

CODE OF CONDUCT PANEL

HOBART CITY COUNCIL CODE OF CONDUCT

Complaint by Mr Tony Hope against Lord Mayor Alderman (Ald) Sue Hickey

Determination made 20 September 2017

Local Government Act 1993

Code of Conduct Panel: Jill Taylor, (Chairperson), Gretel Chen, (Legal Member) and Rob Winter (Member).

1. Summary of the complaint

Mr Tony Hope lodged a Code of Conduct complaint (the Complaint) dated 27 June 2017 against Lord Mayor, Ald Sue Hickey.

The Complaint alleges that Ald Hickey contravened Part 1 Section 1, Part 1 Section 2, Part 1 Section 4, Part 3 Section 1, Part 3 Section 2 and Part 7 section 1 (c) of the City of Hobart Aldermanic Code of Conduct (the Code of Conduct), which was adopted by the Hobart City Council (HCC) at its meeting held on 9 May 2016. Specifically, the Complaint alleges that Ald Hickey made a decision which was not based on merit, was not impartial and that her decision was biased. Mr Hope further alleged that by her actions, Ald Hickey had brought the Council into disrepute. Additionally, Mr Hope alleged that Ald Hickey had bullied and harassed him.

The following are the relevant extracts from the Code of Conduct:

PART 1 - DECISION MAKING

1. An Alderman must bring an open and unprejudiced mind to all matters being decided upon in the course of his or her duties, including when making planning decisions as part of the Council's role as a Planning Authority.
2. An Alderman must make decisions free from personal bias or prejudgement.
3. ...
4. An Alderman must make decisions solely on merit and must not take irrelevant matters or circumstances into account when making decisions.

PART 3 - USE OF OFFICE

1. The actions of an Alderman must not bring the Council or the office of Alderman into disrepute.
2. An Alderman must not take advantage, or seek to take advantage, of his or her office or status to improperly influence others in order to gain an undue, improper, unauthorised or unfair benefit or detriment for himself or herself or any other person or body.
3. ...

PART 7 - RELATIONSHIPS WITH COMMUNITY, ALDERMEN AND COUNCIL EMPLOYEES

1. An Alderman –
 - (a) ...
 - (b) ...
 - (c) must not bully or harass any person.

2. Investigation

The Chairperson of the Code of Conduct Panel (the Chairperson) conducted an initial assessment of the Complaint and determined on 18 July 2017 that it was to be investigated and determined by a Code of Conduct Panel (the Panel) in accordance with section 28ZA(1)(e) of the *Local Government Act 1993* (the Act).

The Panel determined that it would hold a hearing on the matter.

The Panel received the following documents prior to the hearing:

1. The Code of Conduct.
2. The Complaint with attachments-
 - a. Letter dated 2 June 2017 from Mr Hope to Lord Mayor Hickey
 - b. Email dated 7 June 2017 from Lord Mayor Hickey to Mr Hope
 - c. Letter dated 27 June from Mr Hope to Lord Mayor Hickey
3. Response from Lord Mayor Hickey to Mr Hope's complaint dated 31 July 2017 with attachments-
 - a. Transcript Triple M Breakfast dated 8 March 2017
 - b. Copies of newspaper articles containing print date 31/7/2017 – page 2 of 3 and 3 of 3
4. Summary Background – “Showcasing Tasmania and the connection to Fujian China” (submitted by Mr Hope)
5. Statutory Declaration by Mr Tony Hope dated 17 September 2017 with attachments-
 - Letter dated 4 June 2017 from Mr Hope to Lord Mayor Hickey
 - Email dated 7 June 2017 from Lord Mayor Hickey to Mr Hope
 - Letter dated 27 June 2017 from Mr Hope to Lord Mayor Hickey
 - Email dated 31 August 2015 from Lord Mayor Hickey to Mr Hope
 - Email dated 29 August 2015 from Mr Hope to Lord Mayor Hickey
 - Email dated 1 December 2015 from Lord Mayor Hickey to Mr Hope
 - Email dated 1 December 2015 from Mr Hope to Lord Mayor Hickey
 - Email exchange between Mr Hope and Lord Mayor Hickey dated 28 January 2016
 - Email dated 31 May 2017 from Mr Hope to Lord Mayor Hickey
 - Article containing statement from Lord Mayor Hickey (published 2016)
 - Article containing statement from then Premier Doug Lowe (1977-1981)
 - Article containing statement from Premier Will Hodgman (undated)
 - Article containing statement from Senator Eric Abetz (undated)
 - Article containing statement from HUANG Guobin (undated)
 - Article containing statement from Sir Guy Green Former Governor of Tasmania (undated)
 - Article containing statement from Professor James Chis (undated)

