

Local Government Act 1993

HUON VALLEY COUNCIL CODE OF CONDUCT

Complaint by Mr Geoffrey Swan against Councillor Michael Newell

Determination made on 2 September 2019

Code of Conduct Panel:

Jill Taylor (Chairperson), Rob Winter (Legal Member) and Penny Cocker (Member).

1. Summary of the complaint

On 8 April 2019 Mr Geoffrey Swan lodged a Code of Conduct Complaint (the Complaint) against Councillor (Cr) Michael Newell through the Acting General Manager of the Huon Valley Council, Mr Wayne Thorpe. Mr Thorpe advised Mr Swan that his complaint did not fully comply with the *Local Government Act 1993* and requested additional information from him. Mr Swan responded to this request by providing further information dated 15 April 2019.

Mr Swan alleged that Cr Newell breached Part 7 1 (a), (b) and (c) of the Huon Valley Council Code of Conduct which was approved by the Huon Valley Council on 27 April 2016.

Specifically, Mr Swan alleged that Cr Newell contributed to a stream of Facebook posts on or about 4 February 2019, supporting comments, made by a Frances Bender, which were unfavourable to Mr Swan. Furthermore, Mr Swan alleged that Cr Newell made disparaging remarks about feeding peanuts to people sitting in the public gallery prior to a Council meeting held on 6 February 2019.

Part 7 of the Code of Conduct provides for the following-

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*

An initial assessment undertaken by the Chairperson determined on 2 May 2019 that further investigation was warranted in relation to Mr Swan's complaints.

A Code of Conduct Panel was formed to investigate the complaint made by Mr Swan. On 5 June 2019 Cr Newell was provided with a copy of the Complaint and invited to provide a response. Cr Newell submitted a response by way of a statutory declaration dated 6 June 2019.

2. Investigation

On 7 June 2019, the Panel was advised that Cr Newell was absent from Council duties due to a medical condition. Based on this information, the Panel wrote to Cr Newell requesting that he provide a medical certificate covering his anticipated absence from Council duties. Cr Newell was also advised that subject to the provision of a medical certificate, the complaint against him would not proceed until he was medically cleared. Cr Newell responded on 7 June 2019 saying that he was

* Section 28ZK (7) of the *Local Government Act 1993* requires that any person who receives a determination report must keep the determination report confidential until the report is included within an item on the agenda for a meeting of the relevant council. Failure to do so may result in a fine of up to 50 penalty units.

feeling better, and as this complaint had contributed to his medical condition he wanted the matter finalised as soon as possible.

On 25 June 2019 the Panel met to consider this complaint, and agreed to write to Mr Swan to ask whether he was in attendance ahead of the Council meeting held on 6 February 2019 where Cr Newell was alleged to have made a derogatory comment about “feeding peanuts” to the public gallery. The Panel advised Mr Swan that if he was not in attendance, he was to provide the Panel with the details of any witnesses to the alleged incident. Mr Swan advised that he was not in attendance, but Dr Elizabeth Smith was and was prepared to submit a statutory declaration in relation to this matter. Dr Smith subsequently submitted a statutory declaration dated 3 July 2019.

Given the confusing references to the “January” Council meeting and the Council meeting held on 6 February 2019, on 25 June 2019 the Panel also wrote to the General Manager of the Huon Valley Council seeking clarification. The General Manager responded on 26 June 2019 advising that the January meeting was postponed until 6 February 2019 owing to bushfires in the Huon area.

The Panel had established that Mr Swan was not actually present at the meeting on 6 February 2019, but determined that, as S28V (1) of the Act states "**A person may make a complaint against one councillor in relation to the contravention by the councillor of the relevant council's code of conduct;**" the Act does not define "complainant" and nor does it say that there has to be a specific impact or effect on the complainant, the Panel was still satisfied that Mr Swan had the ability or standing to bring his complaint in relation to the “feeding peanuts” allegation.

A hearing date of 25 July 2019 but was subsequently vacated as Cr Newell identified two witnesses to support his response to part of the complaint relating to the events of 6 February 2019. The witnesses were asked to provide, by way of a statutory declaration, any evidence of relevance in support of Cr Newell's response to Mr Swan's complaint. Only one of those witnesses, Cr Wilson, responded by submitting a statutory declaration dated 18 July 2019.

