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## Local Government Standards Panel

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Complaint Number	20230313
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Councillor Peter Rogers</b>
<b>Respondent</b>	<b>Councillor Ryan Burns</b>
Local Government	<b>City of Mandurah</b>
Regulation	Regulation 18 of the <i>Local Government (Model Code of Conduct) Regulations 2021</i>
Panel Members	Mr Tim Fraser (Presiding Member) Mrs Emma Power (Member) Cr Renee McLennan (Member)
Heard	8 December 2023 Determined on the documents
Finding	1 x Breach - Regulation 18

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### FINDING AND REASONS FOR FINDING

04 January 2024

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#### DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents.



## Summary of the Panel's decision

1. On 8 December 2023, the Panel found that Councillor Ryan Burns a councillor of the City of Mandurah ("**the City**") did commit a minor breach pursuant to the *Local Government Act 1995 (WA)* ("**the Act**") and Division 4 and Regulation 18 of the *Local Government (Model Code of Conduct) Regulations 2021* ("**the Regulations**") when he shared a Facebook Post by a third party and made a subsequent comment which allegedly caused a detriment to the Complainant as further set out in paragraph 17 below.

## The Panel's Role

2. Under section 5.110(2) of the Act the Panel is required to consider a minor breach complaint and make a finding as to whether the alleged minor breach occurred.
3. The Act and the *Local Government (Administration) Regulations 1996* provide for the circumstances in which a council member commits a minor breach.
4. Section 5.105(1) of the Act provides that a council or committee member commits a minor breach if the council or committee member contravenes a rule of conduct. Division 4 of the Regulations sets out the rules of conduct for council members and candidates.
5. Regulation 34D of the *Local Government (Administration) Regulations 1996* also provides that the contravention of a "*local law as to conduct*" is a minor breach pursuant to the Act.
6. The Panel may make a finding that a councillor has committed a minor breach of the Act and Regulations based on evidence from which it may be concluded that it is more likely that the alleged breach occurred than it did not occur.<sup>1</sup>
7. In order to find a breach, it must be established that each element of the relevant Regulation is more likely than not to have been breached or met.
8. In considering whether a minor breach is established the Panel must consider:
  - a. all evidence provided and, where there are conflicting circumstances, inferences or evidence, must come to a reasonable conclusion that any circumstance, inference or evidence relied upon is more likely than not to have occurred or be accurate<sup>2</sup>; and
  - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding<sup>3</sup>.
9. The Panel does not possess investigative or supervisory powers.<sup>4</sup> The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials in the public domain or published by the relevant local authority's website.
10. It is the responsibility of both complainants and respondents to provide the Panel with all information they wish the Panel to consider when making its determination.

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<sup>1</sup> Section 5.106 of the Act

<sup>2</sup> *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1

<sup>3</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336

<sup>4</sup> *Re and Local Government Standards Panel* [2015] WASC 51 (at paragraph 24)



11. The Panel also must have regard to the general interests of local government in Western Australia<sup>5</sup>.
12. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

### **Jurisdiction and Procedural Fairness**

13. On 24 October 2023 the Panel received a complaint from Ms Casey Mihovilovich acting as complaints officer of the City ("**the Complaints Officer**"). The same enclosed a Complaint of Minor Breach Form dated 10 October 2023.
14. In the complaint form, the Complainant alleges that Cr Burns has breached regulation 18 of the Regulations when he when he shared a Facebook Post by a third party and made a subsequent comment which allegedly caused a detriment to the Complainant as set out in paragraph 17 below ("**the Complaint**").
15. The Panel convened on 8 December 2023 to consider the Complaint.
16. The Panel:
  - a. accepted the advice of the Department of Local Government, Sport and Cultural Industries ("**the Department**") that, based on information published on the Western Australian Electoral Commission's website, Cr Burns was:
    - i. elected to the Council of the City in October 2021 for a term expiring in October 2025; and
    - ii. a Councillor when the Panel met on 28 November 2023;
  - b. was satisfied the Complaint was made within six months after the alleged breach occurred<sup>6</sup>;
  - c. was satisfied that the City's Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of a minor breach<sup>7</sup>;
  - d. was satisfied the Department had provided procedural fairness to Cr Burns; and
  - e. found it had jurisdiction to consider the Complaint.

### **The Specifics of the Complaint**

17. The Complainant provided the following comments and arguments in respect to the Complaint as summarised by the Panel:
  - a. Councillor Ryan Burns breached Regulation 18 of the Regulations when he proactively shared misinformation from his political ally on his Facebook page, and then agreed with commentary that stated that the Complainant had misused his position and had not put a matter to the vote.

