

LOCAL GOVERNMENT STANDARDS PANEL

Established under section 5.122 of the *Local Government Act 1995* (WA)

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| Complaint Number | SP 49 of 2015 DLG 20150241 |
| Legislation | <i>Local Government Act 1995</i> |
| Complainant | Mr Ian Hill |
| Subject of complaint | Councillor Mark Burns |
| Local Government | City of Subiaco |
| Regulation | Regulations 4(2) and 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i> |
| Panel Members | Brad Jolly (Presiding Member) Councillor P Kelly (Member) Mr P Doherty (Member) |
| Heard | 23 February 2016 (Determined on the documents) |
| Outcome | Two breaches established |

FINDINGS AND REASONS FOR FINDING

DEFAMATION CAUTION

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1. Summary of the Panel's Decision

- 1.1 The Panel found that Cr Burns breached regulations 4 and 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (**Regulations**) by respectively making the August 2015 OCM Statements and the 6PR Statements in relation to Wilson Parking Australia Pty Ltd 1992 (**Wilson Parking**).

2. Jurisdiction

- 2.1 On 29 September 2015, the Presiding Member of the Local Government Standards Panel received a Complaint of Minor Breach (**Complaint**) from Mr Ian Hill, the then Chief Executive Officer of the City alleging that:

- (a) during the Ordinary Council Meeting of the City held on 25 August 2015 (**August 2015 OCM**), Cr Burns made offensive or objectionable statements in relation to Wilson Parking, alleging that they are:
- (i) “corporate psychopaths and bullies”; and
 - (ii) “like vultures on a barbed wire fence”;
- (**August 2015 OCM Statements**) and thereby breached clause 4.10(3) of the City's Meeting Procedures Local Law 2013 (**Standing Orders**) and, thus, regulation 4 of the *Regulations* (**Allegation 1**); and
- (b) Cr Burns subsequently repeated the August 2015 OCM Statements “and others” on radio and television without the approval or direction of the City's Mayor, and made no attempt to clarify that he was expressing his personal opinion about Wilson Parking and not those of the Council or City and thereby breached regulation 7(1)(b) of the *Regulations*, in that he exceeded his authority as a councillor by taking on a role defined as that of the Mayor under section 2.8 of the *Local Government Act 1995* (**LG Act**) (**Allegation 2**).

Regulation 4

- 2.2 Regulation 4(2) of the *Regulations* provides that the breach of a “local law as to conduct” (being a local law relating to the conduct of people at council or committee meetings¹) is a minor breach for the purposes of s 5.105(1)(b) of the *LG Act*.
- 2.3 In the Panel's opinion, regulation 4(2) applies to those provisions of a local law relating to standing orders which relate to the conduct or behaviour of a councillor at a council or committee meeting, but does not apply to any provision of that local law which is procedural in nature or which extends to conduct or behaviour by a councillor outside council or committee meetings.
- 2.4 In the present case, the Panel considers that clause 4.10(3) of the Standing Orders is a local law as to conduct, the breach of which would be a minor breach.

¹ Regulation 4(1).

Regulation 7

- 2.5 A breach of regulation 7(1)(b) is also a “minor breach”².
- 2.6 The Panel is therefore required to make a finding as to whether the breaches alleged in the Complaint occurred or to send the Complaint to the Chief Executive Officer of the Department of Local Government and Communities under section 5.111 of the *LG Act*.
- 2.7 The Panel finds that the Complaint was made and has been dealt with in accordance with the requirements of Division 9 of the *LG Act*, that the Complaint is not one that should be dealt with under section 5.111 and that the Panel has jurisdiction to determine whether the Breach occurred.

