

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.

Local Government Act 1993

CODE OF CONDUCT PANEL DETERMINATION REPORT

LAUNCESTON CITY COUNCIL CODE OF CONDUCT

Complaint brought by Mr Dean Murray Cocker on behalf of JAC Group against Councillor Joe Pintarich (also known as Pentridge)

Code of Conduct Panel

- Rob Winter (Chairperson),
- Andrew Paul (Local Government Member)
- Don Jones (Legal Member)

Date of Determination: 2 August 2023

Content Manager Reference: C27074

Summary of the complaint

A code of conduct complaint was submitted by Mr Dean Cocker, the Managing Director of the JAC Group to the General Manager of the Launceston City Council (LCC) on 16 January 2023.

In the initial complaint it was alleged that Councillor Joe Pintarich had breached the following parts of the LCC's Code of Conduct effective from 7 March 2019, in relation to Councillor Pintarich's participation in and voting on a specific Planning matter listed on the agenda of a LCC council meeting held on 15 December 2022.

Part 1.2 of the Code of Conduct –

Decision-making – a Councillor must make decisions free from personal bias or pre-judgement.

Initial assessment

Following receipt of the initial complaint, the Chairperson conducted an initial assessment of the complaint in accordance with the requirements of section 28ZA (1) (d) and section 28ZC (1) of the *Local Government Act 1993* (the Act) to assess whether the complaint disclosed whether an offence may have been committed or that the complaint may be dealt with more appropriately by another person or authority.

Having undertaken that initial assessment, the Chairperson determined that the complaint may be best dealt with by the Director of the Office of Local Government and referred the complaint to him on 16 February 2023.

On 10 March 2023, the Director of Local Government refused to accept the Chairperson's referral, as a consequence of which, by virtue of section 28ZC (5) of the Act, the Chairperson undertook further assessment which was required to be conducted in accordance with section 28ZA of the Act.

Having undertaken that further assessment, the Chairperson determined that, due to Councillor Pintarich's participation in a specific item listed on the Agenda the initial complaint of an alleged breach of Part 1.2 of the Code – decision making – *a Councillor must make decisions free from personal bias or pre-judgement*, should be further investigated as it substantially related to a contravention of the LCC's code of conduct,

as if the allegations in relation to Part 1.2 of the Code are proven, they are capable of constituting a breach in relation to the LCC's Code of Conduct.

The complaint material provided by the complainant also indicated evidence to the Chairperson of the following further potential breaches of the Code arising out of the same issues before the LCC in its 15 December 2022 meeting:

Part 2 - Conflicts of interest that are not pecuniary:

5. A Councillor must avoid, remove himself or herself from positions of conflict of interest so far as reasonably practicable and

6. A Councillor, who has an actual potential perceived conflict of interest in a matter before the council must –

(a) Declare the conflict of interest and the nature of the interest before discussion of the matter begins.

(b) Act in good faith and exercise reasonable judgement to determine whether a reasonable person would consider the conflict of interest requires a councillor to remove him or herself physically from the council discussion and remain out of the room until the matter is decided by the council.

The Chairperson determined that these allegations should also be further investigated as they too substantially related to a contravention of the LCCs code of conduct, as if the allegations in relation to Part 2- 5 and 6 (a)(b) of the Code are proven, they are also capable of constituting a breach in relation to the LCC's Code of Conduct.

A copy of the complaint was provided to the other members of the Panel appointed to investigate the complaints. The complainant, respondent Councillor and the General Manager were notified of the outcome of the further initial assessment by letter dated 30 March 2023.

Investigation

In accordance with section 28ZE of the Act, the Code of Conduct Panel (the Panel) investigated the complaint.

The Panel determined that further information was required to investigate the complaint. The Panel wrote to the respondent on 30 March, providing him with a copy of the complaint requesting a response thereto within 14 days.

After the Panel's granting of a short extension for the provision of a response to the complaint, on 15 May 2023 the Panel received a detailed written response from the respondents' solicitor, Mr Chris Groves of Messrs Dobson, Mitchell and Allport.

In this correspondence Mr Groves, on behalf of Councillor Pintarich, indicated that Councillor Pintarich was also content for the Panel to determine the complaint without the need for a hearing.

