

Local Government Act 1993

BURNIE CITY COUNCIL CODE OF CONDUCT DETERMINATION REPORT*

RELATING TO THE CONDUCT OF COUNCILLORS

Complaint by Alderman Teeny Brumby against Alderman Steve Kons

Reference : 155113

Determination made on 9 September 2020

Code of Conduct Panel:

Jill Taylor (Chairperson), Richard Grueber (Legal Member) and Rob Winter (Member)

I. Summary of the complaint

The complaint made by Alderman (Ald) Brumby on 31 July 2018 was previously investigated and determined by a Code of Conduct Panel. That determination was appealed by Ald Kons and on 24 February 2020, the Supreme Court set aside the previous determination by way of consent orders. However, the orders did not finally dispose of the complaint and the Solicitor-General advised that the complaint was still active and needed to be resolved.

In accordance with Section 28L (2) of the *Local Government Act 1993* (the Act) Ms Jill Taylor was appointed Chairperson to undertake an initial assessment of the Ald Brumby's complaint dated 31 July 2018. Mr Andrew Wardlaw, General Manager of the Burnie City Council, confirmed that the complaint met the requirements of Section 28V (3) of the Act as it existed at that time.

The Chairperson undertook an initial assessment and determined that part of the complaint should be further investigated. Ald Brumby, Ald Kons and the General Manager were advised of this decision on 1 April 2020. Ald Kons was provided with a copy of the complaint and requested to provide a response within 14 days.

Ald Brumby alleged that Ald Kons had breached Part 7.1 (a), (b) and (c) of the Burnie City Council's Aldermen's Code of Conduct, Version 4 which was approved on 17 May 2016. Ald Brumby's complaint was accompanied by Attachments labelled "A" to "S". The Chairperson determined that only evidence dating from 1 February 2018 (i.e. 6 months prior to the date of the lodgement of the complaint) would be investigated.

Part 7 of Version 4 of Burnie City Council's Aldermen's Code of Conduct approved on 17 May 2016 stated:

PART 7 - Relationships with community, councillors and Council employees

1) *A councillor –*

- a) must treat all persons with courtesy, fairness, dignity and respect; and*
- b) must not cause any reasonable person offence or embarrassment; and*
- c) must not bully or harass any person.*

* 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.

Specifically, Ald Brumby alleged that Ald Kons had breached the Code by circulating offensive and inappropriate emails to other aldermen on the Burnie City Council, and by posting derogatory comments about the then Mayor on the Advocate newspaper's Facebook site.

The Chairperson accepted the following attachments to Ald Brumby's complaint which fell within the statutory period of six months prior to the complaint: -

- Attachment A - A motion to Council dated 17 July 2018
- Attachment B – an email dated 14 July 2018 from Ald Kons with attachment “picture of rat bait” to accompany the notice of motion
- Attachment C – an email dated 14 July 2018 from Ald Kons to T Brumby which contained comments including “don't let kids draft policy for you” and “zero out of two”
- Attachment D - Ald Kons post on the Advocate newspaper Facebook dated 9 July 2018 referring to Alywn Boyd
- Attachment E – an email dated 14 February 2018 from Ald Kons to Sandra French which included a rating of councillors' performance
- Attachment F – an email dated 14 February 2018 from Ald Kons to aldermen reference to “only a few contributors”
- Attachment S – An email dated 20 April 2018 from Ald Kons to aldermen with photo of “New Mayoral Vehicle”

A Code of Conduct Panel was formed to investigate the complaint. Ald Kons was advised of the Chairperson's initial assessment on 1 April 2020 and invited to provide a response.

Ald Kons responded to the notification of the complaint with several emails querying reasons as to why the complaint was being re-determined and raising other procedural matters. The Panel responded to Ald Kons' emails on 14 April 2020 and 22 April 2020, with copies provided to Ald Brumby.

On 21 May 2020 Ald Kons sent a further email stating that he had been denied natural justice and raising other procedural matters. As a result of Ald Kons' numerous emails and to provide both him and Ald Brumby with information about the complaint process and investigation, the Panel decided to hold a directions hearing. The directions hearing was held on 17 June 2020. Both Ald Brumby and Ald Kons attended by telephone. Ald Kons advised that he had his legal representative, Mr Glynn Williams, present with him. Ald Brumby was asked if she had any objections to this and she replied, no. Following the directions hearing, the Chairperson wrote to both parties confirming agreed actions and advised that the matter would proceed to a hearing.

