

CODE OF CONDUCT PANEL

DORSET COUNCIL CODE OF CONDUCT

Determination made 16 February 2017 Local Government Act 1993

Complaint against Mayor Howard, Cr Jessup and Cr Arnold by Mr Peter Coxhead

Code of Conduct Panel:

Sue Smith Chairperson, Jill Taylor, Steven Bishop

I. Summary of the complaint

A Code of Conduct complaint was lodged by Mr Peter Coxhead on 21 September 2016.

In his complaint under the Heading "Details of the Behaviour of each Councillor that Constitutes the Alleged Contravention", Mr Coxhead alleged that at a Dorset Council Meeting on 21 March 2016, Mayor Howard, Cr Jessup and Cr Arnold (the Respondents) did not declare a pecuniary interest (actual, potential or perceived) in debating and voting on Motion 44/16 "Support of Forestry Tasmania".

That motion as passed reads as follows:

"That Dorset Council issue a public statement and write to Forestry Tasmania stating Council's position of officially supporting Forestry Tasmania in both its commercial and non-commercial activities in the Dorset Municipality".

In Appendix "A" to his Complaint Mr Coxhead made a number of allegations, the relevant ones being:

- (a) Mayor Howard "trains operators to be certified as competent harvesting operators";
- (b) Cr Jessup "manages a major sawmill in Dorset";
- (c) Cr Arnold "owns and runs the major chainsaw business in Dorset".

In his complaint, Mr Coxhead cited various provisions of the Code of Conduct of Dorset Council relevant to conflict of interest, that had come into effect after 21 March 2016, which he claimed had been breached.

He also cited certain sections of the *Local Government Act 1993* ("the Act") and alleged that the Respondents had a pecuniary interest in the outcome of the motion, as a result of which there was a breach of those sections of the Act.

2. Investigation

The Chairperson of the Code of Conduct Panel conducted an initial assessment of the complaint and determined that, as it had been alleged that sections of the Act were contravened, that part of the complaint should be referred to the Acting Director of Local Government under section 28ZA of the Act.

That referral was made and was accepted by the Acting Director on 14 October, 2016. A response was received on 19 January 2017 informing the Panel that the complaint was dismissed on that the basis that there was no pecuniary interest to be gained from the motion as resolved. This information allowed the Panel to then complete their process.

At the time of the initial assessment the Chairperson further determined that the alleged breaches of the Council's Code of Conduct should be investigated.

Under the Act, Schedule 8A – Savings and Transitional Provisions, the Panel is required to determine a complaint under the Dorset Council's Code of Conduct which was in force at the time of the alleged conduct. That was the Code adopted on 15 November 2010, (hereinafter the "2010 Code") not the one cited by Mr Coxhead.

Accordingly Mr Coxhead was informed of this and asked to specify, with precision, which sections of the 2010 Code he believed had been contravened. This ensured Mr Coxhead was afforded procedural fairness.

Mr Coxhead responded on 3 November 2016. In his clarification he cited principles 1, 2, 3, 6 and 9 of the Code of Conduct 2010 as having been breached by the failure to declare a conflict of interest. Those principles are as follows:

1. A Councillor should uphold the law and on all occasions, act in accordance with the trust that the community places in that Councillor.
2. A Councillor is accountable to the community and should act in the public interests by impartially serving the interests of the whole community.
3. A Councillor should act with integrity and propriety and should have no conflict of interest.
- 6A. Councillor should be objective in decision making and open about reasons for decisions.
- 9A. Councillor must not behave in such a manner as to bring the Council or the Offices of Mayor, Deputy Mayor or Councillor, into disrepute.

The Panel at its meeting on 11 November 2016 agreed that the original complaint and the supplementary response be forwarded to Mayor Howard, Cr Jessup and Cr Arnold as a matter of procedural fairness. Subsequently the Panel received the following statutory declarations:

- A. Mayor Howard declared 20 December 2016;
- B. Cr Jessup declared 20 December 2016; and
- C. Cr Arnold declared 19 December 2016.

As per section 28ZG(2)(b) of the Act, the Panel determined that a hearing was unnecessary in the circumstances because the investigation could be adequately conducted by examination of the written materials that had been supplied.

