

*CODE OF CONDUCT PANEL*

**DERWENT VALLEY COUNCIL CODE OF CONDUCT**

**Complaint by Ms Maree Jones and Mr Bert Lawatsch against**

**Deputy Mayor Ben Shaw (Cr)**

**Determination made 23 April 2018**

***Local Government Act 1993***

Code of Conduct Panel: Jill Taylor, (Chairperson), Richard Grueber (Legal Member) and Robert Winter (Member).

**1. Summary of the complaint**

Ms Maree Jones and Mr Bert Lawatsch lodged a joint Code of Conduct complaint against Cr Ben Shaw (the Complaint) dated 15 January 2018.

The Complaint alleges that Cr Shaw contravened Part 2 Section 1, 2, 3, 4, 5, 6 (a) and (b) of the Derwent Valley Code of Conduct (the Code of Conduct), which was approved by the Derwent Valley Council on 2 April 2017.

Specifically, the Complaint alleges that Cr Shaw failed to declare a conflict of interest in relation to a Development Application being considered by the Derwent Valley Council at its meeting held on 17 August 2017, namely the Derwent Valley Hard Rock Quarry. The complainants allege that Cr Shaw had a conflict of interest in this matter because of his, then, employment with Rapid Supply Pty Ltd, which he did not declare at the meeting prior to the matter being discussed and determined.

The following is the relevant extract from the Code of Conduct:

**PART 2 – Conflict of Interest**

1. When carrying out his or her public duty, a councillor must not be unduly influenced, nor be seen to be unduly influence, by personal or private interests that he or she may have.
2. A councillor must act openly and honestly in the public interest.
3. A councillor must uphold the principles of transparency and honesty and declare actual, potential or perceived conflicts of interest at any meeting of the Council and at any workshop or any meeting of a body to which the councillor is appointed or nominated by the Council.
4. A councillor must act in good faith and exercise reasonable judgement to determine whether he or she has an actual, potential, or perceived conflict of interest.
5. A councillor must avoid, and remove himself or herself from, positions of conflict of interest as far as reasonably possible.
6. A councillor who has an actual, potential or perceived conflict of interest in a matter before the Council must:
  - a. declare the conflict of interest before discussion on the matter begins, and
  - b. act in good faith and exercise reasonable judgement to determine whether the conflict of interest is so material that it requires removing himself or herself physically from any Council discussion and remain out of the room until the matter is decided by the Council.

## 2. Investigation

The Chairperson of the Code of Conduct Panel (the Chairperson) conducted an initial assessment of the Complaint and determined on 19 February 2018 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 met on 20 March 2018 and determined that it would hold a hearing on the matter.

The Panel received the following documents prior to the hearing:

- The joint Complaint dated 15 January 2018, including an attached statement by the complainants
- The Derwent Valley Model Code of Conduct approved on 2 April 2017
- Email dated 11 March 2018 from Ms Jones and Mr Lawatsch clarifying specific Parts/Sections of the Code of Conduct Cr Shaw is alleged to have breached
- Email dated 13 March 2018, Cr Shaw's response to the complaint.

Panel members also read the relevant section of the minutes of the meeting of the Derwent Valley Council held on 17 August 2017.

### Summary of Hearing

The hearing was convened on 23 April 2018 at the Court House Building, Circle Street, New Norfolk. Ms Jones, Mr Lawatsch and Cr Shaw attended, and each made an affirmation prior to giving evidence. Mayor Martyn Evans also attended as a support person for Cr Shaw. 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.

Ms Jones spoke first to the joint complaint. She told the Panel that she and Mr Lawatsch attended the Council meeting on the 17 August 2017 as they had concerns about the likely outcome of the Development Application being the approval of the quarry, which they were both opposed to. Ms Jones stated that from her observations, Cr Shaw had a greater knowledge of the development of the quarry than other councillors present, and at the meeting he had spoken highly of its benefits and was keen to see it go ahead. This, Ms Jones alleged could have influenced other councillors. Cr Shaw had moved the motion in support of this Development Application, and the motion was passed with 5 for, 2 against and 1 abstaining. Ms Jones said that she was disillusioned at the outcome of the motion.

