

DERWENT VALLEY COUNCIL CODE OF CONDUCT

Complaint by Ms Rebbecca Thorpe against Councillor Martyn Evans

Determination made on 10 March 2019

Local Government Act 1993

Code of Conduct Panel:

Jill Taylor (Chairperson), Richard Grueber (Legal Member) and Rob Winter (Member)

1. Summary of the complaint

On 26 July 2018, Ms Rebbecca Thorpe lodged a Code of Conduct Complaint (the Complaint) against then Mayor, Martyn Evans and Councillor (Cr) Ben Shaw. In the intervening time Cr Shaw has become Mayor and Martyn Evans is a Derwent Valley Councillor.

Ms Thorpe alleged that Mayor Shaw and Cr Evans had both breached several provisions of the Derwent Valley Council's Code of Conduct. Without specifying the specific parts of the Code that were alleged to have been breached, Ms Thorpe stated in her complaint form that the alleged contraventions were related to:

- Decision making
- Conflict of interest
- Use of information
- Gifts and Benefits
- Relationships with community
- Representation

Attached to her complaint form, Ms Thorpe detailed information relating to the alleged breaches by both Mayor Shaw and Cr Evans under each of the Parts listed above. During the initial assessment period, the Executive Officer, at the request of the Chairperson, wrote to Ms Thorpe on 21 August 2018, requesting that she provide more precise information as to the date on which each of the alleged events took place. Ms Thorpe responded in writing on 3 September 2018. Whilst this response was not exactly what was required, the Chairperson considered that there was enough information to further investigate these complaints. Documentation supplied by Ms Thorpe in support of her complaint contained information relating to events prior to the period of 6 months before the date of her complaint. In accordance with Section 28V (3) (f), the Chairperson dismissed the part of Ms Thorpe's complaint relating to events prior to 26 January 2018.

2. Investigation

A Panel was formed to further investigate the matter and met on 1 October 2018. The Panel were of the opinion that, despite an attempt by the Chairperson to seek clarification on some aspects of her complaint, Ms Thorpe had not provided the necessary information. It was, therefore, decided that a further request be sent to Ms Thorpe with a template attached for her to align the alleged breach, date of that breach, specific part of the Code of Conduct alleged to have been breached and which elected member had allegedly breached the Code of Conduct. A letter with the attached template was sent to Ms Thorpe on 2 October 2018.

On 16 October 2018 Ms Thorpe again provided a comprehensive response, yet again, did not provide the specific information required by the Panel. In the meantime, Cr Evans had received

copies of Ms Thorpe's communications and indicated that he had difficulty in knowing exactly what he was expected to respond to.

Given the confusion that existed and Ms Thorpe's inability to provide specific details required by the Panel, the Panel decided to hold a preliminary hearing. The purpose of this hearing was to establish the precise nature of the alleged breaches as outlined in the template forwarded to Ms Thorpe on 2 October 2018. The Executive Officer attempted to arrange a preliminary hearing during October but was unable to arrange a mutual time for Panel members, the complainant and respondents. The preliminary hearing was arranged to be held on 29 November 2018. At this stage the Panel determined that it appeared that there were similar complaints against Mayor Shaw and Cr Evans, therefore the hearings would be held concurrently.

At the preliminary hearing Ms Thorpe was represented by her advocate, Mr Chris Lester. Both Mayor Shaw and Cr Evans attended. Evidence at this preliminary hearing was given under oath/affirmation. The Chairperson outlined the purpose of the preliminary hearing as described above and advised the parties of the documentation that the Panel had before it. The parties confirmed they were in receipt of all documents.

Through her advocate, Ms Thorpe identified five complaints against Mayor Shaw and three against Cr Evans, none of which were jointly against the respondents. The Panel determined that at this point, the complaints lodged by Ms Thorpe against Mayor Shaw and Cr Evans should proceed separately.

Through the process of identifying each complaint, Ms Thorpe agreed that all alleged breaches were under Part 7 (1) of the Derwent Valley Council's Code of Conduct. Part 7 (1) of the Code states:

PART 7 - Relationships with community, councilors and Council employees

1. A councilor:-

- a) must treat all persons with courtesy, fairness, dignity and respect; and
- b) must not cause any reasonable person offence or embarrassment; and
- c) must not bully or harass any person.

The following table outlines each complaint against Cr Evans and the further action to be taken by Ms Thorpe in order for the complaint to be considered by the Panel.