3. The Panel’s Role

- 3.1 The Panel observes that its members are required to have regard to the general interests of local government in Western Australia³; it is not an investigative body and determines complaints solely upon the evidence presented to it; a finding of a minor breach may affect an individual both personally and professionally and that in order for the Panel to make a finding that a minor breach has been committed by a Councillor, the finding is to be “based on evidence from which it may be concluded that it is more likely that the breach occurred than that it did not occur”⁴ (**Required Standard**).
- 3.2 When assessing whether it is satisfied to the required standard:
- (a) the Panel considers, amongst other things, the seriousness of the allegations made in the Complaint, the likelihood of an occurrence of the given description and the gravity of the consequences flowing from a particular finding; and
 - (b) where direct proof is not available, the Panel considers that it must be satisfied that the circumstances appearing in evidence give rise to a reasonable and definite inference of a breach, not just to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture.

4. Documents

- 4.1 The Documents considered by the Panel (**Documents**) are set out in Attachment “A”.

5. The Complaint

- 5.1 The substance of the Complaint is set out in paragraph 2.1 above.
- 5.2 Insofar as the Complaint alleges that August OCM Statements “and others” were repeated on radio and television, those occasions are set out below.

Article 1: Article entitles “Subiaco takes aim at Wilson Parking”, Community News, 28 August 2015 by Rosanna Candler

² *LG Act*, s 5.101A and s 5.105(1).

³ Clause 8(6) of Schedule 5.1 of the *LG Act*

⁴ *LG Act*, s 5.106.

5.3 This article includes the following:

“SUBIACO councillors want to dissociate the City of Subiaco from Wilson Parking and its reputation for expensive fines, wheel clamping and “bullying tactics” at Seddon Street carpark.

“They are like vultures on a barbed wire fence, just waiting for you to stay one minute over and charge a \$65 fine,” Cr Mark Burns said.”

The Council last night approved Cr Burns’ elected member’s motion for administration to present a report to the September council meeting, detailing the current legal status and tenure of the management agreement between the City and Wilson Parking over 46 bays at Seddon Street.

Cr Burns said the current agreement would be broken if either the 16-storey mixed-use development at the old Pavilion Markets site or Barrie Lepley's 1 Seddon Street offices were built.

"If they don't build, then this agreement exists (indefinitely)," he said,

"The bottom line is that they are bullies. Does Subiaco and our community really want to be in business with them?"

Article 2: Article entitled “Subiaco councillor lashes Wilson Parking as “corporate psychopaths”, WA Today (electronic version), 27 August 2015, by Ray Sparvell, (which includes an audio recording from a 6PR interview with Councillor Burns that morning) (**Audio Recording**)

5.4 This article includes the following:

“A Subiaco councillor has labelled Wilson Parking “corporate psychopaths” on Radio 6PR and accused the pay-parking giant of behaving like “vultures sitting on a barbed wire fence”.

Councillor Mark Burns told Breakfast hosts Steve Mills and Basil Zempilas that he received calls from teary ratepayers every week complaining about being slammed with a \$65 fine only minutes after the expiration of their parking fees.

"Some have told me they've got back to their car only one minute late and they've already got a fine," he said.

He believed parking officers were over-vigilant and lacked leniency.

...

Mr Burns said the City of Subiaco had a contract with Wilson Parking since the early 2000s, but was now keen to disassociate itself from the company, believing it had a reputation for excessive fining and wheel clamping.”

- 5.5 The Audio Recoding records Cr Burns as having said during the course of the 6PR interview that:

“But I will comment on Wilson Parking. I did say they were vultures like sitting on a barbed wire fence but I also said that I believed that they were a bunch of corporate psychopaths.

...

And as I said, they, these people they are corporate psychopaths.”

(6PR Statements)

Article 3: Article: Article entitled “Subiaco councillors attack Wilson Parking over Seddon St car park, theaustralian.com.au (via Perth Now) (electronic copy), 27 August 2015 by Rosanna Candler.

- 5.6 This article includes the following:

“SUBIACO councillors want to dissociate the City of Subiaco from Wilson Parking and its reputation for expensive fines, wheel clamping and “bullying tactics” at Seddon Street carpark.

