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Local Government Act 1993

CODE OF CONDUCT PANEL DETERMINATION REPORT
BURNIE CITY COUNCIL COUNCILLOR'S CODE OF CONDUCT

Complaint made by Deputy Mayor Councillor Giovanna Simpson and Councillor Amina Keygan against Councillor Trent Aitken

Code of Conduct Panel

- Lynn Mason AM (Chairperson)
- Craig Perkins (Local Government Member)
- Sam Thompson (Legal Member)

Date of Determination: 9 August 2023

Content Manager Reference: C28110

The complaint

The complainants, Councillors Giovanna Simpson and Amina Keygan made a joint complaint about various statements made by the respondent, Councillor Trent Aitken to the General Manager of Burnie City Council on 17 April 2023. These include a report in the Advocate Newspaper on 30 November 2022, citing statements made by Councillor Aitken; various emails between councillors; and various Facebook posts and Instagram Posts made by Councillor Aitken and others between 8 January 2023 and 5 March 2023. While the comments reported in the Advocate on 30 November 2022 fall outside the six months limitation period for a Code of Conduct complaint, in accordance with section 28V(f) of the *Local Government Act 1993* (the Act), the statements were later repeated by Councillor Aitken on 7 March 2023 and are therefore included in the determination of this complaint. The complaint related to the following conduct:

1. At the Council meeting on 29 November 2022 Councillor Aitken called into question the identifying of people as Aboriginal. His remarks were reported in The Advocate newspaper on 30 November 2022. After a request from the Council's General Manager to remove 'racist and derogatory commentary' on Councillor Aitken's social media, and a second request from Councillor Simpson that the social media commentary be removed, Councillor Aitken wrote on 7 March 2023 that he was 'happy to take a DNA test today....This whole pretend aboriginal (sic) rubbish won't wash with Me(sic)'.
2. On 8 January 2023 Councillor Aitken posted a photo of a seagull on one leg with its head tucked 'upside down'. This was captioned 'just standing around like a retard'.
3. On 17 January 2023 Councillor Aitken posted on Facebook the comment 'OMG...we now have kids that go to school and identify as cats, whats (sic) next.', and further, 'this is going too far'.
4. On 4 February 2023, The Advocate newspaper posted an article titled 'Clash over transgender change rooms access at pools'. Cr Aitken commented on the newspaper's Facebook site, 'trans people have a mental illness called Gender Dysphoria, we should be supporting them to get mental health help, not to have surgeries to remove parts of their bodies. Unfortunately this is what is now happening.'
5. On 27 February 2023, Councillor Aitken posted on Facebook and Instagram a picture of the back of a minibus bus with the caption, 'Honestly we should ban Migrant worker Busses (sic) from the CBD, I'm sick of seeing them fly down past Kmart, cut thru Traffic and Run (sic) red lights, the drivers have absolutely no idea. Someone is going to get killed by these Busses (sic) one day..'
6. On 1 March 2023, Cr Aitken posted on social media that 'I'm not quitting, not a hope in Hell...I am getting absolutely bashed up at the council like you would not believe, did you see the garbage in todays (sic) Paper about me..'. He then posted another comment on the same day, 'next Tuesday I might have to take boxing gloves and a helmet', referring to the next council meeting.

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7. On 5 March 2023, Councillor Aitken posted on social media a picture of a half-eaten fish body, with the caption 'I feel like this fish...the sharks have been ripping away at me all week, but I'm not dead, now I'm just pissed off and gunna kick a lot of sharks (sic) arses...'

The complaint alleged that Councillor Aitken breached the following sections of the Code of Conduct (the Code):

Part 3 – Use of Office

1. *The actions of a councillor must not bring the Council or the office of councillor into disrepute.*

Part 7 – Relationships with community, Councillors, and Council employees

- 7.1. A Councillor –

(a) *must treat all persons fairly; and*

(b) *must not cause any reasonable person offence or embarrassment; and*

Part 8 – Representation

5. *A Councillor's personal views must not be expressed publicly in such a way as to undermine the decisions of the Council or bring the Council into disrepute.*
6. *A Councillor must show respect when expressing personal views publicly.*
7. *The personal conduct of a Councillor must not reflect, or have the potential to reflect, adversely on the reputation of the Council.*