Article containing statement from The Fujian People's Association for Friendship with Foreign Countries
Article containing statement from Fuzhou Foreign and Overseas Chinese Affairs Office
2 x Page of logos
Open letter dated 3 April 2017 from Senator Eric Abetz
Letter dated 3 April 2017 from Sir Guy Green to the Australia-China Council
Statement dated 2 December 2015 from Lord Mayor Hickey
Letter dated 28 August 2017 from Kim Evans to Mr Hope
Mr Anthony Hope Summary Background statement

At the hearing Ald Hickey read from a written submission, a copy of which she provided to the Panel and to the Complainant. Attached to the submission was an extract of Council minutes taken on 7 March 2016 recording Council's decision to decline financial contribution towards the publication of the Complainant's book; a letter from Alderman Jeff Briscoe dated 18 September 2017; an email from Alderman Ron Christie dated 19 September 2017; an email from Alderman Philip Cocker dated 19 September 2017; an email from Alderman Bill Harvey dated 19 September 2017 and an email from Alderman Helen Burnet dated 19 September 2017.

Ald Hickey also provided a copy of relevant parts of the minutes of the HCC meeting held on 3 April 2017, showing unanimous support for the HCC's position on Australia Day.

It was Council's position on Australia Day that was the subject of Mr Hope's letter of 4 June 2017 to Ald Hickey.

Summary of Hearing

The hearing was convened on 20 September 2017 at the Executive Building 15 Murray Street, Hobart. Both Mr Hope and Ald Hickey attended and took an oath prior to giving evidence. The Chairperson outlined the substance of the Complaint and the procedure the Panel would follow, including options available to the Panel if the Complaint was upheld.

Mr Hope told the Hearing that he wrote to the Lord Mayor on 4 June 2017, to express his disappointment that the HCC was seeking to change the date of Australia Day. The letter dated 4 June 2017 was attached to the Complaint. Mr Hope said that his letter was not denigrating Council, but rather he was pointing out that the Council was spending time on issues it should not be involved in.

Ald Hickey responded to the Complainant's letter by email dated 7 June 2017.

The Complainant said that the Complaint was borne out of the strongly worded final paragraph of Ald Hickey's email response dated 7 June 2017. That paragraph read:

Accordingly, I shall not be providing you with a letter for publication in your coming book on the Tasmania-Fujian relationship. I am also withdrawing consent for you to republish the letter I provided for Friends Across the Ocean and you may not use any image whatsoever of me in this or future books.

The final paragraph was also typed in bold font.

The Complainant was also unhappy that Ald Hickey had circulated a copy of her email response to 16 people, including the Premier of Tasmania and the co-author of the Complainant's book. The Complainant was also unhappy that a copy of his letter dated 4

June 2017 had not been forwarded to the 16 other parties to whom Ald Hickey had forwarded her response.

Mr Hope told the Panel that Ald Hickey had previously agreed to provide the foreword for a book he was preparing for publication about the Tasmania-Fujian relationship. Ald Hickey did not dispute that she had agreed to provide the foreword. Her email dated 7 June 2017 indicates that she had previously agreed to provide a letter for use in the book and that she had provided a similar form of letter for the Complainant's previous book. The Panel was also provided with an email from Ald Hickey to the Complainant dated 31 May 2017 regarding content for the book in which she stated that Council's Executive Officer was "onto it".

The Complainant believed that Ald Hickey's subsequent withdrawal contained in the email dated 7 June 2017 was based on bias towards him following his letter of 4 June 2017. He said that the withdrawal of Ald Hickey's consent had resulted in wasted time and additional cost as the book was already with the printers.

When asked by the Panel to outline the specifics of his complaint against each of the Parts/Sections of the Code of Conduct Mr Hope provided the following response.

Part 1, Section 1 – Ald Hickey's withdrawal of consent to use her words or images showed she had a prejudiced mind towards him.

Part 1, Section 2 – The last paragraph of the email dated 7 June 2017 showed a personal bias towards him.