Subsequently, Ald Brumby submitted to the Panel a letter dated 24 June 2020 and a statutory declaration dated 25 June 2020, together with an article from the Advocate newspaper dated 2 March 2020 which related to Ald Kons' comment in relation to the findings of the Supreme Court.

Ald Kons submitted his formal response to the complaint in a statutory declaration dated 22 May 2020.

On 29 June 2020 Ald Kons sent two emails, again raising issues about process and requesting that the Chairperson recuse herself from the Panel. The Chairperson responded to Ald Kons on 6 July 2020 advising that the procedural matters had been addressed at the directions hearing and as Ald Kons had not provided any substantial reasons to recuse herself, she would not do so.

2. Investigation

The hearing took place on 3 August 2020 at the Burnie City Council Chambers. Ald Brumby attended with her brother, Mr Trent Austin, as a support person. Ald Kons attended with his lawyer, Mr Glynn Williams, as his support person. The Chairperson made it clear that as Mr Williams is a legal practitioner, he would not be able to make any comment or provide advice to Ald Kons during the hearing. Ald Brumby objected to Mr Williams being present claiming that she was disadvantaged and that she would leave the hearing if Mr Williams remained. The hearing was adjourned briefly for the Panel to consider Ald Brumby's objection.

When the hearing re-commenced, the Chairperson advised Ald Brumby and Ald Kons that there was nothing to prevent Mr Williams attending the hearing as Ald Kons support person, but he could clearly not as legal representative. The Panel determined that Ald Brumby would not be disadvantaged by Mr Williams attendance as a support person. Furthermore, given this complaint was now over two years old, the Panel had an obligation to bring it to a conclusion as soon as practicable. On this basis, the Panel would proceed with the hearing. Ald Brumby was advised that she could leave the hearing if she wished and the Panel would consider the written evidence she had provided. Ald Brumby chose to remain at the hearing.

The Chairperson advised the parties how the proceedings would be conducted, and the options available to the Panel in relation to sanctions, should part or the whole complaint be upheld.

The following documents were before the Panel as evidence: -

- Ald Brumby's complaint dated 31 July 2018 and a 3-page attachment entitled "Tuesday 31 July 2018". Also attached are documents labelled "A through to S". Only Attachments A,B,C,D,E and S were accepted as evidence
- Statutory declaration signed by Ald Brumby on 5 April 2020
- An email dated 6 April 2020 from Ald Kons
- A response dated 14 April 2020 from the Chairperson to Ald Kons' email of 6 April 2020
- An email dated 16 April 2020 from Ald Kons
- A response dated 22 April 2020 from Chairperson to Ald Kons' email of 16 April 2020
- An email dated 21 May 2020 (9.26am) from Ald Kons
- An email dated 21 May 2020 (10.15am) from Ald Kons
- Statutory declaration signed by Ald Kons on 22 May 2020
- An email dated 17 June 2017 from Ald Kons
- A letter dated 18 June 2020 to Ald Brumby and Ald Kons following directions hearing held on 17 June 2020
- An email response dated 25 June 2020 from Executive Officer to Ald Kons
- Letter dated 24 June 2020 from Ald Brumby

- Statutory declaration dated 25 June 2020 from Ald Brumby with attached Advocate newspaper article dated 4 March 2020
- An email dated 29 June 2020 (5.32pm) from Ald Kons
- An email dated 29 June 2020 (7.44 pm) from Ald Kons
- Response from the Chairperson dated 6 July 2020 to Ald Kons re his emails of 29 June 2020

Both Ald Brumby and Ald Kons took an oath before giving their evidence.

Ald Kons asked the Panel which law the complaint was proceeding under i.e. whether the current legislation or the legislation that existed when the complaint was lodged would be applied. It is well established that rights are determined as at the time that legal proceedings are instituted.¹ It is also well established that unless an amendment to legislation is clearly intended to act retrospectively, or that it is purely procedural in character, it will only act prospectively.² The presumptive rule of construction is that unless an amendment appears with reasonable certainty to be intended to be retrospective it will not affect rights or liabilities existing prior to the amendment.³ The complaint therefore falls to be determined according to the Code of Conduct and the Act in force at the time of the alleged breaches. There were procedural changes made to s28V (3) of the *Local Government Act*⁴ which commenced in December 2018, between the making of the initial complaint and the hearing. These amendments imposed further requirements on the maker of a complaint at the time of lodgement. The additional requirements are to verify the complaint by statutory declaration and to include in the complaint details of efforts to resolve the complaint. A failure to comply with these requirements should result in the general manager, on undertaking an assessment of the complaint returning it to the complainant⁵ rather than referring the complaint to the Code of Conduct Panel⁶. It cannot have been Parliament's intention that a complaint validly on foot and referred to the Panel prior to the amendments would be retrospectively required to comply with the amendments or rendered invalid.

