drive road construction machinery?
- A. The same amount of time as Mr Neville Pfeiffer fills potholes on his way to meetings and the same amount of time as the girls in the office spend cleaning the toilets.
28. The council has a Code of Conduct (**the code**) which applies to staff members.⁴ It includes the following commitment:
- 4.3 Council Employees must be fair and honest in their dealings with individuals and organisations and behave in a manner that facilitates constructive communication between the Council and the community.**
We agree that at all times we should:-
-
When representing Council in the community, conduct ourselves in a manner that will not reflect unfavourably on the Council.
29. I am of the view that the remark made by the works manager was arguably in breach of the code provision quoted above, and possibly other provisions as well. I note that the code provides⁵ that ensuring compliance is a responsibility of the CEO.
30. The CEO has advised my office that since this incident the council has engaged the services of a consultant, who facilitated a workshop for council staff on 3 February 2010 to address what acceptable standards council officers need to observe during council meetings.
31. In these circumstances, my final view is that the remark made by the works manager may have been inappropriate, but that the CEO has taken the necessary action to enforce acceptable standards of behaviour. In the circumstances, my final view is that the council has not acted in way which is unlawful, unreasonable or wrong within the meaning of the *Ombudsman Act 1971*.

Whether the council has failed to respond to residents' complaints

32. The GRA claims that the council has failed to properly respond to correspondence from its residents about service delivery matters, and the responses residents have received from the council have not fully addressed the concerns raised.

⁴

http://www.southernmallee.sa.gov.au/webdata/resources/files/Code_of_Conduct_for_Council_Members.pdf

⁵ in section 5.0

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33. Between 3 July and 27 October 2009 the GRA or its members individually wrote to the council on a number of occasions. The council met with the GRA on 21 May 2009, and I understand that the issues raised at that meeting related to:
- the increase in council rates
 - road safety issues
 - how the council spent its money on maintaining its roads.
 - trucks driving in the middle of the council roads due to high cambers
 - the number of times the council grades its roads
 - large areas of pot holes not being filled by council
 - the width of council roads
 - over hanging branches
 - re-sheeting of council roads
34. I accept that over a protracted period of time the GRA was dissatisfied with the responses it received from the council. I am advised that the CEO has reviewed the council's complaint management system, and has implemented a Customer Action Report System to incorporate all complaints lodged with the council whether they are lodged verbally, by telephone or through casual conversations with council staff.
35. Whatever may have been the case in the past, based on the information provided to me it appears that that the council is now taking all residents' complaints seriously. It appears to me that in recent times, where written complaints have been lodged with the council it has responded within a reasonable time frame, and when necessary, has met with residents to discuss their concerns.
36. I note that I am currently undertaking an audit of complaint handling across local government, and I anticipate that my report will provide useful guidance on this important aspect of a council's work. I encourage the council to consider that report closely once it is available.
37. However, my final view is that the council's current complaint management system cannot be described as unlawful, unreasonable or wrong with the meaning of the *Ombudsman Act 1972*.

Opinion

In conducting its road maintenance program, the council has not acted in a way which is unlawful, unreasonable or wrong within the meaning of section 25(1) of the *Ombudsman Act 1972*.

In maintaining and clearing its road carriage ways, the council has not acted in a way which is unlawful, unreasonable or wrong within the meaning of the *Ombudsman Act 1972*.

In deciding to replace a tractor, the council did not act in a way which was unlawful, unreasonable or wrong within the meaning of the *Ombudsman Act 1972*.

Whilst the project could have been handled better, in carrying out the upgrade of the Lameroo Caravan Park, the council did not act in a way which was unlawful, unreasonable or wrong within the meaning of the *Ombudsman Act 1972*.

In making the remark complained about, the works manager may have acted inappropriately. However, the CEO has taken the necessary action to enforce acceptable standards of behaviour, and in these circumstances, the council did not act in a way which was unlawful, unreasonable or wrong within the meaning of the *Ombudsman Act 1972*.

The council's current complaint management system cannot be described as unlawful, unreasonable or wrong with the meaning of the *Ombudsman Act 1972*.