Noting the requirements of section 28ZE (3) of the Act, on 17 May the respondent was requested to provide his response to the Panel by Statutory Declaration, which he did on 19 May 2023.

Although Mr Groves' letter and its attachments were not referred to in that Statutory Declaration as an attachment to avoid further delay, the Panel determined to accept the Statutory Declaration and Mr Groves' letter and its attachments as part of the material for its consideration,

On 24 May the respondents Statutory Declaration and Mr Groves' letter and attachments were forwarded to the complainant, seeking a response by Wednesday 7 June 2023.

As with the correspondence sent by the Panel to the respondent, in this correspondence the complainant was also advised that pursuant to section 28ZG2 (a) and (b) of the Act the Panel had determined that the complaint could be investigated without a hearing, as it was considered that neither the complainant nor the councillor against whom the complaint was made, would be disadvantaged if a hearing was not

held and it is appropriate in the circumstances not to hold a hearing or a hearing is unnecessary in the circumstances because the investigation can be adequately conducted by means of written submissions or examination of documentary evidence or both.

On Tuesday 6 June, a copy of the complainant's response to Councillor Pintarich's statutory declaration and other documentation was received from Mr Anthony Spence SC of Messrs Page, Seager Lawyers. As this too was not provided under cover of a statutory declaration, a statutory declaration was requested. Mr Cocker's statutory declaration adopting and confirming the accuracy of the contents of the letter from Page Seager being received by the Panel on 13 June 2023

On 26 June, subsequent to a Panel Zoom meeting on 23 June, a copy of a letter and article from the Examiner Newspaper of 15 December 2022, which were received from Mr Cocker on 30 March 2023, was also provided to Mr Groves for Councillor Pintarich's comment.

On the 7 of July 2023 a response was received from Mr Groves on behalf of Councillor Pintarich. Although not provided under cover of a statutory declaration, the Panel decided to consider this letter in its determination.

Material considered by the Panel

The following documents have been presented to the Panel to consider as evidence in this matter:

1. All material received with the Complainant's complaint.
2. Statutory Declaration from Councillor Pintarich dated 9 May 2023 and letter from Dobson, Mitchell & Allport dated 5 May 2023 and attachments A and B
3. Statutory Declaration from Mr Cocker dated 30 June 2023 attaching a copy of a letter from Page Seager Lawyers dated 6 June 2023 (with amendments)
4. Letter from the complainant dated 30 March 2023 attaching a copy of an Examiner article of 15 December 2022.
5. Letter from Dobson Mitchell & Allport to Local Government Code of Conduct Panel dated 7 July 2023

As indicated previously in this determination/decision, both Councillor Pintarich and Mr Cocker through their respective lawyers, indicated that they were content for the Panel to determine the complaint without the need for a hearing.

Determination

Pursuant to section 28ZI of the Act, the Code of Conduct Panel determines that Councillor Pintarich has breached the Code of Conduct, and therefore the Panel upholds the complaint.

Reasons for determination

The factual basis for Mr Cocker's complaint is not in dispute, and the panel finds them to be as follows.

1. Prior to Councillor Pintarich being elected to the LCC in October 2022 he was the sole director/ shareholder of Connector Park Pty Ltd, which for some considerable time, as early as 2006, had been involved in ongoing alleged breach of contract litigation in the Supreme Court of Tasmania, with RV Pty Ltd, being a wholly owned subsidiary of the JAC Group.
2. Councillor Pintarich remained in his role with Connector Park Pty Ltd subsequent to his election to the LCC, and the litigation remained on foot. (the most recent development in this litigation being a decision of His Honour, Chief Justice Blow on 6 December 2022- RV Pty Ltd v Connector Park Pty Ltd (No 4) [2022]TASSC 66.)