Part 1, Section 4 - Ald Hickey made her decision not to contribute to his publication in response to his comments that Council should not waste time on changing Australia Day and, therefore, the decision was not based on merit.

Part 3, Section 1 – The relationship with Fujian is part of a long-standing relationship between Tasmania and China. The decision by Ald Hickey to withdraw her support for the publication has brought the Council into disrepute.

Part 3, Section 2 – Ald Hickey made a unilateral decision to withdraw support without referring it to Council.

Part 7 Section 1 (c) – Ald Hickey's response to his letter of 4 June 2017 was bullying.

In responding to Mr Hope's complaint against her, Ald Hickey said that Mr Hope had not produced evidence to support his complaints. In her written response to the Complaint, Ald Hickey stated that the concept of bias and pre-judgement related to the exercise of a statutory discretion and her decision not to contribute to Mr Hope's publication did not fall into that category. Ald Hickey indicated that it was a decision that she made of her own accord, and not one that needed Council endorsement.

Ald Hickey explained that one of her staff, Mr Tim Short, had prepared the email dated 3 June 2017 that was sent to Mr Hope, but admitted that after a review of the initial draft, she had personally written the final bolded paragraph withdrawing consent to contribute to the book. When asked by the Panel why she had decided to withdraw her permission, Ald Hickey replied that she did this because she felt that Mr Hope's philosophy varied from hers and that it would not be appropriate to continue to provide a contribution to his book.

When questioned by the Panel about whether she thought there may be "fallout" from her withdrawal to participate, Ald Hickey said that it was a commercial venture undertaken by

Mr Hope and his partner Jason Xu and in no way damaged relations between Tasmania and China.

Mr Hope did not agree that the book was a commercial venture and said that it would not be profitable, especially as Ald Hickey's late change of mind had cost the project extra money. As a point of clarification, the Panel confirmed that whilst the book might not return a profit, it was a commercial venture and not one sponsored by any level of Australian Government. Mr Hope confirmed that he had received a grant of \$6000 from the Tasmanian Department of State Growth for the book. Ald Hickey said that she had been advised that the Council had agreed to purchase 48 copies, which Mr Hope refuted saying that only 100 copies will be produced. Ald Hickey said that she had only received that information just prior to the Hearing, and it may be incorrect.

3. Determination

The conduct complained of in this case is:

- Ald Hickey's decision, communicated by email dated 7 June 2017, not to provide a letter for publication in the Complainant's book;
- Ald Hickey's conduct in copying her email dated 7 June 2017 to 16 other people;
- Ald Hickey's failure to attach a copy of the Complainant's letter to her dated 4 June 2017 to the 16 other people to whom she sent her email on 7 June 2017. (Collectively "the Conduct")

Ald Hickey advised the Panel that the email dated 7 June 2017 had been largely prepared for her by a Council officer. She said that she inserted the final paragraph of the email and she signed it. She did not suggest that the email was anything other than an accurate portrayal of her view and position on the matter.

Ald Hickey admitted sending the email to 16 other parties including other Aldermen, the Premier and the Complainant's business partner. She did not dispute that she did not attach a copy of the Complainant's 4 June 2017 email to that email, and the document itself suggests that that was the case.

Accordingly, the Panel finds that Ald Hickey did engage in the Conduct. The question then to be addressed is whether any of the Conduct amounted to a breach of the Code of Conduct.

Section 28 U of the Local Government Act 1993 (the Act) provides:

4. *In performing the functions and exercising the powers of his or her office with a council, a councillor is to comply with the provisions of the council's code of conduct.*

The functions of Mayors are set out in section 27 of the Act. The Complainant did not refer the Panel to any of the functions set out in section 27 of the Act that he says Ald Hickey was performing at the time of the Conduct.

...

The functions of councillors are set out at section 28 of the Act. Again, the Complainant did not refer the Panel to any of the functions or powers set out in section 28 of the Act that he says Ald Hickey was performing at the time of the Conduct.

The Act contains various other powers and functions granted to councils and council committees. The Complainant did not refer the Panel to any other power or function within the Act that he says Ald Hickey was exercising at the time of the Conduct.

Attention then turns to the question of the contraventions of the Code of Conduct alleged.