Richard Bingham
SA OMBUDSMAN

12 July 2011

Attachment A

Conciliation Conference 19 April 2010

Geranium Ratepayers Association
The Southern Mallee District Council

Present

Ms Barbara Ley / Ombudsman SA office
Ms Katina Theodoulou /Ombudsman SA office

Mr Rod Ralph CEO of Southern Mallee District Council (the council)
Mr Gordon Hancock Mayor the council

Mr Ian Farley President of the Geranium Ratepayers Association (GRA)
Mr Paul Carley from Parrakie member GRA
Mr Marilyn Smith from Parrakie member GRA
Mr Adrian Waite from Jabuk member GRA
Mr Richard Howard member GRA

Introduction/Welcome by Barbara Ley.

Barbara explained the process of conciliation and role of the State Ombudsman in accordance with the Ombudsman Act 1972.

Issues:

1. Road Maintenance in the Geranium area
2. Road side tree trimming
3. Purchase of the new tractor
4. Cost to construct the Lameroo Caravan Park
5. Work Manager's conduct during a meeting held in 2009.

Jurisdiction /powers of the Ombudsman in relation to this matter:

The Ombudsman has no jurisdiction to consider changes to the council boundaries.

Policy issues relating to council's allocation of resources and functions: Ombudsman is not able to investigate policy issues or to second guess the validity of the council's decision/s. (reference made to *City of Salisbury v. Biganovsky (1990) 54 SASR 117*)

Further explanation of how the conciliation will be conducted.

1. Road Maintenance in the Geranium area

Mr Ian Farley:

The issue of the maintenance of roads is a long standing issue. He referred to owning several properties in the Coorong council area. The level of service in the Coorong area far exceeds the level of service received from the Southern Mallee Council in which the Mr Farley owns three properties. Southern Mallee Council roads get graded on a 7 day week program. Coorong council run graders 6 days a week and operators work around the clock/regular as clock work.

Mr Rod Ralph

CEO disagrees/don't grade road to that period/Farley wants CEO to substantiate where he got this information/evidence.

Mr Ian Farley

Example: Launer Rd only services Farley/still gets graded 4 times a year. Mr Farley continued to compare both councils

If road is not graded you can't maintain the surface.

Southern Mallee Council maintain that due to extended dry period they haven't been able to grade the road but the Coorong Council maintained their grading program for 6-7 weeks right through the whole 10 year period and have had 6 or 7 droughts through that period.

Camber of road is of great concern to Ian Farley

He referred to Beehive Rd- (Jabuk end) currently labelled Nichols Rd but recently renamed to Beehive Rd).

That road was resheeted about 20 years ago.

10 years ago Coorong council graded and rerolled roads.

Road has enormous amount of traffic on it.

Road goes into Southern Mallee council on Beehive Rd/surface is rough/if stock or grain truck goes onto that part of road they sit dead in the middle of the road /same happens to Mr Farley

Photos submitted to Barbara.

When 2 trucks pass each other there is a potential for trucks to tip and roll over.

Consequently, most trucks drive in the middle of the road/only way to prevent rolling over/causing problem if another truck comes on the other side of the road.

Beehive Rd has far more traffic than Parrakie Road.

Mr Farley received support in relation to heavy traffic on Beehive Rd.

People have been run off and accidents reported.

Mrs Marilyn Smith also supported Mr Farley. She explained that she came very close to being wiped off on this road from a vehicle speeding around a bend.

Barbara explained that need to be clear as to driver's behaviour on the roads and the level of maintenance of council roads.

Mr Farley explained that they have no option and have to drive in the middle of the road.

Barbara Ley

Not administration error.

- We are discussing the maintenance of council roads and whether council is able to do anything to try to remedy this in any way to make it reasonably safe for drivers.
- Barbara explained that the Ombudsman may not deem driving in the middle of the road, because the camber too high, as an administrative error, but more of a choice by a driver.

Marilyn Smith/stated that:

She was informed by the Works Manager that he builds roads to 3 - 4 % camber. The council's Works Manager measured Parrakie South Road and it was 7 - 10% and admitted that it was too high. Even the CEO came out and had a look and he thought that they should engage an engineer to look at the road as a benchmark

Counsellor Hancock was one of the people that spoke against it as severely as he could. It was a tied vote. Nothing happened. It was decided that the Works Manager with his staff find 4 unsafe places on the roads in the Southern Mallee area. Staff decided it was too political and wouldn't do it. Ms Smith wrote to CEO Rod Ralph, no action has been taken.