Ald Brumby commenced her evidence by drawing the Panel's attention to a four-page submission dated 24 June 2020 (submitted to the Panel on 25 June 2020) which she said held all the information she wished to convey to the Panel in support of her complaint. Ald Brumby said that she had provided other evidence outside of the six-month period because she felt it portrayed a pattern of behaviour exhibited by Ald Kons. However, she said she would accept the Panel's decision in relation to evidence outside of the statutory period.

Ald Brumby refuted the allegation by Ald Kons that her complaint was politically motivated. She said she "was not wired that way" and her motivation was her concern about the tone of Ald Kons' emails. Ald Brumby told the Panel that in 2017 she had met with Ald Kons about the tone of his emails and reported that their chat was friendly. Following their discussion, she

¹ E.g. see *MMI General Insurance Ltd v Donnelly* [No 2] [2000] TASSC 163 par 7; *In re Keystone Knitting Mills' Trade Mark* [1929] 1 Ch 92 at 105

² *Maxwell v Murphy* [1957] HCA 7

³ *Kraljevic v Lake View & Star Limited* [1945] HCA 29 per Dixon J

⁴ By s6 of the *Local Government Amendment (Miscellaneous) Act 2018* inserting s28V(3)(fa) and (fb)

⁵ See s28Y

⁶ Pursuant to s28Z

noticed a change in the tone of Ald Kons' email exchanges. However, she said this did not last and he started again sending what she considered were inappropriate communications

Given her concern about Ald Kons' behaviour, Ald Brumby spoke to a member of the Local Government Division at a LGAT conference. She was advised that one incident alone would probably not be sufficient to lodge a complaint but if other instances occurred then she could consider lodging a complaint. Based on this advice Ald Brumby originally appended a long list of incidents to her complaint.

Ald Brumby told the Panel that Ald Kons' behaviour would not be tolerated by a manager or leader in a corporate workplace and it should not be tolerated in local government. Ald Brumby said it was clear Ald Kons was not remorseful. She drew this conclusion based on an article in the Advocate newspaper dated 4 March 2020 following the Supreme Court decision, which quoted Ald Kons.

The Panel asked Ald Brumby to align her evidence with the relevant part of the Code she alleged Ald Kons had breached. She provided the following response:

- Attachment A & B – breaches Part 7.1 (a), (b) and (c)
- Attachment C - breaches Part 7.1 (a) and (b)
- Attachment D –breaches Part 7.1 (a), (b) and (c)
- Attachment E - breaches Part 7.1 (a), (b) and (c)
- Attachment F – breaches Part 7.1 (a), (b) and (c)
- Attachment S – breaches Part 7.1 (a), (b) and (c)

Ald Brumby said that she found the language used by Ald Kons in some of these exhibits as “disgusting” and she did not think she had been treated fairly and courteously.

The Panel confirmed with Ald Brumby that her written evidence was her complaint of 31 July 2018 with Attachments A,B,C,D,E,F and S, and her letter of 24 June 2020.

Ald Kons was given the opportunity to question Ald Brumby and he asked her if she thought she was being subjective about his comments and if she believed she had higher standards than him. Ald Brumby replied that she expected the same standard of behaviour as her fellow councillors who were listed in her complaint.

Ald Kons then asked Ald Brumby if she was aware that the statements made today were under oath, to which she replied “yes”. Ald Kons went on to say that he has copies of all Ald Brumby's emails (in relation to the first complaint investigation) and that she was not correct in saying her complaint was not political. Ald Brumby said she presumed those emails related to her seeking advice about dealing with the media. If this were the case, Ald Brumby stated categorically that she did not approach the media it was the media who approached her. She contacted certain individuals, seeking advice about what she “could and couldn't say”.

Ald Kons was then invited to respond to the complaint.

Ald Kons said this had been a harrowing experience for him and his family as it had “dragged on for over 2 years”. He believed that initially the Code of Conduct was seriously flawed as it was very subjective, and this was borne out by the Government making changes to the Code and the legislation.

In presenting his response, Ald Kons read from a statement which he said covered 35 reasons why the complaint should be set aside. Several reasons outlined by Ald Kons had been addressed by the Chairperson in responding to Ald Kons' emails during the period from 1 April 2020 until the present time.