Following this meeting, Ms Jones and Mr Lawatsch saw Cr Shaw around the town (of New Norfolk) wearing clothing displaying a logo or the words "Rapid Supply", and researched the Internet to find out more about Rapid Supply. It was at that point that they became aware that Rapid Supply was a business involved in the supply of mining goods and equipment. They also identified through the firm's Facebook page that Cr Shaw had been recently "welcomed to the team". It was at that point that Ms Jones and Mr Lawatsch determine that Cr Shaw had a perceived conflict of interest in the development of the quarry. Ms Jones said that Cr Shaw should have known of the requirement under the Act to declare an interest in the matter prior to it being discussed. She further claimed that he did not comply with the principles of "integrity and transparency" required of a councillor.

When asked if he had anything further add, Mr Lawatsch said that he felt Ms Jones had covered the concerns he had in relation to this matter.

When asked by the Panel whether they would have lodged a complaint against Cr Shaw for not declaring a conflict of interest, if the matter was voted in the negative, Ms Jones answered, “possibly” whilst Mr Lawatsch said that Cr Shaw should have been aware of a potential conflict of interest “in any event.”

Responding to the claim by Ms Jones that she assessed Cr Shaw to have a greater interest and knowledge in the quarry than other councillors, the Panel suggested that in the normal course of events any one councillor may have a more in-depth knowledge of a specific agenda item than their colleagues. Ms Jones agreed with this proposition.

The Panel asked the complainants whether they had any knowledge of a direct connection between Rapid Supply and the quarry. Ms Jones replied that it was a perceived interest and may occur in the future. In order to assess whether Cr Shaw had a potential conflict of interest, the Panel asked the complainants whether a “reasonable person” would judge this to be the case. Ms Jones said that a reasonable person would deem a potential conflict of interest on the part of Cr Shaw.

In seeking clarification as to their decision to lodge a code of conduct complaint against Cr Shaw, the Panel asked whether the complainants had made specific enquires about his employment with Rapid Supply. Mr Lawatsch said that it was only after seeing Cr Shaw wearing clothing with the words Rapid Supply on it, that they seriously considered making a complaint. During this consideration they discovered that they were inside the timeframe to make a code of conduct complaint.

At this point Cr Shaw had no questions to put to the complainants.

The Panel then heard from a witness called by the complainants, Mr Kellett. Mr Kellett made an affirmation before giving his evidence. He confirmed he was Andrew John Kellett of 3657 Gordon River Road, Maydena and that he was a self-employed painter and decorator.

Mr Kellett told the hearing that he also considered Cr Shaw had a perceived conflict of interest in the Development Application for the quarry discussed at the Council meeting held on 17 August 2018 at which he has present. Prior to this meeting Mr Kellett said that he had sent an email to all councillors expressing his concerns about the establishment of a quarry in Maydena. He then followed his email up with a phone call to 6 of the 8 councillors (including the Mayor and Cr Shaw) prior to the meeting. He said that he felt that in this telephone conversation he was given a fair hearing by all councillors except Cr Shaw who, he claimed told him “he didn’t want to listen to anything” as it might prejudice his decision. Cr Shaw was invited to ask questions of Mr Kellett and in doing so he said he remembered the telephone conversation with Mr Kellett. However, a point of difference between the two was that Cr Shaw said he did advise Mr Kellett that he had received his email, but Mr Kellett did not recall Cr Shaw saying this. Apart from this, both Cr Shaw and Mr Kellett agreed that Cr Shaw indicated that he did not want to discuss the matter with Mr Kellett.