3. Summary of Hearing

The hearing was rescheduled for 15 August 2019. Both Mr Swan, accompanied by his wife as a support person, and Cr Newell attended the hearing. Dr Smith was asked to attend as a witness on behalf of Mr Swan and Cr Wilson as a witness for Cr Newell. Witnesses were advised that they would only be required to attend the hearing to give their evidence.

Before proceedings began, the legal representative of the Panel raised the issue of apprehended bias with the parties, given that the same Panel had presided over a complaint lodged by Mr Swan against another councillor's response to Frances Bender's Facebook post of 4 February 2019.

Submissions were sought from both Mr Swan and Cr Newell, as to whether they raised any objection to the Panel continuing to hear this complaint.

Both Mr Swan and Cr Newell stated that they were satisfied that the Panel would be able to hear this complaint in an open and unbiased manner.

The Panel unanimously agreed to continue to hear the complaint.

The Chair outlined the process that would be followed, stating that the Panel had before it the following documents, and confirmed that both the complainant and respondent had received copies of all these documents:

- a complaint (and attachments) dated 8 April 2019 lodged with the Acting General Manager, Huon Valley Council;
- an amended complaint (and attachments) dated 15 April 2019 which was requested by the Acting General Manager to comply with Section 28V (3) of the Act;
- a letter to the Panel from Mr Swan dated 29 April 2019 containing additional information relating to his complaint;
- a statutory declaration dated 6 June 2019 signed by Cr Newell;
- a letter dated 26 June 2019 from the General Manager, Huon Valley Council clarifying the January 2019 Council meeting was postponed until 6 February 2019;
- a statutory declaration dated 3 July 2019 signed by Dr Elizabeth Smith; and
- a statutory declaration dated 18 July 2019 signed by Cr Wilson.

A Huon Valley Council employee, Sandra Rustell, was present at the Council meeting held on 6 February 2019 and provided a statutory declaration dated 29 July 2019. The Panel did not initially include this in evidence as Ms Rustell stated she did not hear the comments Cr Newell was alleged to have made ahead of the 6 February 2019 meeting. However, during evidence being presented in relation to this aspect of the complaint, with the agreement of the parties, Ms Rustell's statutory declaration was read into the evidence as she made mention to handing out peppermints, which was questioned by Mr Swan.

It was agreed that the hearing would deal with the two aspects of the complaint separately. The complaint relating to the Facebook posts would be dealt with first, followed by the alleged comments made by Cr Newell ahead of the 6 February 2019 meeting. Mr Swan and Cr Newell as well as Cr Wilson took an oath prior to giving evidence. As noted below Dr Smith failed to appear.

In speaking to his complaint, Mr Swan provided a context by stating that he and his wife had moved to the Huon Valley some 10 years ago and that he had bought a property in Lonnvale. He said that during this time he had approached both the Environmental Protection Authority (EPA) and the Huon Valley Council asking why part of the Russell River that ran through his property had a slippery bed and green algae. Mr Swan outlined the various actions he and others had undertaken in the intervening period in the interests of resolving the quality of the Russell River. He told the hearing that this had put him at odds with many members of the community who were friends of the Benders or supporters of Huon Aquaculture.

Mr Swan said that since 2015 he has regularly attended Council meetings, asking the former Council, Commissioner Adriana Taylor (the appointed administrator when the former Council was sacked) and the current Council to respond to his concerns. Mr Swan said that when he first raised the issue of pollution of the river, there were several people in the community who expressed similar concerns, but over time they have become silent, some due to the fact that the fishery has provided them or their families with employment opportunities. Mr Swan added that when he raised the matter with Commissioner Taylor, she said that she was not interested in looking back, only looking forward.

Mr Swan said that he believed the catalyst to Frances Bender's Facebook post of 4 February 2019 was a Facebook post he placed on 4 February 2019 with a photo of the Prime Minister and Premier who were visiting the Huon Valley in the aftermath of the bushfires. Mr Swan said the Premier, who he had met with on another matter recently, asked how he was, and Mr Swan replied that for the "first time in 10 years the Russell River was looking the best we have ever seen it". He added that "maybe Huon Aquaculture had turned off the taps at their fish farm". These comments were included in Mr Swan's post of the photo of the Prime Minister and Premier. On that same day

Frances Bender posted on Facebook a lengthy message, which Mr Swan said, “publicly shamed” him and that the post went “viral”.