3. On 8 November 2022 Mr Cocker, the Managing Director of the JAC Group raised concerns with The LCC regarding Councillor Pintarich attending workshops and voting on applications made by the JAC Group and its wholly owned subsidiaries due to “apprehended bias”.
4. On 8 December 2022, the LCC CEO, advised the complainant by letter that he had personally met with Councillor Pintarich and advised him of his duties and obligations to manage conflicts of interest. This letter noted that it was ultimately a matter for Councillor Pintarich to determine whether to remove himself from the discussion and decision in respect of applications by the JAC Group and its subsidiaries.
5. In the LCC meeting on 15 December, during which a development application lodged by the JAC Group’s wholly owned subsidiary Paterson Bridge Pty Ltd was being considered, Councillor Pintarich did not declare any actual, potential, or perceived conflict of interest, remained in the meeting, and voted in favour of the development application.
6. Mr Cocker’s complaint was lodged on 16 January 2023

Having considered the Complaint, the material accompanying it, the other materials referred to in this determination, and especially the content of the respective submissions of Mr Groves for Councillor Pintarich, and Mr Spence SC for the complainant, the Panel has determined that that the complaint is substantiated for the following reasons.

Whilst Mr Groves submissions on behalf of Councillor Pintarich correctly states the law in part, it fails to consider the further comments of the Judges in the decision of *Isbester v, Knox City Council* [2015] HCA20 at para when they stated:

“23 How the principle respecting apprehension of bias is applied may be said generally to depend upon the nature of the decision and its statutory context, what is involved in making the decision and the identity of the decision-maker. The principle is an aspect of wider principles of natural justice, which have been regarded as having a flexible quality, differing according to the circumstances in which a power is exercised²². The hypothetical fair-minded observer assessing possible bias is to be taken to be aware of the nature of the decision and the context in which it was made²³ as well as to have knowledge of the circumstances leading to the decision²⁴.

24 The two cases referred to in the Courts below, *Jia Legeng* and *McGovern*, furnish examples of how the above-mentioned factors assume relevance to the question of what a fair-minded observer may reasonably expect as to the level, or standard, of impartiality which should be brought to decision-making by certain non-judicial decision-makers. Whether those factors assume particular relevance to a case such as the present, where the essential question concerns **incompatibility** of roles, or a conflict of interest, is another question.”

And again, later in their Honour’s judgement they stated:

“49 The majority reasons in *Ebner* should not be understood to exclude cases of the kind here in question from the application of the principle by the test there stated. The test directs attention, as a first step in cases where apprehended bias is alleged, to the critical question of the decision-maker’s interest. The difference in the application of the test is that in cases like the present one that concern **incompatibility** of roles, once the interest is identified as one which

points to a conflict of interest, the connection between that interest and the possibility of deviation from proper decision-making is obvious.

Conclusion and order

50 A fair-minded observer might reasonably apprehend that Ms Hughes **might** not have brought an impartial mind to the decision under s 84P(e). This conclusion implies nothing about how Ms Hughes in fact approached the matter. It does not imply that she acted otherwise than diligently, and in accordance with her duties, as the primary judge found⁴², or that she was not in fact impartial. Natural justice required, however, that she not participate in the decision and because that occurred, the decision must be quashed.”

While Mr Justice Gageler did not join in the joint judgement, he did say:

“ Ms Hughes might have developed, as Ms Isbester's prosecutor, a frame of mind incompatible with the dispassionate evaluation of whether administrative action should be taken against Ms Isbester's interests in light of Ms Isbester's conviction. Ms Hughes' frame of mind might have affected the views she expressed as a member of the Panel, and the expression of those views might have influenced not only the recommendation made by the Panel, which included Mr Kourambas, but also the acceptance of that recommendation by Mr Kourambas in his capacity as delegate of the Council. Those are all possibilities which fairly arise from the established facts. There is nothing fanciful or extravagant about them. A hypothetical fair-minded observer with knowledge of all of the circumstances would be quite reasonable to apprehend them.”

From the decision it can be discerned that **where incompatibility** of roles is concerned greater consideration must be given to procedural fairness and natural justice.

The basis of this complaint does not relate to any specific action or commentary by Councillor Pintarich before the meeting of 15 December 2022. The basis of the complaint is clearly the apprehension of bias in Councillor Pintarich given the long history of, and ongoing litigation between, the two companies.

To use the words of Mr Spence SC in his letter of 6 June 2023, that is the “gravamen “of the complaint.

As stated by Mr Spence SC, in his letter of 6 June 2023, the test with respect to apprehension of bias arising from a conflict of interest is far stricter than with respect to prejudgement.