Initial assessment of the complaint

Following receipt of the complaint, the Chairperson of the Code of Conduct Panel (the Panel) conducted an initial assessment of the complaint in accordance with the requirements of section 28ZA(1) of the Act. Having assessed the complaint against the provisions of sections 28ZB and 28ZC of the Act, the Chairperson determined that:

- the complaint substantially related to a contravention of the Council's Code of Conduct. If the allegations therein were substantiated, they would constitute a breach of the Code;
- the complaint was not frivolous, vexatious or trivial. The complaint appeared to relate to matters of substance under the Council's Code of Conduct and did not appear to be trifling, insignificant or a misuse of the Panel's resources;
- the reasons for not attempting to resolve the complaint directly with the respondent were adequately explained; and
- the complaint was not made in contravention of
 - a determination made by the Chairperson under subsection (2); or
 - a determination of the Code of Conduct made under section 28ZI(3).

On this basis, the Chairperson determined to investigate the complaint.

The complainants, respondent councillor and the General Manager of Burnie City Council were notified of the outcome of the initial assessment by letter dated 12 May 2023.

Material considered by the Panel:

- The Burnie City Council Councillor's Code of Conduct, 19 February 2019;
- The Burnie City Council Councillor's Code of Conduct, 28 February 2023;¹
- The complaint from Deputy Mayor Councillor Giovanna Simpson, and Councillor Amina Keygan, accompanied by two Statutory Declarations, dated 17 April 2023;

¹ Two versions of the Code of Conduct policy were taken into account, as the allegations referred to incidents within both time frames. The relevant clauses in the two versions were identical.

- Statutory Declaration from Councillor Trent Aitken, dated 25 May 2023, with response to the complaint, 2pp;
- Statutory Declaration from Councillor Keygan, 2 June 2023, 2pp;
- Email from Councillor Aitken to the Panel, sent at 7.52 am, 15 June 2023;
- Statutory Declaration from Councillor Keygan, 16 June 2023, 40pp.

Procedure

In accordance with section 28ZE of the Act, the Panel investigated the complaint as it related to the clauses of the Code cited above.

The Panel received Councillor Aitken's response to the complaint on 25 May 2023. The Panel met on 1 June to consider the complaint and response, and Councillor Aitken's response was sent to Councillors Keygan and Simpson for their information and responses, if they wished to provide one. A response from Councillor Keygan was received on 2 June 2023.

The Panel conducted a Directions Hearing on 9 June 2023. This was conducted by video and Councillor Aitken, Councillor Keygan, and Councillor Simpson all attended. The parties were advised that they could submit further material if they wished to do so, prior to the Panel's consideration of whether a hearing would be necessary in accordance with section 28ZG of the Act. Councillor Keygan stated that she wished to provide further information; this was received by the Panel on 16 June 2023.

On 15 June 2023 Councillor Aitken advised the Panel by email that he had nothing further to add to the information already before the Panel, and suggested what sanction should be imposed if any part of the complaint were to be upheld. This email and the response from the Panel were sent to Councillors Keygan and Simpson.

The Panel met on 20 June 2023 and again on 25 July 2023, to consider whether a hearing was necessary, or whether the matter could be decided on the material already available, without disadvantage to any party. As Councillor Aitken, Councillor Keygan, and Councillor Simpson all stated that they were content for the investigation to proceed to a determination on the basis of the material before the Panel, without the conduct of a hearing, the Panel decided that it would not conduct a hearing into the matter.

Determination

Pursuant to section 28ZI(1)(c), the Panel upholds part of the complaint and dismisses the remainder. In particular, the Panel finds that Councillor Aitken breached parts 3(1), 7(1)(b), and 8(5), (6) and (7) of the Code. The part of the complaint alleging a breach of part 7(1)(a) is not established and is dismissed.

Reasons for determination

Introduction

Councillor Aitken confirmed in his response to the complaint and in the Directions Hearing that all of the matters raised in the complaint had occurred as described. The Panel concluded that as a result of this acknowledgement, its task was simply to determine whether Councillor Aitken's conduct breached the Code as alleged.

Councillor Aitken contended that he had a right to free speech and that his conduct was unrelated to his work as a councillor. The Panel does not consider that to be a complete answer to the complaint. The Code regulates councillors' conduct. Its effect is that the actions of elected representatives must uphold standards of behaviour generally acceptable to the community; the community expects that these standards of behaviour will be upheld in public activities, whether those activities are council directed or not. A councillor does not have the right to choose when, and when they are not, a councillor. Having said that, the more removed from the Council context, the more egregious the conduct must be in order to breach the Code.

