

Decision-maker's Title: LOCAL GOVERNMENT STANDARDS PANEL
Jurisdiction: Complaints of minor breach by local government council members
Act: *Local Government Act 1995*
File No/s: SP 26 of 2008
Heard: Determined on the documents
Considered: 18 July 2008
Coram: Mr Q. Harrington (Presiding Member)
Councillor C. Robartson (Member)
Mr J. Lyon (Member)

SP 26 of 2008

Complainant: William Murray MITCHELL

Council member complained about: Councillor Anne RYAN

Findings:

The Panel finds that Councillor Ryan committed a breach of the Shire of Busselton's standing order 20.2, and thus committed a minor breach by virtue of regulation 4(2).

The Panel also finds that Councillor Ryan committed a breach of regulation 7(1)(b).

REASONS FOR FINDING

1. In these Reasons, unless otherwise indicated, a reference to a section is a reference to the corresponding section in the *Local Government Act 1995* ("the Act"), and a reference to a regulation or a sub-regulation is a reference to the corresponding regulation or sub-regulation in the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations").

2. Mr Matthew Smith, the complaints officer of the Shire of Busselton ("Shire") has sent to the Local Government Standards Panel ("the Panel") a complaint ("the complaint"), dated 29 April 2008 and made by Mr Mitchell about Councillor Ryan's conduct during the consideration of Item 21, Questions From Members Without Notice, at the Shire's Ordinary Council Meeting ("OCM") on 14 November 2007 ("the relevant OCM") when she:

- (a) quoted an extract from the Corruption and Crime Commission's "*Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup, 5 October 2007*" ("the CCC Report") reproduced in paragraph 3 of these reasons and from a newspaper of 14 November 2007; and
- (b) immediately thereafter posed 5 questions ("the subject questions") for response by Mr Andrew Macnish (the Shire's Chief Executive Officer) ("the CEO"), in regard to a meeting at Dome Café, Busselton on 2 November 2007 between Mr Mitchell and the CEO ("the Dome café meeting").

(This conduct is referred to in these Reasons as "Councillor Ryan's conduct")

3. The minutes of the OCM record the address to the OCM constituting Councillor Ryan's conduct as follows:

"In its report of the outcome of the CCC investigation into the Smiths Beach Enquiry, the Commissioner stated in Part:

"The acceptance of the invitation and attendance by Dr Cox to a private lunch, when he knew the agenda for discussion and knew (or should have known) that the Canal Rocks Pty Ltd SEA was before him and his agency, constituted the performance of functions as a public officer in a manner that was not impartial. The conduct could constitute a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (vi) of the CCC Act."

Ex Councillor David Hunt, also a member of the Smiths Beach Action Group wrote in the newspaper today "Codes of Conduct in public arenas demand a very high standard of behaviour and a recognition of public perceptions of behaviour of public officers".

I request that the CEO provide answers to the Council (in writing and before the close of business on Friday, 16 November, 2007) in response to the following questions arising from his meeting with a lobbyist who is a prominent member of the Smiths Beach Action Group on the morning of 2 November at a café in Busselton.

- 1. Was he on duty at the time of the meeting and, if so, what was the purpose of the meeting? If not, what was the nature of leave and had the leave been approved by the Shire President?*
- 2. Who paid for the refreshments?*
- 3. Did the CEO declare the meeting to anyone else or make note on his file?*
- 4. Given the recent findings of the CCC in relation to public officers meeting with lobbyists (both official and unofficial) does the CEO consider it appropriate that the meeting took place in a place other than the Shire offices?*
- 5. Is there the potential that this meeting has compromised the Council's handling of matters involving the Smiths Beach Action Group?"*

4. The complaint consists of a 2-page *Complaint of Minor Breach Form* with attachments being a one-page statement by the complainant; a copy of pages 31 and 32 of the minutes of the relevant OCM; a copy of pages 1 and 8 of the "Busselton-Dunsborough Mail" newspaper published on 21 November 2007; a copy of page 9 of the "Busselton-Dunsborough Mail" newspaper published on 23 November 2007, and a copy of pages 9 - 12 of the minutes of the Shire's OCM held on 28 November 2007, reproducing a copy of the response of the CEO to the subject questions.

