Confidential Item

CAMPBELLTOWN CITY COUNCIL

Confidential Item

For Council meeting to be held on

Tuesday 6 August 2019 at 7.00 pm

Refer Item 11.6

Confidential Item

11.6 East Waste – Reappointment of Independent Chair

Chief Executive Officer, Paul Di Iulio's Report

Purpose of Report

To consider the reappointment of Independent Chair, Mr Brian Cunningham, to the Board of East Waste for a further two year period.

Strategic Plan Link

Strategy 1.5.4 Effectively administer Council's statutory obligations in compliance with relevant legislation

Strategy 2.5.1 Provide an effective corporate governance service that meets legislative requirements

Background

Mr Brian Cunningham has held the role of Independent Chair since 2013 and was last reappointed in July 2017; his tenure expired on 30 June 2019.

Given the expiration of Mr Cunningham's term as Chair, the East Waste Board held a special Board meeting on 1 July 2019 to consider his tenure. At that meeting, the Board resolved to seek Member Council approval to reappoint Brian Cunningham as Independent Chair for a further term through until 30 June 2021.

The intent of the Board is to engage Mr Cunningham for an initial period of three months in order to allow for Member Council consideration (and endorsement) of his reappointment.

The Board is due to meet again on 26 September 2019, whereby they will be expecting to consider the response from Member Councils (see attachment). Since late 2015, Mr Brian Cunningham has also held the role as Chair of NAWMA (Northern Adelaide Waste Management Authority).

Discussion

At or about the time that the contract between SKM and East Waste (for the receipt and processing of Member Council recyclables) ceased, East Waste entered into a short-term contract with NAWMA. This in itself created a 'conflict of interest' situation, given Mr Cunningham held the role of Chair for East Waste and NAWMA at the same time. This conflict was equally recognised by East Waste and other Member Councils, so much so, that East Waste sought legal advice on how to manage the conflict.

Staff have a concern that since awarding the recycling tender to NAWMA, a situation has been created where the Chair of the service provider (NAWMA) is the same Chair as the client (East Waste), creating a conflict for both entities.

During the tender process for recycling material, Mr Cunningham's conflict of interest was diligently managed by the Board and Administration, principally by excluding him from all information and decision making associated with the Recycling Contract. The legal advice was strictly adhered to and further advice has recently been received with respect to his ongoing role. This information and item was discussed at the Special East Waste Board Meeting in July.

The legal advice confirmed that Mr Cunningham has a material conflict of interest and recommended that the Chair separate himself from any meetings, whether they be NAWMA Board meetings or East Waste Board meetings where the contract, between the entities is discussed.

Options for Consideration

Option 1

That Council having considered the request received from the General Manager of East Waste, to reappoint Mr Brian Cunningham as the Independent Chair for a further two years, has determined that as the conflict of interest remains, given that East Waste has recently signed a three year contract with NAWMA for the receipt and processing of East Waste's recyclables and that Mr Brian Cunningham is the Chair of NAWMA, resolves not to support the reappointment of Mr Brian Cunningham until 30 June 2021.

Option 2

That Council supports the recommendation from the East Waste Board to reappoint Mr Brian Cunningham for a further two year term until 30 June 2021.

The above legal advice is sound however Staff have a concern from a due diligence perspective, given that irrespective of whether the Chair excuses himself from any meeting, he is still entitled to receive all reports, agenda items and minutes in relation to the item that is to be discussed. Therefore Staff are recommending Option 1.

An alternative position could be that Mr Cunningham resign from the NAWMA Board and in that case Staff would recommend Option 2, however to date he has indicated that he isn't prepared to do that.

Although acknowledging Mr Cunningham has been an exceptional Independent Chair, reappointing him for a further two year term or any term, will result in the continuation of a material conflict of interest for East Waste when discussing the recycling contract. Should Council seek to reappoint Mr Cunningham, it would be doing so knowing that there is a material conflict, which may prove troublesome in the future should a dispute arise between the service provider and the client. Furthermore, the matter with SKM may still need to be considered by the East Waste Board and therefore Mr Cunningham would also need to excuse himself from those discussions.

Social Implications

There are no social implications in relation to this report.

Environmental Implications

There are no environmental implications in relation to this report.

Asset Management Implications

There are no asset management implications in relation to this report.

Governance / Risk Management

Council has fulfilled its obligation to consider the reappointment of the Independent Chair for a further two year term, in line with the East Waste Charter and has considered legal advice with respect to Mr Cunningham's conflict of interest.