Part 8(7) relates directly to personal conduct and behaviour. While Parts 3(1), 7(1) and 8(5), and (6) do not, their ambit may extend to personal conduct outside of a councillor's functions depending on the circumstances. To this end, personal conduct, although disconnected from council, may be so egregious, disreputable or notorious that the Council itself, or the councillor's office, is brought into disrepute: part

3(1). With respect to part 7(1), conduct that is particularly unfair, offensive or embarrassing may enliven this part of the Code notwithstanding that the conduct occurred outside of the Council context.

Similarly, Parts 8(5) and 8(6) regulate a councillor's public expression of personal views. To this end, as above, the councillor's expression of personal views, although disconnected from council, may be so disrespectful that the Council itself, or the councillor's office, is brought into disrepute, and thus constitute a breach of the Code.

The extent to which the actions occurred or came to attention in the public domain is relevant. Having said that, the Panel remains conscious that the Code regulates a councillor's conduct, not the conduct of the media or other persons who may, for example, comment on a councillor's Facebook post. Councillor Aitken is not responsible for their conduct.

Finally, the Panel notes that the Code does not regulate, and a contravener is not to be punished for, personal or political views. However, the Code does regulate *how those views are expressed*.

Specific clauses of the Code – complaint upheld

Part 3 – Use of Office

1. The actions of a Councillor must not bring the Council or the office of Councillor into disrepute.

A number of Councillor Aitken's public statements were expressed in such a way so as to be offensive and, more particularly, so offensive that they brought the office of Councillor into disrepute. While each statement, read alone, may not breach this part of the Code, their cumulative effect was disreputable and brought Councillor Aitken's office into disrepute. The statements' tone was, on occasion, sneering, offensive and disrespectful. In making this finding, the Panel relied on the cumulative effect of the following conduct:

- i. As a result of his voting against the motion to change Council's acknowledgement of country, Councillor Aitken's statement that 'what we see as an Aboriginal person is not necessarily a genuine claim to being Aboriginal' was published in the Advocate newspaper on 30 November 2022. The statement was repeated in an email from Councillor Aitken sent on 7 March 2023. The Panel determines that this statement denying a number of members of the community the right to be part of the culture and acknowledged heritage of Aboriginal Tasmanians brings the office of Councillor into disrepute.
- ii. Councillor Aitken's use of the offensive word 'retard' in conjunction with a photograph of a seagull standing with its head under its wing is not acceptable to the general public, and as such is a breach of Clause 3(1).
- iii. Councillor Aitken's proposal published on the Advocate newspaper's website on or about 4 February 2023, that transgender people should be treated for mental illness, and denied the right to surgery should it be desired, is similarly contrary to modern thinking on the subject and is not acceptable to the general public. The expression of such an opinion in the way in which Councillor Aitken expressed it brings the office of Councillor into disrepute.
- iv. Councillor Aitken's expression of his views on what he termed 'migrant worker buses' disparaged the community members using those buses and vilified (without evidence) those people from other countries working in the community.
- v. Councillor Aitken's depiction of himself as similar to a fish ravaged by sharks (his fellow Councillors), and his stated intention of using violence against the 'sharks' (Councillors) brings both the Council and the office of Councillor into disrepute. The community has reasonable expectations that the inevitable internal divisions within a council will be handled professionally and with maturity. This was not the case with this posting on social media.

Part 7 - Relationships with community, Councillors, and Council employees

7(1) A Councillor –

(b) must not cause any reasonable person offence or embarrassment; and...

The Panel determines that Councillor Aitken's post on the Advocate newspaper Facebook page on or about 4 February 2023 regarding transgender people was offensive to a number of reasonable members of the community. Similarly, Councillor Aitken's statements regarding 'migrant worker buses' was also offensive, not just to the users of the bus services, but to many other community members. The Panel therefore determines that Councillor Aitken breached Clause 7(1)(b) of the Code.

Part 8 – Representation

- (5) *A Councillor's personal views must not be expressed publicly in such a way as to undermine the decisions of the Council or bring the Council into disrepute.*
- (6) *A Councillor must show respect when expressing personal views publicly.*
- (7) *The personal conduct of a Councillor must not reflect, or have the potential to reflect, adversely on the reputation of the Council.*

The Panel notes that Councillor Aitken has made extensive use of social media to publicise his views on a range of subjects, and that this constitutes personal behaviour. Councillor Aitken was not acting as a representative of Burnie City Council, but rather, as a person who is known to be an elected member of that body, and therefore has the social and political responsibilities attached to that office.