5. Three allegations are made by Mr Mitchell in the complaint or arise under it ("the three allegations"). They are:

- (1) That Councillor Ryan's conduct contravened regulation 10(3)(b) by her use of offensive or objectionable expressions in reference to the CEO when members of the public were present.

- (2) That Councillor Ryan's conduct contravened standing order 20.2 of the Shire's *Proceedings and Business of Council Local Law 2004* as amended ("the Shire's Standing Orders"), a minor breach by virtue of regulation 4(2), by:
- (a) commenting adversely upon the character or actions of the CEO; or
 - (b) being intentionally disrespectful to the CEO.

- (3) That Councillor Ryan's conduct contravened regulation 7(1)(b) by making improper use of her office as a Council member to cause detriment to Mr Mitchell and the CEO.

6. The Panel notes that in the complaint Mr Mitchell expresses his opinion that Councillor Ryan's conduct breached "*certain guiding principles for Council members*". This is clearly a reference to the general principles set out in sub-regulation 3(1), which, while important, is *not* a rule of conduct and hence contravention of the general principles is not a minor breach under section 5.105(1)(a).

7. By a Panel *Notice of Complaint* dated 20 May 2008, the Panel Administration, inter alia, notified Councillor Ryan of the three allegations, and invited her response to them. Councillor Ryan responded by her 3-page letter of 10 June 2008 and attachments being: a *Notice of Denial* dated 8 June 2008 in regard to the alleged breach of Standing Order 20.2, a copy of an article apparently published in the "Busselton-Dunsborough Mail" newspaper on 28 November 2007, and copies of a number of emails. In her *Notice of Denial*, Councillor Ryan admits to having committed the conduct complained about, but she denies that such conduct was a contravention of Standing Order 20.2.

8. The Panel notes that Standing Order 13.2 allows a Councillor to "*ask any question of a specific or general nature relating to the Shire's business as part of the Agenda item 'Questions from Members Without Notice' at an Ordinary Meeting of Council*". Accordingly, if Councillor Ryan had only asked the subject questions (through the Presiding Person), there would in the Panel's view have been nothing untoward in her conduct. However, it is the Panel's view that a reasonable person would be likely to perceive Councillor Ryan's juxtaposition of the quotations from the CCC report and asking the subject questions as an implication ("Councillor Ryan's implication") that the CEO had behaved similarly to the person referred to in the quotation from the CCC Report and that therefore:

- (a) the CEO's conduct in participating in the Dome café meeting constituted the performance of functions as a public officer in a manner that was not impartial;
- (b) the CEO had failed to act with integrity in the performance of official duties; and
- (c) the CEO's conduct constituted misconduct as defined by section 4 of the *Corruption and Crime Commission Act 2003*.

9. The Panel now considers each of the three allegations referred to in paragraph 5 above in turn. In relation to allegation (1) it is noted that regulation 10(3)(b) reads:

"If a person, in his or her capacity as a council member, is attending a council meeting, committee meeting or other organised event and members of the public are present, the person must not, either orally, in writing or by any other means: ...

- (b) *use offensive or objectionable expressions in reference to a local government employee."*

10. The Panel notes that amongst the meanings of the word “expression” in the Macquarie Dictionary (2nd ed) is “a particular word, phrase, or form of words”, and that regulation 10(3)(b) appears to be aimed at the use of abusive language. In the Panel’s view, while Councillor Ryan’s conduct might be understood by some persons as offensive or objectionable, Councillor Ryan did not use any “particular word, phrase, or form of words” that would constitute the use of an expression for the purpose of regulation 10(3)(b).

Accordingly, Councillor Ryan did not breach regulation 10(3)(b).

11. Turning to allegation (2) referred to in paragraph 5 above, it is noted that by section 5.105(1)(b) a council member commits a minor breach if he or she contravenes a local law under the Act, contravention of which the regulations specify to be a minor breach. Regulation 4 reads:

- “(1) *In this regulation —*
“local law as to conduct” means a local law relating to conduct of people at council or committee meetings.
- (2) *The contravention of a local law as to conduct is a minor breach for the purposes of section 5.105(1)(b) of the Act.”*

12. The Shire’s Standing Orders is a local law relating to conduct of people at council or committee meetings. Standing Order 20.2 reads:

“A Member shall not comment adversely upon the character or actions of another Member or Employee, or be intentionally disrespectful in any way to another Member or Employee other than through an appropriate agenda item, the discussion for which is closed to members of the public, or in an authorised grievance meeting.”