At the hearing, Mr Swan handed out a composite account of the Facebook posts which had been included in his complaint documentation. He said he had done this to provide for easier reference. A copy was provided to all Panel members and Cr Newell. Mr Swan agreed that this document be handed in as evidence and Cr Newell agreed. Mr Swan then proceeded to go through this document pointing out the number of times that Cr Newell had either “liked” or “loved” comments supporting Frances Bender’s statement. Mr Swan noted that a post by Jan Denny supporting Frances Bender attracted some responses questioning the negative portrayal of Mr Swan.

Mr Swan was so offended by Cr Newell’s posts calling him a parasite that he contacted Facebook to have the post removed. Facebook responded within five days saying that Cr Newell’s comment had breached its standards and subsequently removed the post. When questioned by the Panel why some of the comment on the hard copy of the removed post was blackened out, Mr Swan said it was done by the person who provided him with the actual copy of the post. Mr Swan posted a request on Facebook for Cr Newell to delete his comments. Cr Newell did not delete his comments. Mr Swan said that Cr Newell’s engagement with the Facebook posts denigrating him was a breach of the Council’s Code of Conduct and he then decided to lodge a formal complaint.

Mr Swan said he found the Facebook post put up by Frances Bender distressing and inaccurate and that he has never said anything offensive about her or her company. He said that even going through the documentation ahead of the hearing was particularly distressing. When questioned by the Panel, Mr Swan said he only engaged for the first time in social media in September 2018 during the local government elections to balance the incorrect propositions that were being advanced by some candidates.

When provided with the opportunity to ask Mr Swan any questions of his verbal evidence, Cr Newell asked Mr Swan if he had copied the Facebook post which had subsequently been taken down by Facebook from his own account. Mr Swan said it was not his copy, but someone had provided a copy to him.

Cr Newell was then provided with an opportunity to respond to the complaint by Mr Swan regarding the Facebook posts. Cr Newell commenced by providing details of his background as a resident of the Huon Valley and his employment and community experiences.

Cr Newell stated that he also had a 470 acre property on the Russell River up river from Mr Swan’s property over a longer period of time than Mr Swan and that contamination of the river commenced some time ago as a result of 1000s of tons of fertilizer being dumped on nearby paddocks and the resultant wash off into the river. He claimed that the river always had algae problems. Cr Newell said that he had been an abalone diver for many years and more recently a radio announcer. He said that he was an active member of the community engaged in charity work as an MC or just generally helping as required. He said that he had been a friend of Frances Bender since they were at primary school.

Cr Newell admitted that he had made comments and posted the “likes” and “loves” as outlined by Mr Swan. He said that he “loved” the posts of those people he personally knew and “liked” others that he didn’t know. He told the hearing that as a radio announcer he is required by his employer to have a social media presence and this was quite separate from his personal social media. He told the Panel that there had been a review of him by the Broadcasting tribunal, but no breach was identified.

Cr Newell said that since becoming a councillor, he had been approached by many people complaining about Mr Swan's perceived negativity but he, Cr Newell, had not made any public comment using Mr Swan's name. The Panel put the proposition that the collective comments in response to Frances Bender's post did not name Mr Swan, however, it appeared that a significant number of people in the community knew who she was referring to. Cr Newell agreed to this proposition.

The Panel asked Cr Newell if he had considered that in using social media there was a different expectation placed on him as a councillor compared to a community member. He responded that there probably was and that he "was still learning". When asked if he had undertaken training, he agreed that training was provided to new councillors but that "there was so much to learn, and he was still learning". When asked whether, on reflection as a councillor, he should have participated in the string of Facebook posts following Frances Bender's post of 4 February 2019, Cr Newell said that he did not regret making the statements but could have "used different words". For example, he admitted that as an elected member he should not have used the words "bloody coward".

He told the hearing that he had received about 5000 votes and that they were the people he was representing. It was put to Cr Newell by the Panel, that as an elected member he had a responsibility to represent the whole community and not be seen to be negative about certain community members. He said that he could see that.