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<sup>5</sup> Section 8(6) of Schedule 5.1 of the Act

<sup>6</sup> Section 5.107(4) and 5.109(2) of the Act

<sup>7</sup> Section 5.107 and 5.109 of the Act



- b. On 24 September 2023, Cr Burns posted on his personal Facebook page sharing a previous political post of Mr Mark Chapman from his campaign page this post identifies Cr Burns as a *“Local Councillor at City of Mandurah”*.
- c. Cr Burns is both identifiable as an Elected Member of the City of Mandurah and is proactively commencing communication with the community on a matter related to the City of Mandurah.
- d. Mr Chapman is a political ally of Cr Burns and is a member of the “MarkChapman4Town” group and is supportive of his candidacy to Council.
- e. Mr Chapman made a political post which falsely equates the Council’s resolution to support the Uluru Statement from the Heart in mid-2020 with a view that Council has endorsed the specific constitutional amendment in the Voice Referendum proposed on 14 October 2023 (**“the Chapman Post”**). The Chapman Post names the Complainant specifically in relation to a motion, and contains deliberate factual errors - namely having a *“... permanent unelected Indigenous Voice on Council.”*
- f. In response to the Chapman Post, Mr Angus Kent (a resident) posted the following comment:

*“How can someone or a group be unelected into a position like that? Just like federal elected members council men and women work for the people who are rate payers in that council. Peter Rogers must have rocks in his head if people in Mandurah will accept an un elected permanent body to council. Why are we as rate payers hearing this now, this way... Instead of official council channels? If he wants it then put it to a vote like we do everything else. Instead of what ever the f████ tactic you [call] this .”*

**(“the Kent Comment”)**
- g. Cr Burns then responded to Mr Kent’s comment with the Post as follows:

*“Angus Kent yes, it’s another reminder to us to be more involved in our political processes. Be informed. Contact your candidates and representatives directly. Most of all, make your vote count.”*

**(“the Burns Comment”)**
- h. For clarity:
  - i. Mr Kent is entitled to his opinion, and he is not bound by the obligations of the Regulations; and
  - ii. Cr Burns is under no obligation to correct the false record established by Mr Chapman.
- i. However, when Cr Burns stated *“yes, it is another reminder...”* - in the affirmative to Mr Kent’s statements – he:
  - i. validated and confirmed the statements from Mr Kent. He agreed with Mr Kent’s understanding of the facts, both by making an assertion to the positive and that he did not clarify any parts of Mr Kent’s statements;
  - ii. imputed dishonest or unethical motives by the Complainant, specifically that the Complainant had used a tactic to endorse either the Uluru Statement from the Heart or support for the Voice outside of Council’s decision-making process;



- iii. imputed that the Complainant had failed in his role as a Councillor under section 2.10 of the Act to participate in the local government's decision-making process of the Council. He imputed that the Complainant had unilaterally engaged in a tactic to avoid Council decision-making processes;
  - iv. disparaged the Complainant's character; and
  - v. imputed that Mr Kent's statements were correct - when they are factually incorrect.
- j. Cr Burns knew, or ought to have known, that:
- i. no unelected position was being proposed to sit on Council;
  - ii. no unelected position exists on Council;
  - iii. it is impossible under the Act to have an unelected position as a part of the composition of a Council;
  - iv. the motion was from 2020 and is not a recent motion to Council;
  - v. the motion in 2020 was adopted as a resolution of Council through a properly conducted vote of the Council; and
  - vi. no "tactic" was implemented where the Complainant could unilaterally impose the outcomes of the motion regarding the Uluru Statement from the
- k. Cr Burns is required to ensure that his use of social media and other forms of communication complies with the City of Mandurah Code of Conduct (**the "Code"**) and must only publish information that is factually correct.
- l. The Chapman Post was not factually correct, which Cr Burns re-shared and his Facebook page.
- m. Cr Burns intended to cause the Complainant detriment during an election - as he both re-shared the Post which contained factual errors, and he then supported Mr Kent's statements that had been unethical and dishonest in the Complainant's motives.
- n. In undertaking the actions as outlined above, and to support the element that Cr Burns improperly used his office, Cr Burns failed to adhere to the following under the Code:
- i. act with reasonable care and diligence (Reg 4(1)(a));
  - ii. act with honesty and integrity (Reg 4(1)(b));
  - iii. act lawfully (Reg 4(1)(c));
  - iv. avoid damage to the reputation of the local government (Reg 4(1)(e));
  - v. treat others with respect, courtesy and fairness (Reg 5(1)(a));
  - vi. contribute to a harmonious, safe and productive work environment (Reg 5(2)); and
  - vii. must not impute dishonest or unethical motives to another council member... in connection with the performance of their official duties.
- o. In regard to the scope of the Complaint:
- i. the Complaint is not in relation to a sitting Councillor's ability to support an individual in their attempts to run for Council. The Standards Panel has



consistently held that it is not a conduct breach to support political candidates for office.