The complainants were then provided with an opportunity to questions Mr Kellett. Mr Lawatsch asked why Mr Kellett was at the Hearing, to which Mr Kellett replied that he had concerns about what happened at the meeting of 17 August 2017, in relation to the Development Application for the quarry. Mr Lawatsch then asked why Mr Kellett called Cr Shaw. Mr Kellett replied that it was a follow up call to his email. Mr Kellett added that his follow up call to all the other councillors was “really good”; he had been listened to.

Cr Shaw was then invited to respond to the complaint. He told the hearing that he refuted any claim of a real or perceived conflict of interest. He said that he was employed by Rapid Supply at the date of the council meeting, and that it did not have a business account with any quarry. He added that the Maydena quarry was “never on the radar” as a client for Rapid Supply. After he was advised of the complaint against him, Cr Shaw contacted the Councils General Manager to discuss the matter. He told the hearing that the General Manager did not think he had a conflict of interest, and that the General Manager had told him he could tell the Panel that.

Cr Shaw said that approval for the quarry was a planning matter and Council acted as a Planning Authority in such matters. He said he saw this differently to that of his role as a councillor. Cr Shaw told the hearing he had some issues with the quarry Development Application and had spoken to the Planning Officer who was the qualified person about planning matters. Cr Shaw said that Maydena had existed as an industrial town since its inception and that it now co-exists with other interests.

When asked by the Panel whether in hindsight he could see that some may have perceived that he had a conflict of interest Cr Shaw said that he still did not agree that he had a perceived conflict of interest.

The complainants were then invited to put questions to Cr Shaw. When asked how long he had been a councillor, Cr Shaw replied three and a half years as Deputy Mayor. When asked if he had held elected positions prior to that Cr Shaw said he had not. In response to a further question, Cr Shaw said he put himself forward for election as he wanted to help the community. When asked about the Code of Conduct, Cr Shaw answered that he was familiar with the Code. When asked about his employment with Rapid Supply, Cr Shaw said he was responsible for managing the branch and those who worked in it. When questioned by the complainants whether Rapid Supply could have supplied goods or services to the quarry once established, Cr Shaw said he did not agree with that proposition.

In their final submissions to the Panel, Mr Lawatsch, said the complaint was about a simple perceived conflict of interest that Cr Shaw should have declared as he was employed, at the time, by a company supplying equipment that could be used in the future by a quarry. Ms Jones submitted that Cr Shaw’s attitude to the issue was arrogant and that he considered that given the General Manager had advised he (Cr Shaw) did not have a conflict of interest, potential or perceived, then that was final. She felt that Cr Shaw was making a mockery of the code of conduct.

In summarising his position, Cr Shaw maintained that he did not have any interest in the quarry, and by extension no conflict of interest, actual or perceived.

### 3. Determination

There was no evidence that Cr Shaw had an actual personal or private interest that unduly influenced him. The applicant for development approval was not a customer or a prospective customer of Cr Shaw's employer and there was no evidence of any connection between him and the applicant. There was no evidence of dishonesty or lack of transparency by Cr Shaw. There was no evidence of any actual pecuniary or other conflict of interest by Cr Shaw. Cr Shaw was aware of his obligations in respect to declaring a conflict of interest, an issue he said was raised at the commencement of each Council meeting. As he had no actual conflict of interest he did not declare one. It did not occur to him that there might be a perceived conflict of interest given that his employer supplied equipment that might be within the same general industry as the applicant, but he did not intentionally ignore any perceived conflict.

The remaining issue then is whether Cr Shaw did in fact have a perceived conflict of interest. The complainants asserted that this involved a subjective test and that if they perceived a conflict then there was in fact a perceived conflict of interest for the purposes of Part 2 Section 6. It appears to the Panel that this cannot be so and that there must be a test of reasonableness applied, otherwise any misconceived perception of conflict however fanciful or strained would invoke the Code. The Code gives no guidance as to how a perception of conflict of interest is to be tested. The test that applies to administrative and judicial decision makers is whether a fair minded lay observer appraised of the relevant facts might reasonably apprehend that the decision maker might not bring an impartial mind to the decision (*Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 @ [6]). If this test is used as a guide it can be seen that Cr Shaw's employment is the relevant interest and that his employer's involvement in supplying equipment to the industry in which the development fell connects that interest to the matter before the Council. On that basis Cr Shaw ought to have recognised the potential perception of conflict and to have declared that perception.