Date of alleged breach	4 February 2018
Details of alleged breach	Ms Thorpe handed a document to a council staff member addressed to then Mayor Evans. The letter complained about how businesses were treated by the proprietor of the street market, John Begg. Then Mayor Evans did not provide her with a response to that letter
Parts of Code alleged breached	7.1 (a)
Elected member who is alleged to have breached code	Councillor Evans
Action	Ms Thorpe to provide a copy of that correspondence or a detailed account of the contents of that letter

Date of alleged breach	4 April 2018
Details of alleged breach	Ms Thorpe handed a document to Council employee, Louise, that contained screen shots for then Mayor Evans. Mayor Evans did not acknowledge this communication

Parts of Code alleged breached	7.1 (a)
Elected member who is alleged to have breached code	Councillor Evans
Action	Ms Thorpe to provide a copy of that document or a detailed account of the its contents.

Date of alleged breach	Date to be confirmed by Ms Thorpe
Details of alleged breach	Then Mayor Evans had a conversation with Ms Kelly in which he denigrated Ms Thorpe.
Parts of Code alleged breached	7.1 (a) and (b)
Elected member who is alleged to have breached code	Councillor Evans
Action	Ms Thorpe to provide Panel with date of this alleged breach Panel to write to Ms Kelly requesting a witness statement from her contained in a statutory declaration

Following receipt of a record of the preliminary hearing which contained the above outline of alleged breaches by Cr Evans, Ms Thorpe provided the additional information on 9 January 2019. Ms Kelly also provided a statutory declaration dated 3 January 2019, presumably at the request of Ms Thorpe as at this stage the Panel had not made such a request. The Panel met again on 22 January 2019 and reviewed the additional information provided by Ms Thorpe. It also determined that the statutory declaration dated 3 January 2019, submitted by Ms Kelly, had not been properly completed nor did it contain specific information required by the Panel. On 23 January 2019, the Executive Officer wrote to Ms Kelly requesting she provide specific information through a further statutory declaration. The Panel decided that both hearings should be convened on 25 February 2019.

3. Summary of Hearing

The hearing was convened on 25 February 2019 at the Courthouse adjacent to the Derwent Valley Council offices. Ms Thorpe, her advocate Mr Lester, and Cr Evans attended for the whole hearing and Ms Kelly attended for part of the hearing to provide her witness evidence. All witnesses gave evidence under oath or affirmation.

The Chairperson outlined the substance of the complaint and the procedure the Panel would follow, including options available to the Panel if the complaint was upheld.

The Chairperson detailed the documents which had been circulated to all parties. These were

- Code of Conduct Complaint 26 July 2018 with the following attachments:
 - Statutory declaration signed by Ms Thorpe dated 26 July 2018
 - Four pages entitled “codes broken by Martyn Evans”
 - Three pages entitled “codes broken by Ben Shaw”
 - Four Facebook pages headed “Ben”
 - Copy of “Function and Powers of Council
 - Copy of Facebook page headed “Ian Johnson
 - Copy of what appears to be businesses presumably in New Norfolk
- Copy of Derwent Valley Councillor Code of Conduct approved on 2 April 2017
- Further documentation from Ms Thorpe received on 3 September 2018
- A response from Ms Thorpe sent on 14 October 2018 in response to the Panel’s request that she provide more specific details viz., details of incident, date it occurred, part of code that was alleged to have been breached and by which elected member.

- Response from Cr Evans to complaint by Ms Thorpe sent on 28 September 2018
- Statutory declaration and attachments from Ms Erin Kelly dated 6 February 2019
- Two letters from Ms Thorpe to Derwent Valley Council dated 24 January 2018 and 2 April 2018
- One letter from then Mayor Evans dated 7 May 2018
- Letter to Council dated 24 January 2018 headed "Fashion everyone can afford"

Mr Lester, on behalf of Ms Thorpe was asked to speak to the three individual complaints as outlined above. Mr Lester sought indulgence from the Panel to commence his presentation by referring to some incidents that had preceded the complaint lodged by Ms Thorpe. He stated this was necessary to provide a context to the incidents that occurred during the 6 months prior to 26 July 2018. Mr Lester stated that this "sorry saga" commenced in 2017 when Council allowed a private organisation to control a street market. He added that Council maintained virtually no control over the market. Ms Thorpe requested the coordinator to ensure that no street stall be set up in front of her business. Through Mr Lester, Ms Thorpe claimed that this request was met with abuse. Given this reaction she decided to make representations to Council, through then Mayor Martyn Evans. However, she said that this was to no avail. A Facebook smear campaign commenced against her and continues today. As a result, she has lost her business which was worth \$220,000 per annum. In regard to her representations to Council and receiving no response, she claims that proper process was not adhered to.