Who can solve the problem of people driving in the middle of the road due to the high camber?

Barbara Ley

That's a grey area.

- Nonetheless, it is the responsibility of a driver to obey the rules of the road and drive on the left hand side of a road not in the centre of a road.

Mr Rod Ralph

Concerned about the high camber/allegations that they are illegal/not designed to an engineering standard.

Mr Rod Ralph's response

- there is no specific standard for local govt with regards to the construction of an unsealed road in respect of high camber. The things that will gauge why this is done are largely, rainfall. One of the biggest problems for maintenance issues to arise on a road is where after a rain event the water puddles and the action of vehicle wheels, wet road and water on the road will carve up the road a lot quicker than the water can be dispersed off the road. Most areas and in the mid north where this is more predominant than even this area they have much higher cambers in their roads to allow water to run off as quickly as possible. It's a trade off in regards to what's worse the camber or having water laying on a road that can add to driver safety because of the slipperiness and also the road deteriorating quickly because of vehicle traffic.

The recent concerns raised about Beehive Rd (upgrade) that Mr Ian Farley raised at the March 2011 council meeting this year.

Mr Rod Ralph's response

- The Beehive Road hadn't been finished.
Inspection was conducted/more than satisfied with work completed.
Council does acknowledge that this is a road with some problems regarding whether or not it needs to be graded more often.
In this instance the maintenance that was carried out there was some additional road base brought in to address some problem spots/we accept that this is not a full blown reinstatement of repairing that road.
This was raised as an opportunity to demonstrate what we could do with a slightly different way on how to deal with maintenance.
The elected members for this area believe that the job has been proven to be quite good as have a previous road in another part in our district where we did this similar work but regrettably it doesn't appear to be the case that we can keep at least the members of this association happy with any effort of improved road maintenance.

Marilyn Smith

Expressed concern about inspection of road. Road was inspected after it had been graded. Grader was still working on it. Ms Smith provided photos. They took away all of their signs/no machinery/left in a dangerous situation.

Barbara Ley

- Different issue/council may need to address this issue separately.
- Back to maintenance of road issue. Work was stopped due to machinery malfunction/problem with the roller.

Mrs Marilyn Smith

Then they should have left signage informing people.

Mr Ian Farley

Concerned that work was done just after Ombudsman became involved. Work was not completed/road left in a mess. What prompted council in the first instance.

Barbara Ley

2 issues: What prompted council in the first instance to work on road and why were signs, machinery removed when work not completed?

Mr Rod Ralph response

Had been carrying out work/rain started/maintenance on repairing road inappropriate/left in state that was deemed to be drivable/thus removing 40 kilometre per hour signage.

Barbara Ley

Road repaired/stopped due to rain/signs removed/not completed.

Mr Rod Ralph

Repairs finished, just needed final grading to get right levels, plus rolled at the same time

Barbara Ley

Therefore, hadn't been completed?

Mr Rob Ralph

Yes?

Barbara Ley

Perhaps in this situation signs should have been left/lower risk to drivers

Rob Ralph

- No, no risk at all, simply the final finish. When we did come back we did no further road work, simply tidied up the surface. Referred to photos. Was not left in a dangerous state. To suggest otherwise is not pleasing to me. No one else has complained only this group.
- Regarding Coorong road rating, in the summertime when it's a dry grade their road would have that same metal stone build up on the roads. It is documented that where the driveways are the council actually scrapes some of that away to assist the entry and exit of those vehicle coming from the road onto their private property.

Barbara Ley

Signs where removed/road work not quite finished. Difference of opinion.

Barbara Ley/Rod Ralph

Opposing views

Barbara Ley

Second point regarding what prompted council to work on Beehive Rd

Mr Rod Ralph

Part of roads that had been on council program to be maintained in regards to complaints. Had work done on Canalpyn Road, it was as a result of that work that we could do same type of work done on Canalpyn on Beehive.