Mr Swan asked Cr Newell whether he regretted any of the comments he made, to which Cr Newell replied that he didn't but could have made them differently. Mr Swan then asked Cr Newell why he didn't delete any of his posts. Cr Newell said that he had not thought about doing that and has not thought about the matter since.

In summarizing this aspect of his complaint, Mr Swan told the hearing that he felt continual abuse because of the comments over several days to Frances Bender's Facebook post. He said that he felt bullied but would not give in to bullies and continue to stick up for his rights. Mr Swan added that he has been intimidated and that the process of the Code of Conduct was "challenging" although some friends and family had been very supportive. He said that Cr Newell's description of this episode as "trivial" was upsetting as he has been the recipient of death threats. He added he and his wife have been referred to as "blow-ins" and as such were not treated in the same manner as long term residents. He added that he was well known in the community.

In summarizing his response to Mr Swan's complaint, Cr Newell said that whilst he did not name Mr Swan but did regret the choice of some of his words. Cr Newell left the Panel with the view that he did not see anything untoward for an elected member to engage as part of a negative public campaign against a member of the community.

The second part of the hearing was to investigate the alleged comments made by Cr Newell ahead of the 6 February 2019 Council meeting when he was alleged to have made a comment about giving peanuts to member in the public gallery.

Despite confirming her appearance, Dr Smith failed to appear at the hearing. The complainant and respondent were advised of this situation and asked how they wished to proceed. Mr Swan advocated that the matter should be adjourned whilst Cr Newell requested that the hearing proceed and said he was satisfied to accept Dr Smith's statutory declaration into evidence. The Panel adjourned the hearing briefly to discuss the matter. It was agreed, on balance, that the matter should not be delayed any further and that procedural fairness could be afforded to Mr Swan who

would have the opportunity to cross-examine Cr Newell's witness, Cr Wilson. The hearing resumed and Mr Swan and Cr Newell were advised of the Panel's decision. They agreed to proceed.

The Panel then received into evidence the statutory declaration of Dr Smith. Essentially, Dr Smith stated that prior to the commencement of the meeting, the executive assistant offered peppermints to those in the public gallery when she heard Cr Newell say in a loud voice "you should be giving them peanuts".

Cr Newell was asked to respond to this. He said that he was sitting at the table in the meeting room and Cr Wilson was also sitting down when Cr Newell said to Cr Wilson words to the effect that "they should have given you peanuts, Mick", meaning Cr Wilson. Cr Newell drew a sketch of the meeting room showing both councillors sitting at the meeting table with the public gallery at one end of the table. Cr Newell said he didn't question what Dr Smith thought she heard but he and Cr Wilson were engaged in banter between themselves.

Cr Wilson was then called into the hearing to give evidence. He had also provided a statutory declaration dated 18 July 2019. Cr Wilson stated at the hearing that he and Cr Newell were sitting at the meeting table about five minutes before the meeting commenced when the General Manager's secretary was handing out peppermints to people in the public gallery when Cr Newell made a comment to him that "they are not peanuts". Cr Wilson said it was not unusual for some banter to occur between councillors before the commencement of Council meetings.

Given the opportunity to cross-examine Cr Wilson, Mr Swan said that he had attended many Council meetings and had not seen peppermints handed out. Cr Wilson said that peppermints are handed out and often this might be 15-20 minutes prior to the meeting commencing so maybe this occurred before Mr Swan attended.

Given Mr Swan's comment about not witnessing peppermints being handed out at Council meetings he attended, Ms Rustell's statutory declaration was read out as she confirmed that she was handing out peppermints. Neither Mr Swan nor Cr Newell had any objections to this statutory declaration being accepted into evidence.

Cr Newell stated that he did not doubt the integrity of Dr Smith but maybe she misheard or misconstrued what was said. He said that he would not make such a statement and he was sure if he had then Ms Rustell would have remembered it.

This concluded the evidence presented in relation to both aspects of the complaint.

The Panel advised Cr Newell that if all or part of the complaint was upheld, the Panel would write to him regarding what he thought was an appropriate sanction.

Mr Swan was also asked if all or part of his complaint was upheld, what sanction he would think was appropriate. He responded by using the recent example of his complaint against Cr Wilson where he was handed a caution. Mr Swan said that this matter had been given media coverage making him out to be the bully and causing ratepayer funds to be directed to his complaint. He said that has caused him more stress. Mr Swan said that he sought a public apology.

