

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
DERWENT VALLEY COUNCIL CODE OF CONDUCT**

Complaint made by Mr Nigel and Mrs Heather Shearer against Cr Peter Binny

Code of Conduct Panel

- David Sales (Chairperson)
- Andrew Paul (Local Government Member)
- Graeme Jones (Legal Member)

Date of Determination: 16 November 2023

Content Manager C29060

The complaint

The complaint relates to Cr. Binny's alleged failure to disclose a perceived interest in 2 agenda items at the Derwent Valley Council's meeting on 25 May 2023 and 2 agenda items at the Council's meeting on 22 June 2023. These items related to contract negotiations between Derwent Valley Council and New Norfolk Distillery.

The complaint alleged that the following sections of the Aldermanic Code of Conduct, (the Code), adopted by the Derwent Valley Council in March 2022, were breached:

PART 1 - Decision making

- 1. A councillor 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. A councillor must make decisions free from personal bias or prejudice.*
- 3. In making decisions, a councillor must give genuine and impartial consideration to all relevant information known to him or her, or of which he or she should have reasonably been aware.*

PART 2 - Conflict of interests that are not pecuniary

- 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.*
- 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 and the nature of the interest before discussion of the matter begins; and
- b) act in good faith and exercise reasonable judgement to determine whether a reasonable person would consider that the conflict of interest requires the Councillor to remove himself or herself physically from any Council discussion and remain out of the room until the matter is decided by the Council

PART 3 - Use of Office

2. A councillor 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.

Initial assessment of the complaint

Following receipt of the complaint which related to the Council meeting held on 25 May 2023, the Chairperson received a request from Mr. and Mrs Shearer as to whether they were able to amend their complaint. The Chairperson advised Mr and Mrs Shearer that as the investigation had not commenced in accordance with section 28X of the Act, they were able to lodge an amendment to their complaint. The amendment was received on 1 July 2023 and related to the Council Meeting held on 22 June 2023.

The Chairperson then conducted an initial assessment of the amended complaint in accordance with the requirements of section 28ZA(1) of the *Local Government Act 1993* (the Act). Having assessed the complaint against the provisions of sections 28ZB and 28ZC of the Act, the Chairperson determined that:

- 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 complainants had endeavoured to contact Cr Binny to warn him of the possible alleged breach prior to the meeting on 25 May 2023; 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 Panel made under section 28ZI(3).

The Chairperson determined that the amended complaint should be investigated and determined by the Code of Conduct Panel (the Panel) as the allegation substantially related to alleged contraventions of the Code. If proven, they were capable of constituting breaches of the Code.

The complainants, respondent Councillor and the General Manager of Derwent Valley Council were notified of the outcome of the initial assessment by letter dated 23 June 2023.

Material considered by the Panel

- Code of Conduct Complaint with attachments from Mr and Mrs Nigel Shearer against Cr Peter Binny dated 5 June 2023;
- Amendment to Mr and Mrs Shearer's Code of Conduct Complaint with attachments dated 1 July 2023;
- Response to Code of Conduct Complaint with attachments from Cr Binny dated 2 August 2023;
- Mr and Mrs Shearer's response to Cr Binny's submission dated 11 August 2023
- Cr Binny's further response dated 15 September; and

- Copy of a confidential letter from the Premier to Mr Tarrant Derksen dated 20 February 2023 which is subject to S338A of the Act and will not be supplied to the complainant. This letter was submitted only to verify a date included in the evidence.

Procedure

The Panel met on 28 September 2023 to consider the documentation before it and was of the opinion that the complaint could be determined without a formal hearing into the complaint. In arriving at this position, the Panel had considered the provisions of Section 28ZG (2)(a) and (b) of the Act, which states:

The Code of Conduct Panel may determine that a code of conduct complaint may be investigated without a hearing if it reasonably considers that-

- (a) Neither the complainant nor the councillor against whom the complaint is made will be disadvantaged if a hearing is not held and it is appropriate in the circumstances not to hold a hearing; or*
- (b) 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.*

Mr and Mrs Shearer and Cr Binny were advised that the Panel was of this view by letter on 29 August 2023. Both parties advised that they did not feel they would be disadvantaged by the complaint being determined on the evidence submitted without a hearing being held.

Determination

The Panel met again on 8 November 2023 to determine the complaint. Pursuant to section 28ZI(1)(c), the Panel partially upholds the complaint against Cr Binny.

Reasons for determination

The Panel was of the view that there is no, or insufficient evidence, that would lead it to a conclusion that Part 1 (1), (2) and (3), Part 2 (1) and (2) and Part 3 (2) of the Code have been breached and therefore dismisses the Complaint in respect of those Parts.

The primary allegation of complaint raised by Mr and Mrs Shearer for the Panel's determination relates to the allegation that Cr Binny had a perceived conflict of interest in relation to the matters for discussion at the two Council meetings by reason of his personal relationship with members of the Derksen family.

When making its determination the Panel considered Cr Binny's relationship with each member of that family. Cr Binny detailed his relationship with each member in his Statutory Declaration sworn 4 August 2023 (Paras. 32-41). The Panel concluded there was a long-standing friendship with the senior Derksen's and a clear association with their children.

A personal friendship or an association may influence the way in which someone may act or vote. Therefore, a reasonable person, acting in good faith and exercising reasonable judgement would have removed themselves from both meetings whilst the matters on the subject of the complaint were discussed. Members of the public are entitled to view decisions made by their representatives as both transparent and impartial. The Panel concluded that in the circumstances and in the interest of transparency and impartiality, Cr Binny should have taken a conservative approach in this matter and declared a perceived conflict of interest to protect his good name and that of the Council.

Consequently, the Panel upholds the complaint in respect of Part 2 (3), (4), (5) and (6) of the Code.

Sanction

Under section 28ZI (2) of the Act, the Panel may impose one or more of the sanctions listed therein. The Panel considers that the Cr Binny did not intentionally breach the Code and held a genuine belief that he did not have a perceived conflict of interest in relation to the matters under discussion at the Council meetings. However, whilst the Panel does not accept his view as reasonable, in all the circumstances, the Panel views the consequences of Cr Binny's breach of the Code as relatively minor.

Therefore, the Panel does not impose any sanction on Cr Binny.

Timeliness

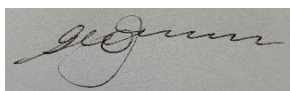
The Panel was unable to complete its investigation and make a determination within the 90 day period specified by S28ZD of the Act. This occurred because of extensions granted to parties to respond to requests and the unavailability of a Panel Member for a period of time.

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.



David Sales J.P.
Chairperson



Graeme Jones
Legal Member



Andrew Paul
Member