- ii. the Complaint is not in relation to an individual's support, or not, for the Voice Referendum - an individual may express their support both positively and negatively for the Voice.
- iii. the Complaint is not in relation to Councillors expressing any opinions or communicating with residents and ratepayers in accordance with section 2.10 of the Act.

18. The Complainant also provide a copy of the Chapman Post.

### **The Respondent's Response**

19. By an email dated 6 November 2023, Cr Burns provided a response to the Complaint.
20. Cr Burns denies that he has committed any minor breach.
21. Cr Burns provided the following comments and arguments regarding the Complaint as summarised by the Panel:
  - a. The complaint made by Cr Rogers is frivolous and vexatious.
  - b. The identification of Cr Rogers as the proposer of the 2020 motion, titled "*Elder in Residence*", is correct. It is open to any reasonable person to infer that the intent of the proposal was to see the unelected appointment of a Senior Indigenous Leader to the City/Council as an Elder in Residence.
  - c. The reposting of Mr Chapman's post was permissible and accurate. The content of that post included both reference to the 2020 motion and by virtue of its wording, the Federal referendum. The jurisdiction of the referendum was outside the control of the City and Councillors and candidates were free and entitled to express their views without fear or favour.
  - d. It is a moot point that the CEO of the City of Mandurah was authorised to instruct, or took the view, that the posted comment should be taken down. However, in good faith, the post was taken down immediately after a phone call with the CEO. On reflection, Councillors and Candidates were entitled to form their own views and vote accordingly. The Burns Comment simply suggested that one should be informed and vote accordingly.
  - e. As for the issue of politics in local government, it is well known that Cr Burns ran for State Parliament in 2021 as a member of the Liberal Party. Cr Burns has strong beliefs that Council should not be run on political lines.
  - f. It is noted that Cr Rogers viewed Mr Chapman and Cr Burns as allies. In the converse, it can be reasonably seen that Cr Rogers views Cr Burns more as an adversary. Cr Burns strongly upholds the Code of Conduct, and he always ensures he approaches the business of Council with an open mind.
  - g. In relation to Aboriginal Affairs, there is no doubt that Cr Rogers has a personal and intellectual affinity with the Aboriginal community.
  - h. Cr Burns supports the City's accepted position from the 2020 "Elder in Residence" and subsequently related motions and feel strongly that we need to



do more to close the gap, not only for our local Indigenous population, but for all those who are in need of help and assistance.

- i. Cr Rogers is confused between our roles and commitment to the Council decision, and the right of a Councillor to follow their own line on the referendum.

### **Regulation 18**

22. Regulation 18 prohibits councillors engaging in conduct to either gain an advantage for themselves (or another party) or cause detriment to another party and specifically provides as follows:

**“ 18. Securing personal advantage or disadvantaging others**

*(1) A council member must not make improper use of their office —*

*(a) to gain, directly or indirectly, an advantage for the council member or any other person; or*

*(b) to cause detriment to the local government or any other person.*

*(2) Subclause (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.”*

23. To make a finding of a minor breach of regulation 18 of the Regulations the Panel must be satisfied to the required standard that:
  - a. Cr Burns was an elected member or a candidate at the time of the alleged breach and the time of the determination;
  - b. Cr Burns made use of his office as Council member or candidate of the City;
  - c. when viewed objectively, such use was an improper use of Cr Burns’ office in that it:
    - i. involved a breach of the standards of conduct that would be expected of a person in the position of councillor by reasonable persons; and
    - ii. was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty; and
  - d. Cr Burns engaged in the conduct in the belief that detriment would be suffered by another person.
24. As the Complainant has not alleged any advantage was intended to be gained, the Panel has only considered regulation 18(1)(b) in this case.

### **Code of Conduct**

25. The City has an adopted *Code of Conduct for Council Members, Committee Members and Candidates (“the Code of Conduct”)* which governs the conduct of elected members.
26. A breach of the Code of Conduct may indicate that an elected member has acted improperly in breach of Regulation 18.
27. The relevant provisions of the Code of Conduct Code are as follows:



**“ 4. Personal integrity**

- (1) *A council member, committee member or candidate should —*
- (a) *act with reasonable care and diligence; and*
  - (b) *act with honesty and integrity; and*
  - (c) *act lawfully; and*
  - (d) *identify and appropriately manage any conflict of interest; and*
  - (e) *avoid damage to the reputation of the local government.*
- ...”