Mr Lester then addressed the alleged breach of 4 February 2018 which relates to a letter dated 24 January 2018 sent by Ms Thorpe on 4 February 2018 to the Derwent Valley Council. Ms Thorpe did not receive a response to this letter which she took up with the then Mayor. Despite the Mayor saying he would investigate it she still to this day has not received any response. The letter of 24 January 2018 was addressed to the Complaints Department of Council.

In view of the lack of response to her letter of 24 January 2018, Ms Thorpe sent a further letter to Council, this time addressed to Mayor Evans. This relates to the complaint by Ms Thorpe on 4 April 2018. Ms Thorpe re-iterated several of her concerns expressed in her original letter of 24 January 2018. Mr Lester advised the hearing that the letter dated 2 April 2018 contained several screen shots, including a street map depicting Ms Thorpe's shop with a "skull and cross bone" as well as an inappropriate message allegedly sent by then Deputy Mayor, Ben Shaw. (The matter will be considered separately in relation to Ms Thorpe's complaint against Mayor Shaw.)

Other pieces of information were also attached to her complaint but not considered by the Panel as they were outside of the Code of Conduct jurisdiction and had been referred to Tasmania Police. Mr Lester told the hearing that Ms Thorpe was distressed that for several weeks after sending the second letter she still did not have a response.

Mr Lester indicated that the third alleged breach was that then Mayor Evans denigrated Ms Thorpe in a conversation with Ms Kelly which occurred on 7 May 2018.

Following the completion of the presentation of Ms Thorpe's evidence there were no questions asked by Panel members or Cr Evans.

Witness Ms Erin Kelly then attended the hearing. Ms Kelly was invited to make comment on anything she had witnessed in relation to Ms Thorpe's complaints against Cr Evans, especially the complaint that Cr Evans had denigrated Ms Thorpe. Ms Kelly commenced by stating that she had met with then Mayor Evans to discuss the effects the street market was having on Ms Thorpe's business and Cr Evan's response was that Ms Thorpe was "vile and vicious". Ms Kelly said that Cr Evans had told her he would walk on the other side of the street to avoid Ms Thorpe. On another

occasion he asked Ms Kelly to tell Ms Thorpe that it was not him who had refused to make payment for tyres she damaged on a Council road.

In relation to Ms Thorpe, Ms Kelly said she tried to explain to Cr Evans that Ms Thorpe had a lot of problems on her plate and that she was trying to communicate with Council as a business owner and that he shouldn't make assumptions about her behaviour. Ms Kelly told the hearing that she and others were working with Ms Thorpe to improve her behaviour, stating that she was running a successful business. Ms Kelly said she told Cr Evans that Ms Thorpe was continually being ridiculed and condemned by all, starting "at the top".

The Panel asked Ms Kelly did Cr Evans use the words "vicious and vile" to describe Ms Thorpe or did he choose other words. Ms Kelly admitted that they were her words and that Cr Evans described her as confrontational, adding that Cr Evans said, "you know what she's like and she has a foul mouth". When asked whether Cr Evans's treatment of Ms Thorpe was fair, Ms Kelly said she didn't think it was.

In response to further questioning from the Panel, Ms Kelly said that she went to Cr Evans as a friend and manager of Ms Thorpe's business. Ms Kelly stated that Cr Evans and Ms Thorpe did eventually engage with each other in a "civilised" manner and that Cr Evans had admitted that things could have been handled differently.

Ms Kelly was asked why she thought Ms Thorpe's successful business was terminated and she responded saying it was the advent of street market. Ms Kelly said that she had tried to reason with the coordinator of the street market but was told if she didn't like it, she should go and see the Council. On the issue of the skull and cross bones appearing on street maps, Cr Evans told Ms Kelly at one point that the number had reduced from four to one. Ms Kelly said that even one (referring to Ms Thorpe's shop) was not acceptable.

Ms Kelly said that after this interaction with the street market coordinator she went to Cr Evans' home and told him how she and Ms Thorpe were being treated. She indicated that Cr Evans appeared shocked by this information. Sometime after that Cr Evans and his wife came into the shop, Ms Kelly believed to show support for Ms Thorpe.