The proper test to be applied in assessing whether Councillor Pintarich was effected by apprehended bias in the two stage test enunciated in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63: (2000) 205 CLR 337. namely:

1. The identification of what is said might lead a decision-maker to decide a case other than on its legal and factual merits; and
2. The articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.

As alluded to by Archer J in *Dain Pty Ltd v Shire of Peppermint Grove* [2019] WASC 264, when adopting and applying the 2 stage test in *Ebner v Official Trustee in Bankruptcy*(supra), there is no need to demonstrate in the stage 1 test that the factor identified “ will” affect the decision, but rather it” might”, and for the stage 2 test the measure is the “ capability” of the identified factor to affect the decision rather than “ actual affection”.

The panel finds that the stage 1 factor in this complaint is the relationship between Councillor Pintarich and the JAC Group, of which the Complainant is General Manager, and both the history and ongoing litigation between Councillor Pintarich’s company, and the JAC Group.

The Panel finds that the stage 2 factor is the fact that Councillor Pintarich may reasonably be perceived as being unable to bring an impartial mind to the decision because of his personal relationship with the complainant.

There is clear evidence of the history, and ongoing nature of the litigation, and there is also clear evidence of the perception of the litigation in the broader community.

Although Mr Groves in his letter to the Panel of 7 July 2023 refers to this article as “ irrelevant to the issues requiring attention”, the Panel finds that the article published in the Examiner Newspaper on 15th December 2022 on the same day as the LCC Meeting in which Councillor Pintarich voted, is clear evidence capable of supporting the perception in the broader community that Councillor Pintarich has, or may have a non- pecuniary conflict of interest in the matter.

This article is evidence of the public and high-profile nature of the litigation and alludes to the fact that the companies involved in the litigation are effectively the alter egos of their; ‘respective corporate minds, referring to the “battle” between Mr Chromy and Councillor Pintarich. This is case where there is, as referred to by their Honours in *Ibester V Knox City Council*(supra) an incompatibility of roles.

As Mr Spence SC as stated in para 8.6 of his letter of 7 June 2023” A fair- minded and informed member of the public reading this article would conclude that there is plainly a long history of dispute between Councillor Pintarich and the JAC Group. It is clear that Councillor Pintarich must have a great deal of personal knowledge of the JAC Group, and it could hardly be expected that his opinions of the JAC Group and its operations would be neutral or impartial.”

The Panel also adopts Mr Spence SC’s comments in para 8.10 of his letter of 6 June 2023, where he states.

“Finally and putting aside for the moment the correctness or otherwise of the decision to vote on the application, the decision of Councillor Pintarich not to declare any “actual, potential or perceived conflict” in respect of the application, is plainly a breach of Part 2 of the Code of Conduct. Councillor Pintarich had actual knowledge that (at least) a “perceived “conflict of interest existed, as he had been informed of the letter from the Managing Director of JAC Group to the CEO of the Launceston City Council dated 8 November 2022”.

The Panel in considering the comments of their Honours at para 48 of the *Ibester v Knox City Council*(supra) decision noted they implied that even if the employee diligently carried out her duty and the decision had not been made by her would not impact on a decision as to whether there was apprehended bias.

In referring to the decisions of *Dickason v Edwards* (1910)10 CLR 243 and *Stollery v Greyhound Racing Control Board* their Honours said the participation of others in the decision-making does not overcome the apprehension that a person’s interest in an outcome might affect not only that person’s decision-making, but that of others. The mere presence of that person on a Panel could be a material part of the decision.

As stated by their Honours at Para 49 of *Ibester v Knox City Council* (supra), the difference in the application of the Elmer Test, is that in a matter that concerns incompatibility of roles, and once the interest is identified as one which points to a conflict of interest, the connection between the interest and the possibility of deviation from proper decision-making is obvious.

As referred to earlier in these findings, the Panel accepts the long-standing conflict between the complainant and the respondent is well-known throughout the business community, through newspaper articles and general discussion. It could not be discounted that the fair-minded observer would have some knowledge of the ongoing dispute between the parties. The interest of the Respondent could be to exact punishment for the delays or the proceedings, it might be to create obstacles in the path of the Complainant. and a development, to obtain an advantage over the Complainant, to name a few.