4. Determination

In relation to Mr Swan's complaint that Cr Newell had breached Part 7 1 (a), (b) and (c) in relation to his Facebook posts of 4 February 2019, the Panel determined that the complaint be upheld. Part 7 1 (a), (b) and (c) states:

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

The purpose of the Code of Conduct for Councillors is to set out expectations of how elected members should behave. Cr Newell confirmed that he had posted comments, likes and loves as outlined by Mr Swan in his complaint and whilst he said that, on reflection, he may have chosen different words, he did not regret making the comments. Even though some of the posts queried Cr Newell's position as an elected member to make derogatory comments about Mr Swan, Cr Newell did not agree with these statements.

The Panel determined at the conclusion of this complaint process that Cr Newell had not accepted that the onus is on an elected member to refrain from engaging in negative public commentary about one of the Council's constituents. Given Cr Newell's position and his engagement in the Facebook commentary that followed Frances Bender's post, he has not treated Mr Swan with an appropriate level of courtesy, fairness, dignity and respect.

The Panel concluded that Mr Swan had been offended and embarrassed by the comments made by Cr Newell. He particularly was offended by being called a "parasite" and "bloody coward". Even though this post was eventually taken down it was there for several days for community members to view.

As Cr Newell had continued to respond to the string of Facebook posts over several days, after his initial involvement in it on 4 February 2019, the Panel was satisfied that this conduct, when coupled with Mr Swan's evidence, amounted to behaviour which was bullying and harassment of Mr Swan.

The Panel determined that it is beholden of an elected member to maintain a high standard of behaviour as a representative of Council. To this extent, a Councillor must avoid making negative public comment or supporting a negative view about any member of their community.

As stated in this decision, whilst Mr Swan was not directly named in any of the Facebook posts, it was clear, following the trail of responses, that the "man" referred to was Mr Swan and this was well known in the community.

In relation to the complaint made by Mr Swan about the alleged comments made by Cr Newell prior to the commencement of the Council meeting held on 6 February 2019, the Panel dismisses this aspect of the complaint.

Mr Swan was not present when the alleged comments were made; however, the Act allows for anyone to make a complaint and Mr Swan called Dr Elizabeth Smith, who attended the Council, meeting to provide evidence by way of a statutory declaration. Unfortunately, despite confirming that she would attend the hearing, Dr Smith did not appear. On the other hand, Cr Newell had called Cr Wilson who confirmed Cr Newell's account of what comments were made. The Panel determined that based on the evidence presented, it did not find the complaint to be proven.

5. Sanction

Cr Newell's breach was one involving a lack of judgment and using disrespectful terminology in relation to Mr Swan. The Panel notes that, whilst Cr Newell acknowledges that, on reflection, he may have chosen different words, he remained committed to several responses prompted by

Frances Bender's post and subsequent comments from others. The Panel was not satisfied that Cr Newell fully understood the requirements of Section 28 of the Act relating to functions of councillors and the Huon Valley Council Code of Conduct which require him to act impartially and in the best interests of the community as a whole.

The Panel wrote to Cr Newell on 27 August 2019 advising him that part of Mr Swan's complaint had been upheld and asking him if he desired to comment on an appropriate sanction to be imposed by the Panel in light of its finding that part of Mr Swan's complaint had been upheld. The letter to Cr Newell contained a list of sanctions available to the Panel under Section 28ZI (2) of the Act.

On 28 August 2019, Cr Newell responded indicating that as a "first time and inexperienced councillor", he considered a caution was appropriate.

The Panel concludes that Cr Newell should be cautioned in relation to this complaint. This and other recent complaints are a timely reminder for councillors to be fully aware of their obligations under the Code of Conduct, especially in relation to engagement in social media.

6. Determination of complaint

Section 28ZD (1) (a) of the Act requires the Panel to investigate and determine the complaint within 90 days of the initial assessment. In this instance that 90-day period has been exceeded for the following reasons:

- Additional correspondence between parties to the complaint
- Additional time to follow up with witnesses and seek statutory declarations
- Short periods of unavailability of Panel members
- The need to re-schedule the hearing

7. 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



Rob Winter
Legal Member



Penny Cocker
Member