13. The Panel notes that amongst the meanings of the word “comment” in the Macquarie Dictionary (2nd ed) is “a remark, observation, or criticism”.

14. On the basis of the information in and attached to the complaint and Councillor Ryan’s response, it is the Panel’s view that there is sufficient evidence from which it may be concluded that it is more likely than not that:

- (a) Councillor Ryan “commented adversely upon the actions” of the CEO when she juxtaposed the quotation from the CCC report and the subject questions immediately afterwards; and
- (b) Councillor Ryan was “intentionally disrespectful” to the CEO when she juxtaposed the quotation from the CCC report and the subject questions immediately afterwards; and
- (c) due to both or either of (a) and / or (b), Councillor Ryan committed a breach of Standing Order 20.2.

Accordingly, the Panel finds that Councillor Ryan committed a breach of Standing Order 20.2, and thus committed a minor breach by virtue of sub-regulation 4(2).

15. The Panel now considers allegation (3) referred to in paragraph 5 above. Regulation 7(1)(b) reads:

“A person who is a council member must not make improper use of the person’s office as a council member: ...

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

16. Regulation 7 is a rule of conduct under section 5.104(1) and, in accordance with section 5.105(1)(a) of the Act, a contravention of regulation 7(1)(b) is a minor breach.

17. In the Panel’s view a breach of sub-regulation 7(1)(b) will occur if:

- (a) at the relevant time the person complained about was a council member, and committed the alleged conduct; and
- (b) the member’s conduct was a use of the member’s office as a council member; and
- (c) the member’s conduct constituted making improper use of the member’s office as a council member; and
- (d) the relevant conduct was accompanied by the member’s intention to cause detriment to the local government or any other person.

18. Conduct has been held to be “improper” where it involves “a breach of the standards of conduct that would be expected of a person or body in the position of the public body by reasonable persons with knowledge of the duties, powers and authority of the position and circumstances of the case.” [*R v Byrnes: Re Hopgood* (1995) 183 CLR 501 at 514 - 5].

19. In the Panel’s view the required standards of conduct of council members are in essence those flowing from the fiduciary obligations owed by a council member to his or her council (or local government) as complemented by the Act and any relevant code of conduct.

20. The fiduciary obligations owed by a council member to his or her council (or local government) include a duty to act in good faith (i.e. the council member must in his/her dealings act bona fide in what he/she considers to be the best interests of the council) and an obligation to exercise powers conferred on the council member only for the purposes for which they were conferred (i.e. for “proper purposes”).

The Shire’s Code of Conduct includes the following clauses:

“3.1 Personal Behaviour

(a) Members ... shall:

(i) act, and be seen to act, properly and in accordance with the requirements of the law and the terms of the Code;

...

(iii) act in good faith (ie honestly, for the proper purpose, and without exceeding their powers) in the interests of the Council and the community;

(iv) deal with each other in an open, honest and frank manner and in particular will not initiate or participate in activities that denigrate the personality or performance of others;

(v) *make no allegations which are improper or derogatory and refrain from any form of conduct, in the performance of their official or professional duties, which may cause any reasonable persons unwarranted offence or embarrassment; and*
(vi) *always act in accordance with their obligation of fidelity to their Council.*”

3.2 Honesty and Integrity

Members ... shall:

- (i) observe the highest standards of honesty and integrity, and avoid conduct which might suggest any departure from these standards;*
- (ii) bring to the notice of the President/Chairman any dishonesty on the part of any other member or employee; and*
- (iii) be frank and honest in their official dealing with each other.”*

Clause 4.4 of the Shire’s Code of Conduct sets out the conflict resolution process, and sub-clause 4.4.1 reads:

“Collective sanctioning is the preferred method of internal conflict resolution and is to be utilised by members and senior staff as a measure of first resort.