**“5. Relationship with others**

- (1) *A council member, committee member or candidate should —*
- (a) *treat others with respect, courtesy and fairness; and*
  - (b) *respect and value diversity in the community.*
- (2) *A council member or committee member should maintain and contribute to a harmonious, safe and productive work environment.”*

**“ 8. Personal integrity**

- (1) *A council member, committee member or candidate -*
- (a) *must ensure that their use of social media and other forms of communication complies with this code; and*
  - (b) *must only publish material that is factually correct.*
- (2) *A council member or committee member —*
- ....
- (b) *must comply with all policies, procedures and resolutions of the local government.”*

**“9. Relationship with others**

- A council member, committee member or candidate —*
- (a) *must not bully or harass another person in any way; and*
  - (b) *must deal with the media in a positive and appropriate manner and in accordance with any relevant policy of the local government; and*
  - (c) *must not use offensive or derogatory language when referring to another person; and*
  - (d) *must not disparage the character of another council member, committee member or candidate or a local government employee in connection with the performance of their official duties; and*
  - (e) *must not impute dishonest or unethical motives to another council member, committee member or candidate or a local government employee in connection with the performance of their official duties.”*

## **PANEL'S CONSIDERATION**

### **Regulation 18(1)(b)**

#### **Cr Burns was an Elected Member or a Candidate at the relevant times**

28. Cr Burns was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.

29. This element is met.

#### **Cr Burns made use of his office as Council Member of the City**

30. Due to the fact that:

- a. the Facebook Posts were made using Cr Burns' Facebook Page which readily identified him as a local councillor of the City;
- b. the Facebook Posts were commenting on an article which likened the referendum to existing Council policy; and
- c. Cr Burns was purporting to communicate with and guide the community in the local municipality,

the Panel finds that it is more likely than not that Cr Burns was acting in his capacity as an elected member and made use of his office as a council member when undertaking the conduct.

31. This element is met.

#### **Cr Burns' use was improper**

32. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or lack of wisdom. It requires an abuse of power or the use of the councillor's position in a manner that such councillor knew (or ought to have known) was not authorised.

33. Impropriety does not depend on a councillor's consciousness of impropriety. It is to be judged objectively and does not involve an element of intent.

34. Any decision as to what is "improper" cannot be made in isolation but must be considered in the relevant context including the specifics of the relevant event as well as councillor's formal role and responsibilities.

35. In the case of impropriety arising from an abuse of power, a councillor's alleged knowledge or means of knowledge of the circumstances in which the power is exercised and his or her purpose or intention in exercising the power will be important factors in determining whether the power has been abused<sup>8</sup>.

36. In this case it is alleged by the Complainant that Cr Burns acted improperly as in sharing the Chapman Post and making the Burns Comment as Cr Burns validated and confirmed factually incorrect statements which:

- a. disparaged Cr Rogers' character
- b. imputed dishonest or unethical motives by Cr Rogers;

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<sup>8</sup> Treby and Local Government Standards Panel [2010] WASAT 81 (at 31); Chew v The Queen (1992) 173 CLR 626 (at 640 - 641 [Dawson J]); R v Byrnes (1995) 183 CLR 501 – (at 514 - 515 [Brennan, Deane, Toohey and Gaudron JJ] and at 521 [McHugh J]).



- c. implied Cr Rogers had failed in his role as a Councillor under section 2.10 of the Act.
37. In this case the Panel comments that, as noted by both the Complainant and Cr Burns, it is permissible for a councillor to support or not support certain political matters. That is not the issue being considered here.
38. The Chapman Post clearly conflates the “Voice” referendum with the 2020 “*Uluru Statement from the Heart*” and, in particular, the issue considered by the Council of the City of “exploring an Elder in Residence” concept to guide and teach cultural customs.
39. With respect to Cr Burns, although those matters are related, it can be seen to be misleading to the public to state that general support of a concept of equality and referral to indigenous peoples for expert advice is the same thing as agreeing that an unelected person should sit on Council.
40. This misconception was further strengthened when Cr Burns made the Burns Comment which specifically referred to “*a unelected permanent body to council.*”
41. No such thing was ever contemplated by either the “*Uluru Statement from the Heart*” or “*the Voice*” referendum.
42. The Kent Comment also indicates a belief that Cr Rogers was the instigator of such policy and had promoted an unelected position on Council.
43. Cr Burns’ has asserted that “*It is open to any reasonable person to infer that the intent of the proposal was to see the unelected appointment of a Senior Indigenous Leader to the City/Council as an Elder in Residence*”.
44. The Panel comments that:
  - a. Election to Council is a very different thing to an appointment of a consultant to City in an administrative position.
  - b. The Chapman Post and the Kent Comment incorrectly link these two ideas.
  - c. It is normal and usual for Council or the administration of a local government to employ outside consultants on areas which expertise and advice is needed, and such positions would *never* be an “elected” position nor a position on Council.
  - d. Cr Burns did, or should have, known as an elected member of Council:
    - i. it was not possible under the provisions of the Act for the prior motion of Council to appoint an unelected person to the Council of the City;
    - ii. that the intended or actual effect of the relevant motion passed by Council was not as has been alleged in the Chapman Post; and
    - iii. that the statements in the Chapman Post and the Kent Comment had clearly misrepresented, or misunderstood, the possible outcome or effect of such motion.
45. The Panel considers that, as the relevant posts were made very close to a local government election, Cr Burns took an opportunity to discredit Cr Rogers, in favour of supporting Mark Chapman (who was also up for election).
46. To be clear, Cr Burns is able to support any stance he wishes with respect to the “*Uluru Statement from the Heart*” or “*the Voice*” referendum. He also is under no specific requirement to correct the false implications or assumptions in the Chapman Post and Kent Comment.