Not intended to be treated as resheeting/simply a process of trying to get a better response to that road until such time as it does come onto the resheeting program. Meeting tonight regarding long term maintenance.

Mr Ian Farley

- Concerned about residents and strangers that are not familiar to these roads/referred to pot holes/inexperience driver's struggle to keep control.
- Wanted it noted that road material used on Beehive Road had far too much clay on it. Not the proper material put on that road.
- Wants to know what will happen when next heavy rain comes given council claim that they could not continue work when rains.

Mrs Marilyn Smith

Questioned inappropriate that road (Beehive Road) wasn't inspected prior to work commencing.

Mr Rod Ralph

2 staff members did go out and inspect before work commenced.

Ratepayer

Selection of rubble also an important issue. Presented photos.
Geranium North Rd/questions rubble used on this road/obvious too much clay.

Mr Rod Ralph

There are ways of addressing high clay content.Council will generally try to ascertain a nearby rubble pit area; increases cost.At the end of the day the roads are constructed and don't have any problems with constructions of roads.

Ratepayer

Referred to 2009 /where council chose another gravel pit rather than his father's pit/which was further out.

Mr Rod Ralph

Council has to pay royalties. Therefore, council weighs up what it thinks is a reasonable cost in regards to the amount of material council needs. In this case it came down to the dollar.

Mrs Marilyn Smith

Regarding Parrakie South Rd and pot holes/photographs provided.

Road graded in Jan 2011 and last week.

Will last a month or 6 weeks.

Pot holes have been there for at least 12 years.

Ongoing problem.

Mr Rod Ralph

Some roads within council network will need resheeting.

Parrakie road will be one of those roads that will be identified that certainly sections of it will need to be addressed through the program.

Council have a process in place/concentrating on a long term road maintenance program. At least it will give some assurance to people about the priority and the expense that council has available to it and been given to it and the willingness in trying to do this.
Some roads council will never get to. Some do not even have rubble on them.

Gordon Hancock

Works Manager will not repair a section of a road within a road. Council do not generally fix up patches here and there.

2. Overhanging trees

Marilyn Smith

Council should be maintaining and inspecting sites that need trees trimmed.

Ian Farley

IF comparing councils again. Coorong clears vegetation without having to be told. Southern Mallee District Council acts only if ratepayers lodge complaint. Council claim can't always act immediately due to resources.

Barbara Ley

Process not unreasonable. Appropriate for ratepayers to inform council if trees need trimming. Seems that council act on complaints received. Council has aligned their tree trimming policy in accordance with the Native Vegetation Act.

Rod Ralph

If council knows of a section of road that trees are obstructing farming equipment council is happy to act. Karoonda council shares trimming equipment.

Council has recently purchased a new attachment to the trimmer to mulch timber. This was raised by the public and acted on.

Ratepayer

Concerned that council does not consider it beneficial in cutting scrub further back from road than it currently does.

Barbara Ley

Questioned whether council would consider cutting back a further half metre, on roads that are considered dangerous.

Rod Ralph

Council happy to review tree trimming issue but does not consider this will make a difference.

Ratepayer

Roads should be widened when road is under reconstruction.

Rod Ralph

Happy to flag it.

Marilyn Smith

In the budget council have figure for tree trimming; do they have a plan for the year or do they react only when ratepayers lodge complaint?

Rod Ralph

Council responds to complaints but more of a reactive rather than a proactive approach because of our policy that we have around our native veg.

Roadside native veg plan is a document signed off by government.

3. Purchase of new tractor

Ian Farley

Not happy with new purchase. Tractor has only worked 4000 hours which is not long in a tractor's life.

IF tractor has done 15000 hours. Modern equipment has longevity of life.

Council have not enough money in the budget to repair roads but they go and purchase a tractor at \$80,000. At council meeting, council could not give answers/reasons as to why they purchased the tractor.

Eventually found out that council wanted to purchase it a year earlier than had been planned because of the budget.

Tractor did not really need to be changed at all.

Council could have repaired tractor instead/waste of ratepayers money.
 Would have lasted another 10 years if repaired/not used that often.
 Put up for tender - 2 tenders received to buy tractor/ one for \$8000 and one for \$25,000
 When negotiating the person that offered \$25,000 found that there was disconnected wiring
 and the 3pt linkage had been damaged. Council reduced price to \$20,000. Council action
 inappropriate.