In accordance with Section 28ZI (1) of the Act the Panel determines the following: -

**Part 2 Section 1** - *When carrying out his or her public duty, a councillor must not be unduly influenced, nor be seen to be unduly influenced, by personal or private interests that he or she may have.* - **Dismissed**

**Part 2 Section 2** - A councillor must act openly and honestly in the public interest. - **Dismissed**

**Part 2 Section 3** - A councillor must uphold the principles of transparency and honesty and declare actual, potential or perceived conflicts of interest at any meeting of the Council and at any workshop or any meeting of a body to which the councillor is appointed or nominated by the Council. - **Dismissed**

**Part 2 Section 4** - A councillor must act in good faith and exercise reasonable judgement to determine whether he or she has an actual, potential, or perceived conflict of interest. - **Dismissed**

**Part 2 Section 5** - A councillor must avoid, and remove himself or herself from, positions of conflict of interest as far as reasonably possible. - **Dismissed**

**Part 2 Section 6** - A councillor who has an actual, potential or perceived conflict of interest in a matter before the Council must: -

- (a) declare the conflict of interest before discussion on the matter begins - **Upheld**
- (b) -act in good faith and exercise reasonable judgement to determine whether the conflict of interest is so material that it requires removing himself or herself physically from any Council discussion and remain out of the room until the matter is decided by the Council. **Dismissed**

In upholding the complaint in relation to Part 2 Section 6 (a), the Panel concluded that Cr Shaw genuinely assessed that at the Council meeting held on 17 August 2017, when he was an employee of Rapid Supply, he did not have a conflict of interest, either real or perceived. Cr Shaw described his role at Rapid Supply as being responsible for the management of the branch and its employees. It appeared to the Panel that he had not however considered that the range of products offered by that company were ones that could conceivably have been sold to the quarry operators into the future.

Whilst the Panel assessed that Cr Shaw had not breach the code of conduct in Part 2 sections 1-5 and 6 (b), it did determine that given the nature of the business of Rapid Supply, and Cr Shaw's employment by it, that it could have been reasonable for a person to perceive that he could have had a conflict of interest into the future.

## **Sanction**

Cr Shaw's breach was one of omission to identify a perception of conflict in the absence of any actual conflict of interest. Had he declared that potential perception it certainly would not have warranted him abstaining from the deliberation or vote. The breach is at the least serious end of the spectrum of possible breaches of Part 2 and the necessary involvement that councillors will have in the local community means that such perceptions may well be overlooked by councillors.

Section 28ZI(1) of the Act provides that (emphasis added) "after completing its investigation of a code of conduct complaint, the Code of Conduct 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 Code of Conduct Panel may impose one or more" of several listed sanctions.

Section 10A(1)(c) of the *Acts 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.

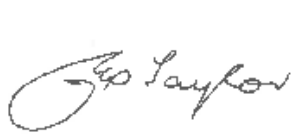
In light of the above provisions of the AIA, it could be argued that if a complaint is upheld the Panel must impose a sanction and the use of "may" in Section 28ZI of the Act only creates a discretion to impose either one sanction or more than one sanction, but if that was the intention it could have 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.

The least sanction that is available to the Panel is to order counselling. There is little point ordering Cr Shaw 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. Although the Panel has upheld the complaint in relation to Part 2 section 6(a), in all the circumstances the breach is such that the Panel has determined that none of the sanctions set out in Section 28ZI(2) will be imposed on Cr Shaw.

### **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



**Richard Grueber**  
Legal Member



**Rob Winter**  
Member