47. However, it was improper, once he had reproduced the Chapman Post on his own Facebook page, to make a response to the Kent Comment which expressly endorsed the incorrect assumptions and statements of those other third parties in a way that implied Cr Roges had acted in an inappropriate manner.
48. The Panel further finds that the Facebook Posts were in breach of the following clauses of the Code of Conduct:
- a. Clause 4(1)(a) to “*Act with reasonable care and diligence*”:
    - i. It was not acting with reasonable care and diligence for Cr Burns to promote incorrect statement and assumptions made by third parties without correction.
    - ii. Cr Burns knew, or should have reasonably known, that Cr Roger moving a motion to support the “*Uluru Statement from the Heart*” simply did not equate to Cr Rogers supporting or promoting the appointment of an unelected party to Council.
  - b. Clause 4(1)(b) to “*Act with honesty and integrity*”
    - i. Cr Burns did not act with integrity when he used the Chapman Post and Kent Comment to affirm a stance that Cr Rogers had engaged in some kind of inappropriate conduct.
  - c. Clause 5(1)(a) to “*treat others with respect, courtesy and fairness*”:
    - i. Supporting and promoting blatantly incorrect information and views of third parties without correction was not fair or respectful to Cr Rogers.
  - d. Clause 8(1)(a) to “*ensure that their use of social media and other forms of communication complies with this code*”:
    - i. Due to the above breaches, the communication does not comply with the Code.
  - e. Clause (8)(1)(b) to “*only publish material that is factually correct*”:
    - i. The Chapman Post re-published by Cr Burns was not factually correct.
49. The Panel does not find that the posts go so far as to:
- a. be considered an unlawful action in breach of clause 4(1)(c) of the Code;
  - b. be damaging the reputation of the local government in breach of clause 4(1)(e) of the Code;
  - c. not contribute to a harmonious, safe and productive work environment in breach of clause 5(2); or
  - d. impute dishonest or unethical motives to another council member in breach of clause 9(e) of the Code.
50. Given the above, the Panel finds that it is more likely than not that the relevant conduct was improper as:
- a. the conduct was in breach of the Code of Conduct;
  - b. the conduct was of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
  - c. the conduct is deserving of a penalty.



51. This element is met.

Regulation 18(1)(b) – Cr Burns intended to cause a disadvantage

52. “Detriment” means loss, damage or injury. It is construed widely and includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage.
53. It is not necessary to find whether any detriment was actually suffered, but an intent to cause such detriment must be established.
54. In this context and circumstances of the Facebook posts, the Panel finds that a reasonable person would consider that the purpose of the Facebook posts was to:
- a. disparage Cr Rogers actions in moving a motion regarding and supporting the *Uluru Statement from the Heart*; and
  - b. make the public think less of Cr Rogers by negatively promoting and supporting the misleading view that Cr Rogers’ prior actions amounted to him appointing an unelected person to Council.
55. The Panel therefore finds it was more likely than not that the predominate purpose of sharing the Chapman Post and making the Burns Comment was to cause a detriment to Cr Rogers in the lead up to a Council election.

56. This element is met.

Conclusion

57. Given the above, the elements required to find a breach of regulation 18(1)(b) of the Regulations have been met.



### **Panel's Findings**

58. Cr Burns did commit a breach of Regulation 18(1)(b) of the Regulations and therefore did commit a minor breach.

### **Signing**

A handwritten signature in black ink, appearing to be 'T Fraser'.