PART 1 - DECISION MAKING

1. An Alderman must bring an open and unprejudiced mind to all matters being decided upon in the course of his or her duties, including when making planning decisions as part of the Council's role as a Planning Authority.
2. An Alderman must make decisions free from personal bias or prejudgement.
4. An Alderman must make decisions solely on merit and must not take irrelevant matters or circumstances into account when making decisions.

Part 1.1 is directed to *all matters being decided upon in the course of his or her duties*. The Panel does not consider that a decision by Ald Hickey not to provide a letter by way of foreword to a book is *a matter being decided upon* in the course of her duties. The provision of a letter of the type envisioned here does not appear to fall within any of the functions and duties of a mayor or alderman set out in the Act. Ald Hickey's evidence was that the decision to provide or not provide a letter of the type contemplated in this case is one that she made independently of Council and in her individual capacity as Lord Mayor.

The Panel also finds that the decision to forward the Complainant's letter to 16 other parties and the decision not to attach the letter of 4 June 2017 also fall outside the functions and duties set out in the Act.

Accordingly, the Panel is not satisfied the actions comprising the Conduct were taken in the course of Ald Hickey's duties and it therefore finds that a contravention of Part 1.1 of the Code of Conduct has not been made out.

The decisions referred to Part 1.2 must, again, be decisions that fall within the powers and functions granted to Ald Hickey under the Act. The Complainant did not refer the Panel to any power or function that he says Ald Hickey was exercising when she engaged in the Conduct. Having considered the Act, the Panel is not satisfied that the Conduct occurred in the performance of any of Ald Hickey's powers and functions under the Act and, therefore, finds that a contravention of Part 1.2 of the Code of Conduct has not been made out.

The Panel applies the same reasoning to the alleged contravention of Part 1.4 and finds that the Conduct was not taken in the performance of any of Ald Hickey's powers and functions under the Act and, therefore a contravention of Part 1.4 of the Code of Conduct has not been made out.

The Panel accordingly dismisses the Complaint in relation to Part 1, Sections 1, 2 and 4.

PART 3 - USE OF OFFICE

1. The actions of an Alderman must not bring the Council or the office of Alderman into disrepute.
2. An Alderman must not take advantage, or seek to take advantage, of his or her office or status to improperly influence others in order to gain an undue, improper, unauthorised or unfair benefit or detriment for himself or herself or any other person or body.

Part 3.1 requires Council or the office of Alderman to be brought into disrepute. There was no evidence submitted by the Complainant to establish that the Conduct had either of the effects contemplated in part 3.1. Accordingly, it dismisses the Complaint in relation to Part 3.1.

Part 3.2 requires evidence of Ald Hickey:

- Taking advantage, or seeking to take advantage, of her office or status;
- To improperly influence others;
- In order to gain an undue, improper, unauthorised or unfair benefit or detriment for herself or any other person or body.

The Complainant was unable to produce any evidence in support of a contravention of Part 3.2. The Panel accordingly dismisses the Complaint in connection with Part 3.2.

PART 7 - RELATIONSHIPS WITH COMMUNITY, ALDERMEN AND COUNCIL EMPLOYEES

1. An Alderman –
(c) must not bully or harass any person.

The Panel dismisses the complaint in relation to Part 7 Section (1) (c).

The Conduct involves the written exchange of conflicting views between a ratepayer and an alderman. It also involves the copying of part of that exchange to other aldermen, some council officers, the Premier and the Complainant's business partner. It also involves a single decision by Ald Hickey not to provide a letter for the Complainant's book.

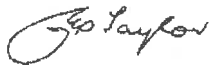
The Code of Conduct does not contain a definition of bullying or harassment. Dictionary definitions and legislative definitions of bullying ordinarily require the conduct to be repeated. Dictionary and legislative definitions of harassment generally require the conduct to be repeated, unwanted, distressing, demeaning or offensive. Harassment also generally requires that the person responsible to know, or ought to have known, that the conduct amounted to harassment.

The correspondence between Mr Hope and Ald Hickey relates to a subject about which both parties hold very strong but divergent views. The exchange could nevertheless be described as a reasonably routine matter between a ratepayer and their elected representative. Ratepayers have the right to express their concerns to their elected representatives and elected members are expected to respond in an accurate and respectful manner.

It is the Panel's view that whilst immoderate, the Conduct could not be construed as bullying or harassing Mr Hope. For that reason, it dismisses the Complaint in relation to Part 7.1(c).

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



Gretel Chen
Legal Member



Rob Winter
Member