In all the circumstances, the Panel has determined that Councillor Pintarch should have declared the conflict of interest prior to any discussion of the matter and the nature of the interest. He was aware and should have been aware of a potential or perceived conflict, particularly, after having the issue raised with him by the General Manager. Once Councillor Pintarich had declared a conflict it was a matter for Councillor Pintarich to act in good faith and exercise reasonable judgement to determine whether a reasonable person would consider that the conflict of interest required him to remove himself physically from any Council discussion and remain out of the room until the matter was decided by the Council in accordance with Paragraph 6 of Part. 2 of the Code of Conduct adopted by the City of Launceston on the 7 March 2019. The Panel was of the view that a reasonable person, would acting in good faith and exercising reasonable judgement would have removed himself or herself from the room. Councillor Pintarich's failure to do so was a breach of the Code of Conduct.

Sanctions

Where a code of conduct complaint or part of it is upheld, the Panel may impose one or more of the sanctions referred to in section 28ZI (2) of the Act. These include cautioning or reprimanding the councillor, requiring the councillor to apologise to the complainant or other person affected by their behaviour, requiring the councillor to attend a counselling or training course; or suspending the councillor from office for a period of up to three months.

Both in his complaint, and in Mr Spence's letter of 6 June 2023, the complainant has sought either a caution s28ZI (2) (a), and/or a reprimand s 28ZI(2)(b)

In his letter of 5 May 2023, Mr Groves states that if the complaint is upheld, the Panel should either impose no sanction or if not content to do so, impose a caution.

Section 28ZI (1) of the Act provides that (emphasis added) "after completing its investigation of a code of conduct complaint, the Panel is to determine the complaint" by upholding the complaint or dismissing it or upholding part and dismissing the remainder. Section 28ZI (2) of the Act then says "If the code of conduct complaint or part of it is upheld, the Panel may impose one or more" of several listed sanctions.

Section 10A(1)(c) of the Act Interpretation Act 1931 ("AIA") provides that in any Act the word "may" is to be construed as being discretionary or enabling, as the context requires, so long as the relevant provision in the Act was passed after the commencement of the Justice Legislation (Miscellaneous Amendments) Act 2000. Division 3A of the Act, which includes Section 28ZI, was inserted in the Act in 2015 and so Section 10A(1) of the AIA will apply to Section 28ZI of the Act. Section 10A(1)(a) of the AIA provides that the word "must" is to be construed as being mandatory and (b) provides that the words "is to" and "are to" are to be construed as being directory. In light of the above provisions of the AIA, it could be argued that if a complaint is upheld the Panel must impose a sanction and the use of "may" in Section 28ZI of the Act only creates a discretion to impose either one sanction or more than one sanction, but if that was the intention it could have been made clear by Parliament by the use of mandatory or directory language.

A better interpretation is that the use of "may" gives the Panel, pursuant to Sections 28ZI (2) of the Act, the discretion to either impose a sanction or not impose a sanction. This interpretation is given weight by the use of the directory "is to" in Section 28ZI (1) of the Act

while the discretionary “may” is used in s28ZI (2) of the Act. 7 The least sanction that is available to the Panel is to order counselling.

There is little point ordering Councillor Pintarich to undergo counselling. No doubt his involvement in the process of the complaint will have made him more acutely aware of the need to consider perceptions of conflict.

With the issues basing this complaint clearly being brought to Councillor Pintarich’s attention before the meeting on the 15th of December 2022, and him proceeding to participate in and vote on the Development Application made by the JAC Group, and the potential consequences flowing from such a decision, the Panel considers that a caution is an appropriate sanction to impose on Councillor Pintarich.

Timing of the Determination

In accordance with section 28ZD (1) of the Act, a Code of Conduct Panel is to make every endeavour to investigate and determine a code of conduct complaint within 90 days of the chairperson’s determination that the complaint is to be investigated.

The Panel has been unable to determine the complaint within 90 days, owing to granting extension for responses, and the other commitments by Panel members preventing preparation of the final report within 90 days.

Right to review

A person aggrieved by the determination of the 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. In accordance with section 17 of the *Magistrates Court (Administrative Appeals Division) Act 2001*, an appeal must be lodged within 28 days of the date of notification of the determination.



Rob Winter

Chairperson

Date: 2 August 2023



Don Jones

Legal Member



Andrew Paul

Member