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Tim Fraser (Presiding Member)

A handwritten signature in black ink, appearing to be 'E Power'.

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Emma Power (Member)

A handwritten signature in black ink, appearing to be 'R McClennan'.

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Renee McClennan (Deputy Member)



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## Local Government Standards Panel

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Complaint Number	20230313
Legislation	<i>Local Government Act 1995 (WA)</i>
<b>Complainant</b>	<b>Councillor Peter Rogers</b>
<b>Respondent</b>	<b>Councillor Ryan Burns</b>
Local Government	<b>City of Mandurah</b>
Regulation	Regulation 18 <i>of the Local Government (Model Code of Conduct) Regulations 2021</i>
Panel Members for Penalty Consideration	Mr Tim Fraser (Presiding Member) Mrs Emma Power (Member) Ms Renee McLennan (Member)
Heard	8 December 2023 Determined on the documents
Penalty Considered	14 March 2024
Outcome	Public Apology

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### DECISION AND REASONS FOR DECISION

02 April 2024

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#### DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005 (WA)*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents



## Introduction

1. At its meeting on 8 December 2023, the Panel found that Councillor Ryan Burns, a councillor of the City of Mandurah (“**the City**”), committed a minor breach under the *Local Government Act 1995 (WA)* (“**the Act**”) and regulation 18 of Division 4 of the *Local Government (Model Code of Conduct) Regulations 2021* (“**the Regulations**”) when he shared a Facebook Post by a third party and made a comment which caused a detriment to the Complainant (“**the Minor Breach**”).

## Jurisdiction and Law

2. The Panel convened on 14 March 2024 to consider how it should deal with the Minor Breaches.
3. The Panel accepted the advice of the Department of Local Government, Sport and Cultural Industries (“**the Department**”) that on this date there was no available information to indicate that Cr Burns had ceased to be, or was disqualified from being, a councillor.
4. If the Panel finds that a councillor has committed a minor breach, it must give the councillor an opportunity to make submissions to the Panel about how it should deal with the breach under section 5.110(6).<sup>1</sup>
5. By a letter dated 04 January 2024, Cr Burns was:
  - a. notified of the Panel’s finding of the Minor Breaches;
  - b. provided with a copy of the Panel’s Finding and Reasons for Finding; and
  - c. offered an opportunity to make submissions as to how the Minor Breaches should be dealt with under section 5.110(6) of the *Act*.

## Possible Sanctions

6. Section 5.110(6) of the *Local Government Act 1995 (WA)* (“**the Act**”) provides that the Panel is to deal with a minor breach by:
  - (a) *ordering that no sanction be imposed; or*
  - (b) *ordering that —*
    - (i) *the person against whom the complaint was made be publicly censured as specified in the order;*  
*or*
    - (ii) *the person against whom the complaint was made apologise publicly as specified in the order;*  
*or*
    - (iii) *the person against whom the complaint was made undertake training as specified in the order;*  
*or*

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<sup>1</sup> *Local Government Act 1995 (WA)*, s 5.110(5).



(iv) *the person against whom the complaint was made pay to the local government specified in the order an amount equal to the amount of remuneration and allowances payable by the local government in relation to the complaint under Schedule 5.1 clause 9;*

*or*

(c) *ordering 2 or more of the sanctions described in paragraph (b).*

### **Cr Burns' Submissions**

7. By an email dated 07 February 2024 the Department received a response from Cr Burns.
8. Cr Burns provided the following comments and arguments, as summarised by the Panel:
  - a. While the events are unfortunate, Cr Burns has learned immensely from both the experience and the process to date. The positive result is that, without a doubt, Cr Burns will be a much better Councillor in the service of my community for this experience.
  - b. The Panel should consider the following issues:
    - i. The post was removed immediately after a brief conversation with the CEO of the City of Mandurah. The CEO did not advise that Cr Burns was in breach nor instruct that he should take the post down. She did, however, provide an alternative viewpoint on how the post could be interpreted. The fact that Cr Burns took the post comment down immediately supports the fact that he did not intend to cause harm to Cr Rogers.
    - ii. It was not Cr Burns' intent to cause harm. The main intent of my original post share and reply to Mr Kent was to encourage residents to be engaged and to participate in the democratic process by casting an informed vote in the upcoming local government elections.
    - iii. Cr Burns could not know whether any one public position on the Voice was more favourable or harmful to a candidates' election prospects.
    - iv. Cr Burns' wording in response to Mr Kent's comments was not ideal and it is evident now that it did not accurately reflect his position. It has demonstrated to me the need to be more specific in my wording and mindful of his role as a Councillor, particularly as it pertains to the effective functioning of the City of Mandurah and our Council.
    - v. Cr Burns' "yes" wording was intended to be an acknowledgement of Mr Kent's comments. Not agreement. The main intent, illustrated by word count and emphasis, was to encourage democratic participation.
    - vi. The comments were unlikely to have been read and shared widely and therefore any possible harm would likely not have been consequential.
    - vii. Cr Rogers comfortably won the election which demonstrates that little harm or consequence was caused to Cr Rogers because of Cr Burns' comment.
  - c. It is Cr Burns' understanding that the Minor Breach System is intended to be a deterrent and educational, but not necessarily punitive.