At the completion of her evidence, neither Mr Lester nor Cr Evans had any questions of this witness.

Cr Evans was then called to respond to the complaint lodged by Ms Thorpe, specifically those outlined in the record of the preliminary hearing of 29 November 2018. Following the preliminary hearing Cr Evans said that his statement sent on 28 September 2018 was his response to Ms Thorpe's complaint and he did not wish to provide any additional response.

Cr Evans told the hearing that he felt he did not have a case to answer in relation to the complaints made by Ms Thorpe. He went on to say that the Council had agreed to hand over the administration of the street market to the General Manager. It was agreed that High Street would be blocked off to traffic, effectively making it a mall. Cr Evans said he received several complaints regarding the street market which he took to the General Manager. Cr Evans said that there were workshops to deal with these issues which Ms Thorpe and Ms Kelly and the General Manager attended.

In explaining his perception of Ms Thorpe, Cr Evans said that he did take a complaint from her to the General Manager in relation to tyres on her car which had been damaged because of roadworks. The General Manager refused to compensate Ms Thorpe. Ms Thorpe in turn made some uncomplimentary statements about Cr Evans on Facebook, believing him to be the person

who refused her request. Cr Evans agreed that as a result of this experience he did, initially, cross over the road to avoid Ms Thorpe.

Cr Evans concluded that he believes Ms Thorpe has blamed him for non-action about matters raised with him, but he, in turn, had passed them on to the General Manager.

When asked by the Panel if he recalled receiving the letter to the Complaints Department of the Council dated 24 January 2018, Cr Evans responded that this document did not come to him. He heard about it second hand. Cr Evans added that it was not usual for correspondence to go to the Mayor and/or Councillors unless it was specifically addressed to them.

Cr Evans was then asked if he had seen the letter dated 2 April 2018 which was addressed to the Mayor. Cr Evans said that he did not recall receiving this letter but as it was addressed to the Mayor it was likely it went into his "tray". Cr Evans added that the Council is currently working on improving communication procedures so that all communication can be tracked. Prior to these changes it was possible that others who had access to his tray may have removed items. When asked by the Panel, what he would have done with that letter of 2 April 2018, Cr Evans said that he would have taken it immediately to the General Manager. Cr Evans said that this was usual procedure as all letters sent out from Council are checked by appropriate personnel. The Panel brought to Cr Evans' attention a letter he wrote to Ms Thorpe dated 7 May 2018 in which he acknowledged her letter of 2 April 2018 and his response of 12 April 2018. Cr Evans indicated that the response of 12 April 2018 was likely to have been a simple acknowledgement of her 2 April 2018 letter. Cr Evans said that the response to Ms Thorpe dated 7 May 2018 would have been developed in consultation with the General Manager and his Executive Assistant.

With reference to Ms Kelly's evidence, the Panel asked Cr Evans what descriptors he used when referring to Ms Thorpe. Cr Evans said that he was always mindful of his language being a public figure but did refer to Ms Thorpe's swearing which he had experienced prior to the street market event. Cr Evans admitted that because of this experience he was initially reluctant to engage with Ms Thorpe, but after speaking with Ms Kelly, he and his wife had visited her shop.

When asked if the street market was still operating, Cr Evans said it was. He admitted that there were some teething problems which is not unusual with new initiatives, but a new coordinator has been appointed by Council following an EOI process and things had got better. Cr Evans acknowledged that information flow back from Council to the community could be improved.

Mr Lester was then offered the opportunity to put questions to Cr Evans. He accepted that Cr Evans had referred these matters to the General Manager but asked if he had followed up with the General Manager and what was the result. Cr Evans said that he had followed up with the General Manager at the Council workshops (closed council meetings). Mr Lester then asked why Cr Evans had not kept Ms Thorpe informed of progress. Cr Evans said that he recalled telling her on one occasion that the matter was with the General Manager.

In his summation on behalf of Ms Thorpe, Mr Lester said that the whole "sorry saga" could have been "nipped in the bud" if Cr Evans had spoken with Ms Thorpe once an issue had been identified. Because of the lack of prompt action by the Council and specifically the then Mayor Evans, Ms Thorpe has suffered the loss of a profitable business in which she was employing 3 people. For example, on a Saturday, Ms Thorpe would take \$800-\$900 but on one Saturday during the street market took only \$39. Not only was her business destroyed but her reputation damaged.