"They are like vultures on a barbed wire fence, just waiting for you to stay one minute over and charge a \$65 fine," Councillor Mark Burns said.

The Council on Tuesday night approved Councillor Burns' elected member's motion for administration to present a report to the September council meeting, detailing the current legal status and tenure of the management agreement between the City and Wilson Parking over 46 bays at Seddon Street.”

Article 4: Radio interview with John McGlue, ABC 720, 27 August 2015

- 5.7 The Panel has not been provided with any details of this alleged interview.

Article 5: Television interview with Nine News, 27 August 2015

- 5.8 The Panel has not been provided with any details of this alleged interview.

Article 6: Article entitled “Wilson Parking fires back in Subiaco row, The West Australian, 28 August 2015, by Kate Emery

- 5.9 This article includes the following:

“WA's biggest private parking operator says it is “disappointed” after being accused of contributing to Subiaco's retail woes in its eagerness to hand out infringements.

Wilson Parking Australia said in a statement Friday morning it was disappointed by the "unprofessional, inaccurate and damaging statements" made by a Subiaco councillor earlier this week.

Subiaco councillor Mark Burns said he believed Wilson Parking's alleged practice of handing out \$65 fines to motorists who were a minute late was "absolutely" keeping people away from Subiaco.,

Mr Burns wants to kick Wilson out of the suburb not just by ending an agreement over City of Subiaco-owned parking bays but by encouraging Private landowners to sever ties with the Perth-founded company,

Subiaco Council agreed on Tuesday night at Mr Burns' behest to look into the legal status of an agreement between the city and Wilson over 46 parking bays on Seddon Street off Rokeby Road, which are owned by the city but managed by Wilson, It is understood the agreement expired but has been allowed to roll over.

Several councillors also expressed their concern about Wilson's practices and the potential for motorists to believe they were being fined by the city,

"I get call after call from people dreadfully upset about Wilson Parking," Mr Burns said, "It varies from tears to frustration to absolute anger because Wilson offers no interaction with people that are making complaints."

Article 7: Article entitled "Wilson Parking disappointed at Councillor", Perth Now, 28 August 2015

5.10 This article includes the following:

"A MULTINATIONAL parking corporation labelled "psychopaths" by a Perth councillor says it is disappointed by his statements, which it called unprofessional, inaccurate and damaging.

MARK BURNS from the City of Subiaco this week said Wilson Parking ... has three people watching "like hawks" to fine overstayers \$65. ..."

Article 8: Article entitled "Wilson Parking branded a "psychopathic corporation", The Post, 29 August 2015, by Lloyd Gorman

5.11 This article includes the following

"Wilson Parking was a "psychopath corporation" hurting Subiaco, a council meeting heard on Tuesday night.

Councillors blasted the firm ... as a bully and scavenger because of the way it ran local car parks.

...

"They sit there like vultures on a barbed-wire fence waiting for you to go a minute over," he said.

...

When Mr Burns was cautioned by the acting mayor ... he said "I'll stop saying Wilson is a corporate psychopath ..."

6. Response

- 6.1 The Department provided Cr Burns with a copy of the Complaint and a Complaint Summary and a reasonable opportunity to respond to the allegations made therein.
- 6.2 In his response to the Panel (documents 5 and 6 of Attachment "A") Cr Burns:
- (a) denies having committed the minor breaches alleged in the Complaint;
 - (b) admits having said at the August 2015 OCM that Wilson Parking were "corporate psychopaths", but does not accept that he said that they were "bullies" or that "they are like vultures on a barbed wire fence" during the debate on the issue;
 - (c) claimed that clause 4.16(3) of the *Standing Orders* (which provides that "[a] member is not to use offensive or objectionable expression in reference to any member, employee or other person" does not apply to Wilson Parking as it is a corporation, not a "person";
 - (d) disputes "that the terminology (or expression) "Corporate Psychopaths" ... is offensive or objectionable, but is in fact an accurate description"; and
 - (e) claims that Kate Emery, Rosanne Chandler and Lloyd Gorman understood him to be speaking in his own capacity, not on behalf of the City or its Council.