3. Determination

The Panel determines the following:

- Principle 1 - Complaint dismissed.
- Principle 2 - Complaint dismissed.
- Principle 3 - Complaint upheld.
- Principle 6 - Complaint dismissed.
- Principle 9 - Complaint dismissed.

4. Reasons for Determination

4.1 Principle 3-A Councillor should act with integrity and propriety and should have no conflict of interest.

Conflict Of Interest

Under the Explanation of the 2010 Code "Conflict of Interest" it states

"If a Councillor has an interest in a matter to be considered by the Council or a Council Committee that is not a pecuniary interest but the Councillor considers that their personal interest may conflict with their public duty to act impartially and in the interest of the whole community, the Councillor must declare a conflict of interest. A Councillor should not be in a position where integrity is called into question by any obligation. As well as avoiding actual impropriety, the Councillor should avoid any appearance of it."

Conflict of Interest is defined succinctly on the Monash University website Conduct and Compliance page:

"A conflict of interest refers to a situation where a conflict arises for an individual between two competing interests. These are often, but not exclusively, interests of public duty versus private interests. This refers to a reasonably perceived, potential or actual conflict of interest".¹

The Evidence

The Respondents each clearly had a "public duty to act impartially and in the interest of the whole community", but, it was claimed by Mr Coxhead, each had a competing private interest in the ways set out above, namely training harvesting operators, managing a sawmill and running a chainsaw business.

Mayor Howard did not contest the allegation that he had an interest in training operators. He clarified that it was his Family Trust which operates the relevant

¹ <https://www.monash.edu/policy-bank/hr/conduct-compliance/conflict-interest> (Extracted 14 Feb 2017)

Company “that provides health and safety advice, environmental advice, risk assessment, accident investigation services, training and assessment to” among other industries the Forestry industry.

Cr Jessup confirmed that he has a role “as a Saw Mill Manager”, although the Saw Mill, Branxholm Mill, only processes pine logs.

Cr Arnold confirmed an interest in a business “which operates a small engine sales and service business in Scottsdale”, but clarified “only 3 – 4 contractors in our area use chainsaws in their operations”. He said that he had “very occasionally repaired chainsaws for Forestry Tasmania”.

Findings

As none of the Respondents have disputed the allegations of fact, it follows indisputably that the Panel is compelled to find that each of them have the personal interests set out in the summary of the complaint above. As a matter of logic each respondent has an interest in the success of each of those businesses. The interest of Cr Jessup is less direct than those of the other Respondents who have an ownership interest, but it is only common sense that as the manager of a saw mill he would have an interest in its success.

Each of the Respondents minimised the extent to which the relevant businesses would flourish, thrive and prosper if Forestry Tasmania were to increase its “commercial and non-commercial activities in the Dorset municipality”.

The intensity, indeed the passion of the language in the Statutory Declarations of the Respondents suggests that they do not appreciate that the extent, degree or magnitude of the conflict is of little relevance in determining whether there has been compliance with the requirement to declare a conflict.

The determinant is quite different to that of “pecuniary interest” where a more substantial risk of financial benefit is required.

It needs to be appreciated that any conflict of interest must be declared not because there is a real prospect of secret financial benefit that may corrupt the impartial mind, but because of the absolute necessity for transparency and the alleviation of the perception of self-interest as a driver in the passing of motions that are meant to be decided impartially.

Compliance with the conflict of interest requirements must be strict to reassure the community of the integrity of the process.

The duty of a Councillor is to avoid conflicts of interest, and if they arise to reveal and manage them appropriately.

In an essay *Understanding the Nature of Conflicts of Interest* by Simon Longstaff, first published 1 December 1995 but available on the website of the Ethics Centre, the learned author says:

"It should be noted that the perception, by others, of a conflict of interest can often be of concern equal to or greater than the actual conflict of interest itself. This is usually because those who perceive a conflict of interest are usually led to conclude that some office or duty is unlikely (or less likely) to be discharged either fairly or impartially.²

This is a particular concern when one of the parties to a conflict exercises some kind of public office. In such circumstances, the need to maintain public confidence in the probity of decision-making processes is seen to be of sufficient importance to make the issue of conflicts of interest one of considerable significance."