- d. Cr Burns hopes it is very clear to the Standards Panel that this has been extremely educational and will absolutely and effectively be a deterrent so as to not commit a Minor Breach in the future. It has further increased Cr Burns' knowledge and awareness of the responsibilities of my role as Councillor and the framework to which he is to conduct myself. Cr Burns commits to using this knowledge to better perform my role in the service to his community.
  - e. Therefore, it is Cr Burns' recommendation that no sanction be imposed by the Panel.
9. As the Panel is not able to reconsider its decision as to a breach at this stage of proceedings, the Panel has not included Cr Burns' comments disagreeing to the Panel's initial finding here.

### **Panel's Consideration**

10. Section 5.110(6) is solely about penalty. The Panel does not have the power to review any finding of a breach.
11. The Panel may order under section 5.110(6)(a), that no sanction be imposed, not to reverse the Panel's finding of a breach, but to indicate that in all the circumstances the relevant councillor should not be penalised further.
12. Guidance as to the factors which the Panel may consider in determining the appropriate penalty to impose include, but are not limited to, the following:
  - a. the nature and seriousness of the breaches;
  - b. the councillor's motivation for the contravention;
  - c. whether or not the councillor has shown any insight and remorse into his/her conduct;
  - d. whether the councillor has breached the Act knowingly or carelessly;
  - e. the councillor's disciplinary history;
  - f. likelihood or not of the councillor committing further breaches of the Act;
  - g. personal circumstances at the time of conduct, and of imposing the sanction;
  - h. need to protect the public through general deterrence and maintain public confidence in local government; and
  - i. any other matters which may be regarded as aggravating conduct or mitigating its seriousness<sup>2</sup>.
13. In this case the Panel notes that, despite certain disagreements with some of the Panel findings, Cr Burns has shown insight and remorse as to his conduct as well as a renewed understanding of his obligations under the Regulations.
14. The Panel further notes that the relevant post was promptly removed.
15. The Panel considers that Cr Burns is highly unlikely to commit further breaches under the Regulations of a similar type.

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<sup>2</sup> *Chief Executive Officer, Department of Local Government and Communities and Scaffidi [2017] WASAT 67 (S)*



16. Despite the above, as in this case the conduct was undertaken in a public forum and questioned the integrity of the Complainant, the Panel considers that a public apology is the appropriate sanction.
17. Making a public apology is a significant sanction, being a personal admission by the individual of wrongdoing<sup>3</sup>. It is a suitable and appropriate penalty when a councillor's conduct:
  - a. adversely affects particular individuals<sup>4</sup>; and/or
  - b. does not meet the standards other councillors seek to uphold.
18. In the relevant circumstances, the Panel considers that making a public apology is an adequate sanction and that it is not necessary to make an order in accordance with Schedule 5.1 clause 9 of the Act that Cr Burns recoup to the City the costs of the Department incurred with respect to the Complaint.

### **Panel's decision**

19. The Panel orders pursuant to section 5.110(6)(b)(ii) of the Act that, in relation to the two Minor Breach of regulation 34D of the Administration Regulations, Cr Burns make a public apology in terms of the attached Order.

### **Signing**

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Tim Fraser (Presiding Member)

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Emma Power (Member)

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Renee McClennan (Deputy Member)

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<sup>3</sup> *Treby and Local Government Standards Panel [2010] WASAT 81 (Pritchard J).*

<sup>4</sup> *Treby and Local Government Standards Panel [2010] WASAT 81 [127] (Pritchard J).*



## ORDER

02 April 2024

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### DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005 (WA)*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents

### THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor Ryan Burns, a councillor for the City of Mandurah **publicly apologises** as specified in paragraph 3; OR
2. Failing compliance with paragraph 3 within the specified timeframe, then paragraph 4 shall apply.