Community Engagement

East Waste Member Council communities would expect accountable and transparent governance, notwithstanding the legal advice, there is an ongoing material conflict of interest.

Regional Implications

There are no regional implications in relation to this report.

Economic Development Implications

There are no economic development implications in relation to this report.

Financial Implications

There are no financial implications in relation to this report.

Recommendation

That Council resolves not to support the reappointment of Mr Brian Cunningham as the Independent Chair to the East Waste Board for a further two year term.

EastWaste

5 July 2019

Mr Paul Di Iulio
Chief Executive Officer
Campbelltown City Council
PO Box 1
CAMPBELLTOWN SA 5074

Dear Paul,

RE: Re-appointment of Independent Chairperson, Mr Brian Cunningham

The East Waste Chair is an independent role and is appointed for a period of two years as per the requirements of the East Waste Charter.

> *21.1.2 one independent person(who shall be the Chair) appointed jointly by Absolute Majority of the Constituent Councils for a two year term (and at the expiration of the term is eligible for re-appointment) who is not an officer, employee or elected member of a Constituent Council, but who has expertise in:*
>
> *(a) corporate financial management and/or*
> *(b) general management and/or*
> *(c) waste management and/or*
> *(d) transport fleet management and/or*
> *(e) public sector governance*
> *(f) marketing and/or*
> *(g) economics and/or*
> *(h) environmental management.*

Mr Brian Cunningham has held the role since 2013 and was last appointed in July 2017, with his tenure expiring on 30 June 2019. Since late 2015 he has also held the role as Chair of Northern Adelaide Waste Management Authority (NAWMA)

The cessation of our contract with SKM Recycling and the subsequent engagement of NAWMA on a short-term contract has created a live conflict of interest situation. This conflict of interest has been diligently managed throughout the whole process and has been supported by legal advice to ensure the integrity of East Waste, NAWMA and Mr Cunningham.

The recent signing of at least a three-year contract with NAWMA for the receipt and processing of our recyclables will result in the conflict of interest remaining live and while it would need to be effectively managed, it is in itself not a unique situation. As mentioned, legal advice from Michael Kelledy, Kelledy Jones Lawyers on this matter was sought prior to the commencement of the Recycling Tender process (refer Attachment 1) and more recently when it appeared likely East Waste would be entering into a contract with NAWMA (refer Attachment 2). Both pieces of legal advice support the process taken to date and suggest that there are appropriate avenues for East Waste and Mr Cunningham to take should he be supported to be retained as Chair of the East Waste Board. This is summarised specifically in the following excerpt:

EastWaste

> *"Finally, if NAWMA is awarded the contract, in the event that East Waste or NAWMA consider and deal with any contractual issues during the life of the contract, those matters can be managed by you on an Agenda by Agenda basis, just as any Board member is required to consider whether they have a conflict of interest captured under the LG Act for any particular Agenda item on an ongoing basis."*
> Michael Kelledy 16 October 2018

A decision on the Chairing role had been delayed until confirmation of the Recycling Contract was known which has resulted in the expiration of Brian's tenure on 30 June 2019. The East Waste Board at a Special Board meeting on 1 July resolved:

> *Moved Cr Green that the Board*
> *1. Approves the extension of Mr Cunningham in the role of Chair for a period of three (3) months, through until 30 September 2019 in order to facilitate a consultation process with Member Councils; and*
>
> *2. Seeks Member Council approval to re-appoint Brian Cunningham as Independent Chair for a further term through until 30 June 2021.*
>
> *Seconded Mayor Holmes-Ross* ***Carried***

The above resolution sees Mr Cunningham engaged for an initial period of three months, to facilitate Member Council endorsement. Further to this and consistent with the requirements of Clause 21.1.2 of the Charter, I am seeking the approval of the Campbelltown City Council to re-appoint Mr Brian Cunningham as Independent Chairperson for a further two (2) year term, expiring on 30 June 2021.

The next Board meeting is scheduled for 26 September 2019, whereby the endorsement or otherwise of the Member Council's will be tabled, so I respectfully request you provide a response to me no later than Friday 6 September 2019, so that it may be included in the Board papers.

Please do not hesitate to contact me on mobile, 0417 466 929, or email robg@eastwaste.com, if you have any questions.