This is especially so in the highly charged atmosphere that is engendered by contrary points of view about the exploitation or the preservation of forestry resources. Where there is suspicion and mistrust it is even more important to protect the integrity of the local government process by declaring interests even where the potential benefit is slight. It may well be that the Branxholm Mill only processes pine logs at the moment, but no one knows what the future may hold and there is a potential for either a change in the current practices of Forestry Tasmania, or of the Mill.

Mayor Howard's Family Trust has a broad range of services (see above) and it is believable that at some future time the capacity for involvement with Forestry is strong.

Cr Arnold's chainsaw company may "*in no way rely on the forestry industry*", at this time, but should Forestry Tasmania return to Dorset in force as the motion seeks, there is potential for enhanced profits.

It is clear that there is no prospect of profit enhancement so strong as to amount to pecuniary interest, but there is a potential and that is why there is a conflict between the public duty and the private interest.

Furthermore, no matter how remote the potential benefit may seem, it is important that not only is integrity preserved in the process, but so is the appearance of integrity.

It is for this reason that the 2010 Code says clearly and explicitly what the duty of Councillors is. It reads:

"Conflict of Interest

If a Councillor has an interest in a matter to be considered by the Council or a Council Committee that is not a pecuniary interest but the Councillor considers that their personal interest may conflict with their public duty to act impartially and in the interest of the whole community, the Councillor must declare a conflict of interest.

*A Councillor should not be in a position where integrity is called into question by any obligation. As well as avoiding actual impropriety, **the Councillor should avoid any appearance of it**".*

² <http://www.ethics.org.au/on-ethics/blog/december-1995/understanding-the-nature-of-conflicts-of-interest>. Extracted 14 Feb 2017

Those words are quite clear and unambiguous, and it is surprising that the evidence from the Respondents was so trenchant and dismissive in its language. These obligations were not new in 2010, and have certainly been black and white since then.

The Panel finds that each Respondent had a personal interest in businesses and each had the potential to benefit if the objective of the Motion, namely increased activity by Forestry Tasmania in Dorset, came to fruition. These interests were not disclosed to the meeting. Even if their support of the motion was not motivated by self-interest, that failure to declare created the perception that the impartiality which every Councillor must have was tainted.

The Panel concludes that the complaint of failing to declare a conflict of interest in breach of Principle 3 is made out in respect of each of the three Respondents.

The Panel has considered whether the failure to declare the conflict of interest also constitutes a breach of the other principles referred to in the complaint.

4.2 Principle 1 - A Councillor should uphold the law and on all occasions, act in accordance with the trust that the community places in that Councillor.

In relation to Principle 1 the primary issue is whether the failure to declare the conflict is a failure to "*uphold the law*". There is ambiguity around the issue as to whether the rules relating to conflict of interest can properly be described as "*the law*".

Because a breach of the Code of Conduct can give rise to a sanction, in accordance with the usual rules of interpretation, the meaning of the word "law" has to be strictly construed.

Strictly speaking, the law relates to statutes and perhaps regulations, depending on context. The rules in relation to declaration of conflict of interest arise from the Code of Conduct. That certainly is of imperative force by virtue of the Act, but that is not the same as characterising it as "the law". It is better characterised as part of the compliance requirements for good corporate and government compliance. In the view of the Panel they are not "the law" for the purposes of a complaint of this nature.

The balance of the Principle, requiring Councillors to act "in accordance with the trust that the community places" in him or her, the Panel regards as an aspirational objective which is too vague to, on this occasion, be capable of being breached by the failure to declare.

4.3 Principle 2 – A Councillor is accountable to the community and should act in the public interest by impartially serving the interests of the whole community.

The allegation by Mr Coxhead of breach of this principle is tantamount to accusing the respondents of each failing to decide impartially whether to support the motion or not. (or indeed in the case of Cr Jessup, moving the motion).

It is unclear from the materials whether Mr Coxhead is alleging that the Respondents have failed to be impartial because of their personal interests. If that is the tenor of the allegation it is entirely rejected. The view of the Panel is that the Respondents at all material times sincerely and genuinely believed in the economic benefit that would accrue to Dorset if Forestry Tasmania were more active in the Municipality, and did not deliberately support the motion because it might benefit themselves.

They have unfortunately overlooked the necessity to make full disclosure of their personal interests, but nothing suggests there was an actual self interest in passing the motion.