### Public Apology

3. On the ordinary council meeting of the City of Mandurah first occurring after the expiration of **28 days** from the date of service of this Order on him, Cr Burns shall:
  - i. attend the relevant ordinary council meeting;
  - ii. ask the presiding person, or acting presiding person, for his or her permission to address the meeting to make a public apology to the public;
  - iii. make the apology immediately after Public Question Time or during the Announcements part of the meeting, or at any other time when the meeting is open to the public, as the presiding person thinks fit; and
  - iv. address the Council and public as follows, without saying any introductory words before the address, and without making any comments or statement after the address:

"I advise this meeting that:

- i. A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened Regulation 18 of the *Local Government (Model Code of Conduct) Regulations 2021*, when, I made a comment relating to the actions of Cr Peter Rogers on Facebook.
- ii. The Panel found that I breached Regulation 18 by my conduct as the comment was not accurate and disparaged Cr Rogers.
- iii. I acknowledge that I should have not made the Facebook comment and I now apologise to Cr Rodgers and my fellow councillors."



4. If Cr Burns fails to, or is unable to, comply with the requirements of paragraph 3 above in the required time frame THEN, within the next **28 days** following the ordinary council meeting referred to in paragraph 3 above the Chief Executive Officer of the City of Mandurah shall arrange for the notice of public apology to be published:
  - a. on the Facebook Page of the City of Mandurah shall be in no less than 10-point font size; and
  - b. in an appropriate place on the website of the City of Mandurah shall in no less than 10 point font size; and
  - c. in the next occurring issue of any City of Mandurah shall the public newsletter (if any) whether in electronic or print copy) in no less than 10-point font size.

**PUBLIC APOLOGY BY COUNCILLOR RYAN BURNS**

A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened Regulation 18 of the *Local Government (Model Code of Conduct) Regulations 2021*, when, I made a comment relating to the actions of Cr Peter Rogers on Facebook.

The Panel found that I breached Regulation 18 by my conduct as the comment was not accurate and disparaged Cr Rogers.

I acknowledge that I should have not made the Facebook comment and I now apologise to Cr Rodgers and my fellow councillors.

**Appeal**

5. In the event that, prior to the date for compliance with the above Orders, Cr Burns:
  - a. commences an appeal the decision of the Standards Panel to the State Administrative Tribunal in accordance with section 5.125 of the Local Government Act 1995; and
  - b. notifies the Complaints Officer of such appeal in writing,THEN:
  - c. compliance with the above Orders may be delayed until the State Administrative Tribunal has made a finding in respect to the decision; and
  - d. such Orders may be amended by an order of the State Administrative Tribunal.



## NOTICE TO THE PARTIES TO THE COMPLAINT

### RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (the Panel) advises:

- (1) Under section 5.125 of the *Local Government Act 1995* the person making a complaint **and** the person complained about each have the right to apply to the State Administrative Tribunal (the SAT) for a review of the Panel's decision in this matter. In this context, the term "decision" means a decision to dismiss the complaint or to make an order.
- (2) By rule 9(a) of the *State Administrative Tribunal Rules 2004*, subject to those rules an application to the SAT under its review jurisdiction **must be made within 28 days** of the day on which the Panel (as the decision-maker) gives a notice [see the Note below] under the *State Administrative Tribunal Act 2004 (SAT Act)*, section 20(1).
- (3) The Panel's ***Breach Findings and these Findings and Reasons for Finding – Sanctions***, constitute the Panel's notice (i.e. the decision-maker's notice) given under the *SAT Act*, section 20(1).

**Note:**

- (1) This document may be given to a person in any of the ways provided for by sections 75 and 76 of the *Interpretation Act 1984*. [see s. 9.50 of the *Local Government Act 1995*]
- (2) Subsections 75(1) and (2) of the *Interpretation Act 1984* read:
  - "(1) Where a written law authorises or requires a document to be served by post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, **service shall be deemed** to be effected by properly addressing and posting (by pre-paid post) the document as a letter to the last known address of the person to be served, and, **unless the contrary is proved, to have been effected at the time when the letter would have been delivered in the ordinary course of post.** [Bold emphases added]
  - (2) Where a written law authorises or requires a document to be served by registered post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, then, if the document is eligible and acceptable for transmission as certified mail, the service of the document may be effected either by registered post or by certified mail."
- (3) Section 76 of the *Interpretation Act 1984* reads:

"Where a written law authorises or requires a document to be served, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, without directing it to be served in a particular manner, service of that document may be effected on the person to be served —

  - (a) by delivering the document to him personally; or
  - (b) by post in accordance with section 75(1); or
  - (c) by leaving it for him at his usual or last known place of abode, or if he is a principal of a business, at his usual or last known place of business; or



- (d) *in the case of a corporation or of an association of persons (whether incorporated or not), by delivering or leaving the document or posting it as a letter, addressed in each case to the corporation or association, at its principal place of business or principal office in the State.”*