Yours sincerely,

ROB GREGORY
GENERAL MANAGER

From: Michael Kelledy [mailto:mkelledy@kelledyjones.com.au]
Sent: Tuesday, 16 October 2018 2:22 PM
To: brian@briancunningham.com.au
Cc: Rob Gregory <RobG@eastwaste.com>
Subject: Conflict of Interest questions (KJ 180229)

Hi Brian

I confirm that you have requested advice with regards to the ongoing viability of your role as Independent Chair of the Eastern Waste Management Authority ("East Waste"). This is in the context that East Waste is about to commence a tender process for the receipt and processing of its recyclables and the Northern Adelaide Waste Management Authority ("NAWMA"), which you also chair, is likely to be a participant in that tender process.

In short, it is my advice that to ensure continuity and stability for the East Waste Board, you are not required and, indeed, should not, take a leave of absence, or otherwise "step aside" while East Waste deals with this matter. That is, there is no legal requirement upon you to take a 'leave of absence' or to 'step aside' from all business of East Waste for a defined period when the 'issue' of concern is a single item of business. Rather, I recommend that East Waste deal with the tendering and contract award for its recyclables at Special Meetings of the Board and that you be an apology for all such meetings, upon the basis of your already declared interest in the matter.

Further, I recommend that you instruct the Executive Officer not to provide you with any agenda papers or minutes or other documentation in relation to this item of business. In this manner, your disclosure and the actions of East Waste can be seen to be a "quarantining" of this item of business. That is, it is self-evident that by clearly separating out this business from the Board's other business, East Waste is acting as a transparent and accountable decision-maker and there can be no (reasonable) suggestion that you had any involvement in any aspect of the decision-making processes regarding this business item.

I set out my advice in full below:

Background

Briefly,

- on 1 October 2018, East Waste terminated its Receipt and Processing of Recyclables Contract with SKM Recycling;
- accordingly, East Waste is now considering options with regards to managing its recyclable waste stream;
- correspondingly, the NAWMA Material Recovery Facility ("MRF") is fully operational and part of the NAWMA business plan involves increasing its receipt of waste tonnages;
- East Waste is considering taking legal action against SKM for breach of the contract and lawyers for SKM have asserted they were never advised of your "potential" conflict, given your dual roles as Independent Chair of both East Waste and NAWMA;
- however, it is clear from the information in the table set out in your email below that, on any occasion the Board of East Waste or of NAWMA has considered the issue of receipt and processing of recyclables for East Waste, **you have** declared a conflict of

interest and left the room whilst the item was discussed, or, alternatively, you did not attend the meeting;

- accordingly, in discharging your role as Independent Chair in the consideration of these matters by East Waste and NAWMA respectively, you have appropriately managed any potential for conflict and you have not been present when these Agenda items were discussed; and
- in circumstances where East Waste is about to go to tender for the receipt and processing of its recyclables and NAWMA is likely to provide a tender submission, you have requested advice as to whether any actual or potential for conflict can continue to be transparently managed by you, given your dual Chairing roles.

Conflict of Interest

Clause 37 of the East Waste Charter provides that section 75(2) of the *Local Government Act 1999* ("the LG Act") and the provisions of Chapter 5, Part 4, Division 3 (the conflict of interest provisions) apply to the Directors, that is the Board members. Regardless, the conflict of interest provisions apply to Board meetings of a regional subsidiary by operation of the LG Act.

Clause 38 of the Charter, also confirms that it is a matter of record that Schedule 2 of the LG Act applies to Board members and particularly notes the importance of clauses 23 (a Board member's duty to act with reasonable care and diligence) and 34 (duties of honesty).

Likewise, clause 7.5 of the NAWMA Charter provides that the conflict of interest provisions under the LG Act apply to members of the Board and that members will at all times act in accordance with their duties of confidence and confidentiality and individual fiduciary duties including honesty and the exercise of reasonable care and diligence with respect to the Board (as required by Chapter 5, Part 4, Division 3 and clause 23 of Schedule 2 to the LG Act).

As you are not a Council employee, or an elected member, the exemptions for the purposes of the conflict of interest provisions in the LG Act, set out under the *Local Government (General) Regulations 2013* have limited application.

Accordingly, the conflict of interest provisions under the LG Act apply to you, in your role as Independent Chair of both East Waste and NAWMA, at all meetings of the Boards of those Authorities (noting that you also, correspondingly, have common law duties of a Director, which include the duty to avoid a conflict of interest).

A Board Member (or Director) will have a "material" conflict of interest if they, or any of the persons prescribed for the purposes of section 73 of the LG Act (which includes a body corporate of which the member is a member of the governing body) **would** gain a benefit (or suffer a loss), whether direct or indirect, personal or pecuniary, depending on the outcome of the matter. Otherwise, an "actual" or a "perceived" conflict of interest arises where there is a conflict between a Member (or Director's) interest (whether direct or indirect, personal or pecuniary) and the public interest, that might lead to a decision that is contrary to the public interest (or may be perceived by an impartial fair-minded person to be so).