Barbara Ley

Issues clarified

1. council should not have reduced price/amount agreed should stand
2. tractor could have been repaired

Rod Ralph

Tractor along with all heavy plant machinery is on a plant register and we program
 replacement of those plant machinery.

The tractor was faulty, council believe optimum time for the tractor was reached, some 12
 years, fitted with council program replacement of machinery and equipment and changed it.
 Brought purchase forward to assist in cost.

Council was not aware that tractor's 3pt linkage was faulty. When inspected by purchaser it
 was noticed that it was damaged.

Council did not point out that it was damaged and in good faith renegotiated the price.

Council have engaged a financial management consultant to assist with such issues and
 purchases.

These types of issues will be reviewed/will not be done and dusted. It will prick the ears of the
 elected members in when we start looking at future programmed replacement of plant
 machinery that council will review it. If your looking for some acknowledgement then the
 acknowledgment is sometimes it's these types of things that we look at that makes changes
 occur in councils. Council may see perhaps that there is some substance or a necessity that
 we do so.

4. Cost to construct the Lameroo Caravan Park

Ian Farley

Questioned why council purchased caravan park for \$350,000 of rate payers money when
 they currently own one in Pinnaroo. Caravan Park is not benefit to ratepayers. Council have
 enough problems with roads and shouldn't be purchasing a Caravan Park.

Rod Ralph

It was closer to \$300,000 because there was a \$40,000 grant that was provided so it didn't
 come out of ratepayer's money entirely. The reason was a council decision, the community
 wanted it. Council at times are persuaded by the community/a long held desire for a caravan
 park at Lameroo for some 20 years. Only after the development of the late Roberts complex
 that the original site of the caravan park moved from where it was originally proposed to then
 compliment the adjacent Jack Roberts facility.

It was prompted largely as a result of a strong community expectation that council provides a
 caravan park in Lameroo.

There was a business plan prepared. A three phase component. Only phase one was
 constructed. Phase 2 had facilities like laundry amenities, camp kitchen facilities for which
 council chose not to proceed with.

Current operators who are managing the park are now returning a profit in regards to their
 outgoing expenses.

Strong argument that the caravan park can't be pulled up and taken away therefore council community has an asset.

What council often does is establish that (caravan park) as the ground work for someone to purchase but council will continue to operate the park and probably invest in it.

Registration of interest only expired last Friday.

There are a lot of things that council does that don't make money e.g. swimming pools, but they provide a community facility.

Council is not in the business in running a caravan park.

Without council input there would not be a caravan park/would not have been profitable for private enterprise to come there in the first place. Council has kick started the opportunity for private enterprise to actually now run a caravan park to put in the capital infrastructure to increase the returns that will benefit the community in the long run.

Council have 2 registrations of interest that will go before council in the very near future.

Council will never be able to please everyone. Council has obligations outside of roads.

Council spend money on parks and gardens/swimming pools etc.

Other people may not consider it appropriate to spend money on roads/will always be difference of opinions.

5. Work Manager's Conduct

Ian Farley

Very offensive

Wants apology for Works Manager remarks/very offensive

Complete fabrication

Disputes most of information provided in Ombudsman letter re this issue.

Refer to Provisional Report/Section: Code of Conduct

Rod Ralph

Works Manager did not breach the code of conduct.

Difficult to remember what actually happened.

Opposing recollection of events.

Barbara Ley

Summary:

Road Maintenance - different perspective of the signage/completion of the road/ may be issue regarding removal of signs.

Trimming of roadside trees - council is acting in accordance with the vegetation Act.

However, they will consider whether they could in the future widen/extend amount of removal from the roadside.

Purchase of the new tractor

Both very strong sides. I think council has recognised maybe their decision in the future needs to be more focussed on whether or not it is viable to purchase such large purchases/ or reconsider repairing .

Cost to construct the Lameroo Caravan Park

I think there is an argument for and against in reference to tourism and reference to building up the infrastructure.

Both strong sides on this particular matter.

Works Manager Conduct

Difference of opinion about where and when comments occurred.