In his summation, Cr Evans said that he did not consider he had anything to answer for and that he held no animosity towards Ms Thorpe. He said that he had done his job as best he could and felt that the General Manager should be investigated.

4. Determination

The Panel determines the following in relation to breaches of Part 7 of the Derwent Valley Code of Conduct which states:

PART 7 - Relationships with community, councillors and Council employees

1. A councillor: -

- a) must treat all persons with courtesy, fairness, dignity and respect; and*
- b) must not cause any reasonable person offence or embarrassment; and*
- c) must not bully or harass any person.*

Complaint 1, Breach of 7 (1) (a) – A lack of response from then Mayor Evans to a letter of complaint by Ms Thorpe dated 24 January 2018 is dismissed. There was insufficient evidence produced that demonstrated that then Mayor Evans had seen this letter which was addressed to the Complaints Department of the Council. In his evidence Cr Evans stated that such correspondence would have been dealt with by the General Manager and/or Council staff and elected members were not involved in day to day correspondence unless it was personally addressed to the Mayor and Councillors. In the absence of any response to her letter of complaint, the Panel understands that Ms Thorpe may have felt she was not being treated with courtesy, fairness, dignity and respect, but this could not be attributed to then Mayor Evans.

Complaint 2, Breach of 7 (1) (a) – A lack of response from then Mayor Evans to a letter of complaint by Ms Thorpe dated 2 April 2018 is dismissed. This complaint was addressed to the Mayor and although Cr Evans was not able to recall exactly what he did with this complaint, he told the hearing that under normal circumstances he would discuss an appropriate response with the General Manager and the Executive Assistant. The Panel noted that a response dated 7 May 2018 was sent to Ms Thorpe. The response of 7 May 2018 referred to an earlier response dated 12 April 2018 (which was not tabled in evidence) but Cr Evans suggested that it was likely to be an acknowledgement of receipt of her letter of 2 April 2018. On the basis that acknowledgement of this complaint was forwarded to her within two weeks, the Panel concluded that she was treated fairly and respectfully, albeit with a full response taking a further 3 weeks.

Complaint 3, Breach of 7 (1) (a) and (b) – Allegation that Cr Evans had denigrated Ms Thorpe in conversation with the witness, Ms Erin Kelly is dismissed. Evidence produced at the hearing from Ms Kelly and Cr Evans was consistent in that Cr Evans, initially avoided contacting Ms Thorpe because of his perception that she was difficult and had a “foul mouth”. However, after talking with Ms Kelly he did speak with Ms Thorpe and in Ms Kelly’s word the conversation was “civil”. The Panel therefore concluded that Cr Evans did not cause embarrassment or offence to Ms Thorpe through his discussions with Ms Kelly.

5. Summary

Whilst the Panel dismisses the three complaints lodged by Ms Thorpe against Cr Evans, it considers that a more pro-active and conciliatory approach by him at the outset might have resulted in a more positive outcome for Ms Thorpe.

The Panel also notes that at the time when Ms Thorpe was making complaints, the Derwent Valley Council did not appear to have effective and efficient processes in place for dealing with incoming

correspondence. Furthermore, it failed to provide timely feedback to Ms Thorpe in relation to her complaints. From the evidence provided to the hearing it appears that no response was made to Ms Thorpe's letter of 24 January 2018, thus necessitating a further complaint dated 2 April 2018. A full response to the 2 April 2018 complaint was not provided until 7 May 2018, over one month later.

Section 28ZD (1)(a) of the *Local Government Act 1993* (the Act) requires the determination to be made within 90 days after the initial determination by the Chairperson to investigate and determine the complaint or provide reasons why this requirement could not be met. In this instance the 90-day period concluded on 4 December 2018. There were several reasons why the Panel was unable to meet this requirement. Firstly, whilst the complainant provided a significant amount of information on two occasions, it was not obvious which breaches of the code occurred on what date. The Panel determined that a preliminary hearing was required to elicit specific detail from Ms Thorpe relating to her complaints. This took longer than anticipated to arrange. Thirdly, owing to these delays the matter extended over the Christmas/New Year period and members of the Panel took annual leave.

6. Right to Review

A person aggrieved by the determination of the Code of Conduct Panel is entitled under section 28ZP of the Act to apply to the Magistrates Court (Administrative Appeals Division) for a review of that determination on the grounds that the Code of Conduct Panel has failed to comply with the rules of natural justice.



Jill Taylor
Chairperson



Richard Grueber
Legal Member



Rob Winter
Member