On my understanding, at least to date, the discussions that the Board of East Waste has had in relation to its contract with SKM and the management of its recyclable waste stream following termination of that contract, are unlikely to have given rise to any conflict of interest for you, for the purposes of the LG Act. However, I note that, for the avoidance of doubt and to ensure transparency and accountability, you have, nonetheless, declared a conflict of

interest on each occasion these matters when they have arisen on the agenda, and have left the meeting (or did not attend).

That is, it could not be reasonably be asserted that you have, on any occasion, acted in relation to these matters in a conflict position.

However, I am of the view that now East Waste is giving consideration to the parties that it intends to invite to tender (which, in a select tender is likely to include NAWMA and, in an open tender would undoubtedly be relevant to NAWMA) you will have a material conflict of interest in any of those discussions and decisions to be made by the East Waste Board which requires that you to declare your interest and leave the meeting.

This, however, **will not** preclude you from otherwise continuing to act as the Independent Chair of the Board of East Waste. You will simply be required to manage that conflict in accordance with the LG Act (as well as in accordance with your common law duties and obligations owed to the Authority).

Recommendation

In light of the correspondence now received from SKM and noting that East Waste is considering taking legal action against SKM for breach of contract, I recommend that all aspects of the tender process and the contract award for recyclables, are dealt with at Special Board meetings. This will, of course, be for only the (relatively) short period of time that it will take East Waste to finalise the tender process. It will also ensure continuity and stability for the Board in its general business and the transparent and accountable management of your conflict of interest. Separately, but relatedly, I also recommend that for any agenda items at Board meetings that address the SKM contract issue, you also continue to declare a material conflict of interest and vacate the Board meeting – but just for that item.

If necessary, for convenience reasons, any Special Board meeting can be held immediately prior to an Ordinary Board meeting and, in this manner, Board members are not adversely affected or disadvantaged in any way.

In following the above recommendation, East Waste is, effectively, “quarantining” the recyclables contract issue from its ordinary business. However, to complete the ‘integrity circle’ in relation to these matters, I also recommend that

- you formally write to the Rob Gregory, as the Executive Officer of East Waste, to advise of the position you will be taking and instructing him that you do not wish to receive any ‘paperwork’ (being agenda reports and/or minutes and/or other documentation, that relates to the recyclables tender process and contract and the SKM contract breach matter), and
- you be an apology for each of the Special meetings that may be called to deal with the tender process and contract award, clearly evidencing you have were not involved in any decision-making process regarding this issue, and
- you declare an interest and leave the Board meeting on each occasion that the SKM contract matter falls for consideration by the Board, and
- at the next Board meeting of East Waste, you seek leave to make a personal explanation and then explain your position (as above) in relation to both of these matters. Of course, for both probity and ‘paper trail’ purposes, an account of your personal explanation will be included in the minutes of the Board meeting.

The legal position is also that in any decisions made by NAWMA in relation to putting a submission in the East Waste tender process and, if successful, entering into a contract with East waste (with benefits for East Waste as well as for NAWMA) you will encounter the same material conflict of interest issue insofar as you are a member of the governing body of East Waste. Relevantly, even if you were to 'step down' from the East Waste Board for a period of time (i.e. take a leave of absence) the same issues continue to arise. Accordingly, it is my advice that you make the same arrangements at NAWMA as I have recommended that you make at East waste but, in this regard, only in relation to the tender/contract process. That is, you advise the Board of NAWMA by way of personal explanation, you instruct Adam Faulkner in relation to agenda reports/minutes/documentation and when the business arises at ordinary meetings of the NAWMA Board that you declare your interest and vacate the meeting for that item.

Whilst the East Waste Board will be required to adopt the Minutes of any Special Meeting, I recommend that this can occur at any subsequent Special Meeting (rather than an ordinary meeting of the Board) or otherwise once the Board has resolved to award the contract to the successful tenderer, which I understand is likely to be in mid-December.

It will be open for you to consider whether, or not, you wish to declare a conflict of interest at the ordinary meeting in relation to the adoption of the minutes from any Special Meeting, but my view is it would not be necessary to do so, the decision to award the contract having already been made and there being no "outcome" captured by the conflict of interest provisions in adopting the minutes.