7. Findings

- 7.1 Having reviewed the Documents (and in particular the Audio Recording of the 6PR radio interview) the Panel is satisfied to the Required Standard that:
- (a) Cr Burns attended the August 2015 OCM;
 - (b) during the August 2015 OCM, when Wilson Parking's parking arrangements with the City were being discussed, Cr Burns made the August 2015 OCM Statements;
 - (c) on 27 August 2015, during the 6PR Radio interview made the 6PR Statements;
 - (d) each of Articles 1, 2, 3, 6, 7 and 8 were published on or about the dates stated above; and
 - (e) Cr Burns was not authorised by the City's Mayor to make the August 2015 OCM Statements, the 6PR Statements or any statements in relation to arrangements between the City and Wilson Parking.
- 7.2 The Panel is not satisfied to the Required Standard:
- (a) that the comments attributed to Cr Burns in Articles 1, 3, 6, 7 and 8 were derived from anything Cr Burns said other than during the August 2015 OCM; or
 - (b) of what took place during the alleged ABC 720 Interview (Article 4) or the Nine News television interview (Article 5).

8. Elements of the offence and the Panel's determination

Regulation 4

8.1 As noted above:

- (a) regulation 4 of the *Regulations* provides that a contravention of a local law relating to conduct of people at council or committee meetings is a minor breach for the purposes of section 5.105(1)(b) of the Act;
- (b) the relevant "local law relating to conduct" is the Standing Orders, clause 4.16(3) of which provides that "[a] member is not to use offensive or objectionable expressions in reference to any member, employee or other person".

8.2 On the evidence available to the Panel, it is satisfied to the Required Standard that:

- (a) by stating, during the 25 August 2015 OCM, that Wilson Parking were "corporate psychopaths" Cr Burns used an offensive or objectionable expression in reference to any "other person", thereby breaching clause 4.16(3) of the Standing Orders; and
- (b) by stating, during the 25 August 2015 OCM, that Wilson Parking were "like vultures on a barbed wire fence" Cr Burns used an offensive or objectionable expression in reference to any an "other person", thereby breaching clause 4.16(3) of the Standing Orders, and

and thereby breached regulation 4 of the *Regulations*.

8.3 The Panel does not accept Cr Burn's contention that clause 4.16(3) of the Standing Orders does not apply to Wilson Parking because it is not a "person" because:

- (a) the Standing Orders are "written laws" for the purposes of the *Interpretation Act 1984 (WA)* which provides, in section 3 that:
 - (i) "written law" means "all Acts for the time being in force and all subsidiary legislation for the time being in force";
 - (ii) "subsidiary legislation" means any proclamation, regulation, rule, local law, by-law, order, notice, rule of court, local or region planning scheme, resolution, or other instrument, made under any written law and having legislative effect; and
 - (iii) "local law" means a local law made by a local government under the Act in which the term is used;
- (b) in any "written law", "person" includes a public body, company, or association or body of persons, corporate or unincorporated: *Interpretation Act 1984 (WA)*, s 3.

8.4 Accordingly, the Panel finds that Councillor Burns breached regulation 4 of the *Regulations*.

9. Essential elements of a contravention of regulation 7(1)(b)

9.1 Where, as here, the alleged conduct is not conduct that contravenes s 5.93 of the *LG Act* or s 83 of *The Criminal Code*, the following elements must be established, to the Required Standard, before a contravention of regulation 7(1)(b) of the *Regulations* is established:

- (a) first, that the person the subject of the Complaint engaged in the alleged Conduct;
- (b) secondly, that the person the subject of the Complaint was a council member both at the time of the Conduct and the time when the Panel makes its determination;
- (c) thirdly, that by engaging in the Conduct, the person the subject of the complaint made use of his or her office as a council member (in the sense that he or she acted in their capacity as a councillor, rather than in some other capacity);
- (d) fourthly, that when viewed objectively⁵, such use was an improper use of the person's office as council member in that it:
 - (A) involved a breach of the standards of conduct that would be expected of a person in the position of a councillor by reasonable persons with knowledge of the duties, powers and authority of the councillor and the circumstances of the case (by for example, an abuse of power or the doing of an act which the councillor knows or ought to have known that he or she had no authority to do⁶); and
 - (B) was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty⁷; and
- (e) fifthly, that the person engaged in the Conduct to cause detriment (or in the belief that detriment would be suffered) by the local government or another person.

10. Findings - regulation 7(1)(b)

10.1 On the evidence available to the Panel, it is satisfied to the Required Standard that each of the above elements have been established and in particular finds that:

- (a) by making the the 6PR Statements, Cr Burns made improper use of his office as a councillor of the City in that:
 - (i) it is the function of the Mayor of the City, not individual councillors, to speak on behalf of the City: *LG Act*, section 2.8(1)(d);
 - (ii) viewed objectively, the 6PR Comments might reasonably have been understood by those who heard them as having the endorsement of the Council or the Mayor, which was not the case;

⁵ That is, when viewed by a reasonable person (i.e. a hypothetical person with an ordinary degree of reason, prudence, care, self-control, foresight and intelligence, who knows the relevant facts).

⁶ *Treby and Local Government Standards Panel* [2010] WASAT 81 at [26] – [34].

⁷ *Hipkins and Local Government Standards Panel* [2014] WASAT 48 at [9].

(iii) pursuant to clause 3(b) of the *Regulations* a Council member in his or her capacity as a council member “should avoid damage to the reputation of the local government; and

(iv) the 6PR Comments were intemperate and when viewed objectively, might reasonably have been understood by those who heard them as reflecting poorly upon the reputation of the City; and

(b) Cr Burns made the Statements to cause detriment (or in the belief that detriment would be suffered) by Wilson Parking as this would be the inevitable consequence of describing Wilson Parking, in the public domain, as “a bunch of corporate psychopaths” and being like “vultures sitting on a barbed wire fence”.

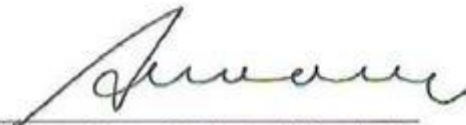
10.2 For these reasons the Panel finds that Cr Burns committed the breach of regulation 7(1)(b) alleged in the Complaint.



Brad Jolly (Presiding Member)



Paul Kelly (Member)



Peter Doherty (Member)

Attachment “A”

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| Attachment B | Statement of Facts | 18 |
| 01 | Copy of correspondence from Mr Ian Hill, former Chief Executive Officer and Complaints Officer at the City of Subiaco, dated 23 September 2015. | 19 |
| 02 | Copy of City of Subiaco Meeting Procedures Local Law 2013 as Gazetted. | 25 |
| 03 | Copy of email and attachments dated 19 November 2015 from Manager Governance at the City. | 27 |
| 04 | Copy of Request for Comments letter to Cr Burns dated 23 November 2015 with attached complaint summary and supporting information. | 40 |
| 05 | Copy of response letter from Cr Burns to the Department dated 17 December 2015 with attachments. | 55 |
| 06 | Copy of response letter from Cr Burns to the Department dated 17 December 2015 with attachments. | 60 |
| 07 | Article 1 – Community News Report on the OCM | 70 |
| 08 | Article 2 – Report on Cr Burns interview with Radio 6PR | 71 |
| 09 | Article 3 – Perth Now – Report on Comments made at OCM by Cr Burns | 72 |
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| 13 | Article 9 – Western Suburbs Weekly | 76 |
| 14 | City of Subiaco Medial Release – 27 August 2015 | 78 |
| 15 | Copy of Email from A/Mayor to all councillors – 28 August 2015 | 79 |
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