The adverb "impartially" has to be interpreted in the context of Local Government decisions. In this context "impartially" means taking account only of relevant considerations. Mr Coxhead said that "Councillors Jessup and Arnold are obviously too close to industry to have a balanced view when voting on any forest related motions". He seems to be suggesting that the Respondents were not impartial because they had a predilection in favour of forestry.

However this is not the sort of bias or prejudice encompassed by the words "impartially serving" in the context of local government.

Councillors are entitled to hold political views and pursue them by the passing of motions. Whether they are pro forestry or pro conservation or of any other political preoccupation as to what is best to serve the interests of the whole community, they are not acting on the basis of bias or prejudice in the relevant sense.

Accordingly this part of the complaint is dismissed.

4.4 Principle 6 – A Councillor should be objective in decision making and open about reasons for decisions.

In light of the above reasoning this complaint cannot stand. Mr Coxhead suggested that if there was a breach of Principle 3 it followed almost as a matter of course that these other principles were also breached. That is simply not the case. There is no case to answer and this part of the complaint is dismissed.

4.5 Principle 9 – A Councillor must not behave in such a manner as to bring the Council or the officers of Mayor, Deputy Mayor or Councillor into disrepute.

In order for this complaint to be sustained there must be some disreputable conduct. The meaning of "disrepute" is disgrace, shame, dishonor, infamy, ignominy, stigma, scandal or some other form of odium or opprobrium due to an immoral or wrongful action. The mere fact that the Respondents failed to disclose a conflict of interest based on a personal interest that was relatively remote and theoretical does not bring the Council or its officers into disrepute. This part of the complaint is dismissed.

5. Sanction

It is clear from the evidence from the Respondents that there was no intent to breach the Code of Conduct, but rather a failure to appreciate what it required. The potential for actual benefit was remote, and the harm was in the fact that it gave rise to a perceived conflict of interest. In the circumstances the Panel issues a caution to each of the Respondents.

It suggests that they learn from this process, and it encourages them to attend any professional development opportunities that may arise to deepen their understanding of the principles involved in the management of conflicts of interest.

6. Legal Matters

6.1 Section 28(V)(3)(d) of the Act – Validity of Complaint.

Each of the Respondents submitted that this section which requires the Complainant to “state the provision of the relevant code that the Councillor has allegedly contravened” had been breached and therefore the complaint was “invalid”.

The Panel does not accept the submission. The requirements of that section are directory and not mandatory. A directory requirement is desirable but not absolutely necessary. Mandatory provisions are essential to the substance of an action. Failure to comply will invalidate and make void the purported act.

In the context of requirements for a complaint to be made which may frequently be read by those without legal training or experience, the Panel is of the view that to make non-compliance a matter that would vitiate the entire complaint is an extreme and inordinate consequence quite out of perspective with the significance of the omitted information.

In the ultimate analysis the characterisation depends upon the intent of Parliament, which has to be gathered from the provision, its nature, design and objective, as well as the significance of the consequence which follows from construing it one way or the other. Considering the trivial consequences that flow from failing to actually name the precise provisions of the correct code, and the general inconvenience and injustice that would flow from holding the provision to be mandatory, the Panel holds that it is directory only.

The core of the complaint is constituted by the provision of information as to what is alleged to have been done. That was provided.

6.2 Section 28ZE – Validity of Clarification

Each of the Respondents complained that the letter from Mr Coxhead clarifying the particular Code of Conduct and its principles about which he wished to complain “has no form of identification that it came from Coxhead” (sic) “and is therefore invalid”.

This argument is unsound.

Section 28ZE ("Conduct of Investigations generally") provides that the Code of Conduct Panel –

- (a) Is to conduct the investigation with as little formality, and as expeditiously, as is reasonably practical in the particular circumstances; and
- (b) Is not bound by the rules of evidence and may inform itself on any matter in any manner it considers appropriate
- (c) In the investigation of the Code of Conduct complaint, the Code of Conduct Panel may –
 - (i) determine what evidence is required to enable it to determine the complaint; and
 - (ii) subject to subsection (3), determine the manner in which it will accept evidence from the Complainant

It is quite obvious from this that the Panel has ample entitlement to accept the document from Mr Coxhead. In any event the Panel notes that:

- (a) it was emailed to its Executive Officer;
- (b) it was addressed to its Executive Officer;
- (c) it was responsive to the prior letter from the Executive Officer and addressed the matters contained in it.