The Chief Executive Officer is to timetable informal sessions for the Council to meet to discuss issues of the day, policy matters and relationship matters.

Councillors will utilise these informal meetings as question and answer sessions. In particular it will be expected that Councillors will also use these sessions in respect to relationship matters to table issues of concern and/or likely dispute or complaint for discussion by the Council as a whole with a view to a consensus agreement on an appropriate course of action.”

21. For regulation 7(1)(b) to be breached, it is not necessary that a detriment has been actually suffered, as it is sufficient that the council member had the intention of causing a detriment (*Chew v R* (1992) 173 CLR 626). Moreover, the test for impropriety being objective, it is not a requirement for the existence of impropriety that there be conscious wrongdoing (*Chew*, at 647; *R v Byrnes* at 514 - 5).

22. The Panel notes that, in considering the meaning of the term “detriment” in regulation 7(1)(b), the Macquarie Dictionary (2nd ed) defines:

- (a) the noun “detriment” as “loss, damage, or injury” and “a cause of loss or damage”;
- (b) the noun “loss”, relevantly, as “detriment or disadvantage from failure to keep, have or get”;
- (c) the noun “damage” as “injury or harm that impairs value or usefulness”;
- (d) the noun “harm” as “injury; damage; hurt” and “moral injury; evil; wrong”; and
- (e) the noun “disadvantage”, relevantly, as “any unfavourable circumstance or condition” and “injury to interest, reputation, credit, profit, etc”.

23. In the Panel’s view, the term “detriment” is to be construed widely, and includes a financial or a non-financial loss, damage, or injury, or any state, circumstance, opportunity or means specially unfavourable. Accordingly, “detriment” may include a tendency for others to think less favourably of a person, humiliation, denigration, intimidation, harassment, discrimination, disadvantage, adverse treatment, and dismissal from, or prejudice in, employment.

24. The Panel considers that for the purposes of regulation 7(1)(b) it may find that a council member intended by his/her conduct to cause a detriment to a person if:

- (a) the member's admission/s is/are to that effect; or
- (b) there is a rational inference arising from the circumstantial evidence that it is more likely than not that:
 - (i) the member intended to cause the detriment; or
 - (ii) the member's conduct was done with reckless indifference that the detriment was a probable or likely consequence of that conduct, and it is more likely than not that such inference is the only inference open to reasonable persons upon a consideration of all the facts in evidence.

25. On the basis of the information in and attached to the complaint and Councillor Ryan's response, it is the Panel's view that there is sufficient evidence from which it may be concluded that it is more likely than not that:

- (a) Councillor Ryan made use of her office as a Council member to make the statements and ask the questions during a Council meeting when the meeting was not closed to members of the public;
- (b) in making that use of her office, Councillor Ryan:
 - (i) committed a breach of Standing Order 20.2;
 - (ii) breached the provisions of Clauses 3.1(a), 3.2 and 4.4 of the Shire's Code of Conduct; and
 - (iii) breached her duty to act in good faith and her obligation to exercise powers conferred on her as a Council member only for the purposes for which they were conferred, by:
 - (A) the breaches referred to in (i) and (ii); and
 - (B) not putting her accusations to the CEO and giving him a reasonable opportunity to respond to them, before she made her accusations in public through the purported exercise of her public duty as a Council member;
- (c) Councillor Ryan's conduct constituted making improper use of the member's office as a council member;
- (d) Councillor Ryan intended by her conduct to cause detriment to the complainant Mr Mitchell and to the CEO (such detriment being a diminishing of their respective reputations and/or a tendency for others to think less favourably of each of them) as there is a rational inference arising from the circumstantial evidence that it is more likely than not that her conduct was indulged in with reckless indifference that that detriment was a probable or likely consequence of that conduct, and it is more likely than not that such inference is the only inference open to reasonable persons upon a consideration of all the facts in evidence; and
- (e) Councillor Ryan committed a breach of regulation 7(1)(b).