It is beholden on any Councillor to ensure that his or her expressions of personal views are done in such a way that they do not undermine the decisions of the council, that they are expressed respectfully, and that they do not reflect adversely on the reputation of the Council.

The Panel determines that in the tone and method Cr Aitken used to express his opposition to the proposed changes to the Council's acknowledgement of country undermined the decision of the Council and brought Council into disrepute. His views on transgender persons, on the users of some of the public buses in Burnie, and on his fellow Councillors and his alleged treatment within Council, were not expressed with due respect to those people to whom he referred; and by the way they were expressed, actually or potentially reflected adversely on the reputation of Burnie City Council. By section 28(1)(a) of the Act, a councillor represents the community, not just a sectional political interest or group.

The Panel notes that the General Manager of the Council emailed Councillor Aitken on 7 March 2023 to ask him to remove his 'racist and derogatory commentary'. On 9 March 2023 the Advocate newspaper printed commentary by the Tasmanian Anti-Discrimination Commissioner, who was quoted as saying that 'People don't want councillors who are using discriminatory and inappropriate words in 2023.' These statements made in the public space, and within Council by the General Manager and other Councillors, support the Panel's view that Councillor Aitken's way of expressing his personal views on a number of topics was unacceptable to the Council and to many people in the wider community.

These instances were the expression of his personal views and his personal behaviour, and as a result, the Panel determines to uphold the complaint that Councillor Aitken has breached Clauses 8(5), 8(6), and 8(7) of the Code.

The Panel considered that Councillor Aitken's social media post about people identifying as cats is sufficiently distanced from his role as a Councillor as not to constitute a breach of the Code. Similarly, the Panel determined that while his post showing an emoji of boxing gloves could be seen as an extreme response to the criticism he was receiving, it could not be taken as a serious threat to his fellow Councillors. Hence these two posts have not been cited as examples of breaches of the Code upheld by the Panel.

Specific clause of the Code – complaint dismissed

- 7(1) *A Councillor –*
 - (a) *must treat all persons fairly; and...*

The Panel determines that while Cr Aitken's statements and posts were offensive or embarrassing on a number of occasions, they do not constitute being unfair to any specific person. The Panel therefore dismisses the complaint that Councillor Aitken breached Clause 7(1)(a) of the Code.

Sanction

Section 28ZI(2) of the Act allows the Panel to impose one or more sanctions if any part of the complaint is upheld.

The complainants stated that their desired outcome of the investigation would be an immediate cessation of the behaviours which led to the complaint, and a formal warning or suspension from performing the duties of councillor. The complainants stated that formal training had previously been offered to Councillor Aitken, but this offer had been refused. Councillor Aitken denied that he was aware of any formal training having been offered.

In his response to the complaint dated 31 May 2023, Councillor Aitken said that he had shut down his social media 'at my choosing', and that he had 'no intentions (sic) of becoming active again on social media.' He said that he 'just had to get through the next 3 and a half years on the council without getting kicked off.'

The Panel takes those submissions into account, and notes that this is Councillor Aitken's first Code of Conduct complaint, and it is his first term on council. The Panel commends Councillor Aitken for his decision to cease his use of social media. Nevertheless, a councillor's function includes facilitating communication by the council with the community: section 28(1)(c) of the Act. Social media can be a helpful tool to perform this function. However, that should be done in a respectful way that complies with the Code. Councillor Aitken's use of social media was unwise.

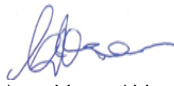
Notwithstanding his inexperience as a councillor and the steps taken by Councillor Aitken since the complaint was lodged, the Panel takes into account Councillor Aitken's repeated conduct, made over a number of days and in respect of various topics, and determines that a caution would be insufficient. A reprimand is the appropriate sanction as it recognises and denounces the serious nature of the breaches. Pursuant to section 28ZI(2)(b) of the Act, Councillor Aitken is reprimanded.

Timing of the Determination

The time taken to reach a determination in this matter has taken slightly more than 90 days. This was owing to the unavailability of the Panel for a short period and the provision of further evidence by the parties.

Right to review

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



Lynn Mason AM
Chairperson
Date: 9 August 2023



Sam Thomson
Legal Member



Craig Perkins
Member