Finally, if NAWMA is awarded the contract, in the event that East Waste or NAWMA consider and deal with any contractual issues during the life of the contract, those matters can be managed by you on an Agenda by Agenda basis, just as any Board member is required to consider whether they have a conflict of interest captured under the LG Act for any particular Agenda item on an ongoing basis.

Please do not hesitate to contact me if you have any questions regarding the above.

Michael

Michael Kelledy

Lawyer

kelledyjones
LAWYERS

T. 8113 7103 | **M.** 0417 653 417 | **E.** mkelledy@kelledyjones.com.au | **W.** kelledyjones.com.au

Level 6/19 Gilles Street Adelaide SA 5000 | GPO Box 2024 SA 5001

This communication, including all attachments, contains confidential information and is subject to legal or other professional privilege. This privilege is not waived or lost by reason of email transmission or by reason of a mistaken or unintended email transmission to the receiver. Where the receiver is not the intended recipient of this email please delete and destroy all copies and telephone KelledyJones Lawyers on + 61 8 8113 7100. This communication is subject to copyright and no part of this email should be reproduced, distributed, disseminated or adapted without written consent of the copyright owner. KelledyJones Lawyers does not warrant that this email is free from computer errors, viruses or interference, except as required by law.

From: Michael Kelledy [mailto:mkelledy@kelledyjones.com.au]
Sent: Thursday, 9 May 2019 4:04 PM
To: Rob Gregory <RobG@eastwaste.com>
Subject: RE: Confidential - Updated Conflict of Interest Clarification (KJ 180220)
Sensitivity: Confidential

Afternoon Rob

I have considered your email below in light of my previous advice arising from Brian's role as Chair of the Boards of both East Waste and NAWMA in the context of the extensive RFT process which has resulted in the identification of NAWMA as the preferred contractor to East Waste for the receipt and processing of recyclables.

I confirm that my advice remains current and, in the circumstances, where the RFT process has resulted in (or will result in) East Waste entering into contractual arrangements with NAWMA, the issue of conflict of interest remains a 'live' issue for Brian. Relevantly –

- under section 73 of the LG Act, as Chair of NAWMA, Brian is a member of its governing body (and, indeed, vice versa, meaning that the principles set out in this advice have 'mirror effect' for his role in NAWMA decision-making). Where the Board of East Waste discusses a matter at a meeting where NAWMA will be a beneficiary or will suffer a loss, depending upon the outcome of the matter, Brian will have a material conflict of interest arising from his membership of the governing body of NAWMA;
- as you are aware, the 'benefit/loss' test is extremely broad insofar as it captures financial and personal and direct/indirect interests of NAWMA. Therefore, whether it is the decision to contract or a decision to approve payment or a decision around performance by NAWMA under the contract or in a worst case scenario, a contract dispute, there will be a benefit or loss issue for NAWMA and Brian will be required to declare his material conflict of interest and act in accordance with section 74 of the LG Act; and
- given the breadth of section 73 of the LG Act, it will capture most, if not all, decisions made by the Board which impact NAWMA. In the unusual circumstances where a material conflict of interest did not arise, Brian would then be required to consider the actual and perceived conflict of interest provisions. At this level of interest, I am unable to envisage circumstances where he would not be dealing with at least a perceived interest.

As stated in my previous advice, the relevant decisions around conflict of interest are required to be made on an individual agenda item basis. It is extremely difficult to set out, in a vacuum, anything other than general principles of the operation of the conflict of interest provisions of the LG Act. Matter-specific facts are necessary to provide specific advice. Therefore, if there were to be any doubt or confusion in relation to any particular agenda item for the East Waste Board and Brian's position vis-à-vis the conflict of interest provisions, it will be necessary to take specific advice at that time.

Let me know if I can assist further.

Michael

Michael Kelledy

Lawyer

kelledyjones
LAWYERS

T. 8113 7103 | **M.** 0417 653 417 | **E.** mkelledy@kelledyjones.com.au | **W.** kelledyjones.com.au

Level 6/19 Gilles Street Adelaide SA 5000 | GPO Box 2024 SA 5001

Best Lawyers

This communication, including all attachments, contains confidential information and is subject to legal or other professional privilege. This privilege is not waived or lost by reason of email transmission or by reason of a mistaken or unintended email transmission to the receiver. Where the receiver is not the intended recipient of this email please delete and destroy all copies and telephone KelledyJones Lawyers on + 61 8 8113 7100. This communication is subject to copyright and no part of this email should be reproduced, distributed, disseminated or adapted without written consent of the copyright owner. KelledyJones Lawyers does not warrant that this email is free from computer errors, viruses or interference, except as required by law.