25. Accordingly, the Panel finds that Councillor Ryan committed a breach of regulation 7(1)(b).

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 Quentin Harrington (Presiding Member)

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 Clive Robartson (Member)

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 John Lyon (Member)

Decision-maker's Title: LOCAL GOVERNMENT STANDARDS PANEL
Jurisdiction: Complaints of minor breach by local government council members
Act: *Local Government Act 1995*
File No/s: SP 26 of 2008 (DLGRD 20080153)
Heard: Determined on the documents
Considered: 18 July 2008 and 2 October 2008
Coram: Mr Q. Harrington (Presiding Member)
Councillor C. Robartson (Member)
Mr J. Lyon (Member)

SP 26 of 2008

Complainant: William Murray MITCHELL

Council member complained about: Councillor Anne RYAN

Local Government: Shire of Busselton

Decision:

The Panel has made a finding ("the first finding") that Councillor Ryan committed a breach of standing order 20.2 of the Shire of Busselton's *Proceedings and Business of Council Local Law 2004* as amended ("the Shire's standing orders"), and thus committed a minor breach by virtue of regulation 4(2) of the *Local Government (Rules of Conduct) Regulations 2007* ("the first breach").

The Panel has also made a finding ("the second finding") that Councillor Ryan committed a breach of regulation 7(1) of the *Local Government (Rules of Conduct) Regulations 2007* ("the second breach").

The Panel's decision on how the first breach and the second breach are dealt with under section 5.110(6) of the *Local Government Act 1995* ("the Act") is that, for the following reasons, pursuant to paragraph (c) of section 5.110(6) of the Act it orders two of the sanctions described in paragraph (b) of section 5.110(6) of the Act, as set out in the attached Minute of Order.

REASONS FOR DECISION

1. The Panel has given to Councillor Ryan:
 - (a) notice of the finding;
 - (b) a copy of the Panel's written *Reasons for Finding* in regard to the finding; and
 - (c) a reasonable opportunity for her to make submissions about how the breach should be dealt with under section 5.110(6) of the Act.
2. Councillor Ryan has not made any such submissions.
3. The Panel views the actions of a council member, at a council meeting when members of the public are present, in commenting adversely upon the actions

of the CEO, and being intentionally disrespectful to the CEO, as inappropriate conduct.

4. The Panel views any improper use by a council member of his/her office of council member for the purpose of causing a detriment to another person as a very serious matter and deserving of public censure.
5. Councillor Ryan has not previously been found under Part 5 Division 9 of the Act to have committed any minor breach.
6. Having regard to the said *Reasons for Finding*, the above matters and the general interests of local government in Western Australia, the Panel's decision in this matter is that pursuant to paragraph (c) of section 5.110(6) of the Act it orders two of the sanctions described in paragraph (b) of section 5.110(6) of the Act, as set out in the attached Minute of Order. Two sanctions are ordered due to the significance of the breach of regulation 7(1). Councillor Ryan ought to be admonished by the Panel and also ordered to:
 - (a) publicly apologise to Mr Macnish for:
 - (i) commenting adversely upon his actions as the CEO, and being intentionally disrespectful to him; and
 - (ii) any diminution of his reputation, and any tendency for others to think less favourably of him,
in connection with her having juxtaposed quotations from the CCC report and asking him 5 questions during the consideration of Item 21, Questions From Members Without Notice, at the Shire's Ordinary Council Meeting on 14 November 2007; and
 - (b) publicly apologise to Mr Mitchell for any diminution of his reputation, and any tendency for others to think less favourably of him, in connection with her having juxtaposed quotations from the CCC report and asking Mr Macnish 5 questions during the consideration of Item 21, Questions From Members Without Notice, at the Shire's Ordinary Council Meeting on 14 November 2007.

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Quentin Harrington

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Clive Robartson

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John Lyon

NOTICE TO THE PARTIES TO THE COMPLAINT/S

RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (“the Decision-maker”) hereby gives notice that:

- (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 (“SAT”) for a review of the Panel’s decision in this matter. *In this context “decision” means a decision to dismiss the complaint or to make an order.*
- (2) Generally, an application to SAT under its review jurisdiction must be made within 28 days of the day on which the Decision-maker gives a notice under subsection 20(1) the *State Administrative Tribunal Act 2004* (“SAT Act”).
- (3) The Decision-maker’s *Reasons for Finding* and these *Reasons for Decision* constitute the Decision-maker’s notice given under subsection 20(1) of the SAT Act.