It was obviously from Mr Coxhead and any argument to the contrary is sophistry.

6.3 Section 28V(3)(f) – Six month time limit

The Respondents submitted that the second piece of correspondence from Mr Coxhead was a second complaint, that was made out of time, being in excess of the six month period during which a complaint can be made pursuant to section 28V(3)(f).

The fundamental flaw with this argument is that the document does not purport to be a second complaint.

On the 24 October 2016 the Executive Officer of the Panel wrote to Mr Coxhead in relation to this Code of Conduct investigation. The letter said in full;

"The Code of Conduct Panel has considered your complaint against Mayor Howard, Cr Jessup and Cr Arnold, and the Chairperson has asked me to write to you.

Under the interim arrangements for Councils to adopt the model Code of Conduct, a complaint must be considered against the Code that was in place at the time of the alleged breach. Dorset Council did not adopt the model Code until 16 May 2016. Your complaint alleges a breach that occurred at the Dorset Council Meeting on 21 March 2016, which means that it must be considered against the Dorset Council Code of Conduct, as adopted in November 2010. I have attached a page identifying the 11 Principles of that Code for your information. The Code of Conduct Panel advises that part of the complaint has been assessed as being potentially relevant to those Principles.

The Panel request that you clarify your complaint, by specifically and concisely indicating the facts that you feel identify particular breaches of the attached Principles. Once you have done so, Mayor Howard, Cr Jessup and Cr Arnold will be asked to respond to your statement.

Please forward your response to me within 14 days of the date of this letter.

Please contact me on ... or lgconduct@dpac.tas.gov.au if you are unclear about any aspect of this letter."

Mr Coxhead then responded with his clarification. In that context it is clearly incorrect to characterise the response from Mr Coxhead as a "second complaint" . It dealt with the same subject matter, albeit that it elaborated on it.

The submission is rejected.

7. Irrelevant Matters

Unfortunately Mr Coxhead went beyond the request to "indicate facts that were relevant, and in "the "*clarification*" made criticisms of the merits of the motion. These took up approximately two type written pages.

The Panel has no interest in the merits of a motion and only in the due process mandated by the the Code. It has paid no attention to such irrelevancies.

Unfortunately, in his Statutory Declaration, the Mayor has seen fit, as have the other Respondents but to a lesser degree, to respond to the comments made by Mr Coxhead on the merits of a motion..

The Panel reiterates that it has no interest in the merits and has given no weight to all of the irrelevancies contained in the various documents.

In the Statutory Declaration Mayor Howard says, in respect of the clarification from Mr Coxhead referred to above:

"to suggest that the second correspondence is a clarification of the original complaint is disingenuous at the very best and at worst may be an attempt to pervert the course of justice and should be investigated under the Criminal code".

The dictionary gives as meanings of "*disingenuous*":

"not candid or sincere, typically by pretending that one knows less about something that one really does, dishonest, deceitful, underhand, duplicitous, double dealing, two faced, dissembling, insincere, false, lying, untruthful, mendacious".

In this and other comments Mayor Howard has been disrespectful of both Mr Coxhead and the Panel. As the Principles above exemplify, the duty of Councillors is to be respectful of all points of view. The Panel suggests if there are any future matters of litigation involving the Complainant or the Respondents, they restrict themselves to commenting upon the relevant issues.

8. Timelines

Part of the complaint was referred to the Acting Director of Local Government. The conclusion of that investigation was received by the Panel on 19 January 2017.

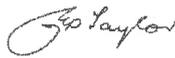
As part of the complaint was referred, the Panel was to make every endeavor to investigate and determine the complaint within 120 days of the initial determination that it be investigated. Section 28ZD(2) allows that if the Panel is unable to investigate and determine a code of conduct complaint, or part of a code of conduct complaint, within the period specified, the Panel is to include the reasons for that in its written determination. While the Panel made every endeavor to investigate and determine the complaint within the timeframe, the reason for the delay in this matter was attributed to additional time required to consider several legal matters (referred to in this report) raised during the assessment, investigation and determination of the complaint.

9. Right of 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.



Sue Smith



Jill Taylor



Steven Bishop