The following summarises Ald Kons' presentation to the Panel which had not been previously dealt with in email exchanges:

Ald Kons commenced his statement by drawing attention to the changes to the legislation and the Code from the date of the complaint (which he claimed was not dated) and the present time. As detailed later in this determination, the Panel had regard to the relevant changes.

Ald Kons alleged that Ald Brumby's complaint was politically motivated, and she was assisted through the original investigation. The Panel did not view any documentation relating to the previous investigation except for Ald Brumby's complaint. Therefore, comments relating to the previous investigation were not within the ambit of the current investigation.

Ald Kons contended that Ald Brumby's complaint had already been the subject of an investigation and formal determination. He said evidence of this was that he had been suspended for a period (one day) and his mayoral allowance withheld. Ald Kons said that effectively this complaint had been "done and dusted". However, the Panel disagreed with this proposition as no disposition order was issued by the Supreme Court. Subsequently, the Solicitor-General advised that the complaint remained unresolved and a new Panel should be established to investigate Ald Brumby's complaint.

Ald Kons said that he has a good relationship with his colleagues and none of them had raised concerns about his behaviour with him. Ald Kons agreed with Ald Brumby that they enjoyed a good working relationship, but Ald Brumby had a "low level of tolerance" that was not automatically shared with other councillors. He described her views as "subjective". Ald Kons added that he feels passionate about issues and that can only be "characterised as robust communication."

Ald Kons alleged that Ald Brumby had been advised by the Panel on "what she should put in her complaint" referring to a letter Ald Brumby wrote to the Panel "post the directions hearing". This assertion is rejected by the Panel. On 18 June 2020, the Chairperson wrote the same letter to Ald Brumby and Ald Kons providing an outline for proceedings for resolution of the complaint and advice that both parties should provide any final evidence within 14 days.

Ald Kons inaccurately states that the Chairperson stated in a letter dated 1 April 2020 that a "hearing will occur". The letter in question was a standard letter sent to respondents advising that the complaint had been accepted following initial assessment for further investigation. At this point it was not evident whether or not a hearing would be required.

When asked by the Panel how he would describe his actions in relation to the Attachments to Ald Brumby's complaint Ald Kons responded as follows:

- Attachment A – This was a motion to Council and no basis for complaint
- Attachment B – This is simply political banter using a common term of "political rat"
- Attachment C – Again, political banter and a demonstration of Ald Brumby's low level of tolerance

- Attachment D – He was expressing disappointment that the former Mayor had disclosed confidential information
- Attachment E – This was an email to Sandra French providing his subjective view on councillors' performance. Ald Kons claimed that the language in the email was no different to what can be seen on television
- Attachment F – This was an email to all councillors commenting on the lack of commitment by some councillors. Ald Kons stated that there "was nothing wrong with that"
- Attachment S – The photograph of Disaster Master van parked outside the Council building was sent in jest. Ald Kons saw it as a "funny picture" and sent it to councillors. It was not more widely distributed.

At the conclusion of his presentation Ald Kons requested that the Panel dismiss the complaint and that the Panel, through the Local Government Division be directed to pay his legal costs. The Panel does not have the power to make any recommendations on cost to either parties involved in a Code of Conduct complaint process.

In summary, Ald Brumby said that she had no "intention to hurt Ald Kons" but had been waiting for him to "draw the line in the sand" and behave more appropriately. Ald Brumby said that she wanted a "culture shift" within Council. She was hopeful that the complaint could be dealt with expeditiously to bring the matter to finality. This was her motivation for making the comment that it should be "resolved before the election" and it was not politically motivated as suggested by Ald Kons.

Ald Brumby said that she had no idea a meeting took place between the Mayor, Deputy Mayor and Ald Kons regarding the "rat bait" email. The Panel were of the opinion that, if the meeting had included Ald Brumby, then mediation could have occurred.

Ald Brumby added that she was not aware that the lodgement of a complaint was confidential as she discussed her intention with a number of her colleagues before deciding to go ahead. Ald Brumby said that she had written to some politicians and the Director of Local Government but was only seeking advice on the complaint process.

Ald Kons summarised by saying that Ald Brumby could have brought witnesses to the hearing and her comment about Mrs Boyd was hearsay. He added that he had approached the complainant about withdrawing the complaint, but she refused.

There was no dispute about the facts of Ald Brumby' complaint. Ald Kons did not deny that he initiated the emails and Advocate newspaper's Facebook post. However, he stated in evidence, that he did not initiate these communiques out of malice and that the point of dispute was that Ald Brumby has a "low threshold of tolerance" and is subjective. Ald Brumby asserted Ald Kons emails and Facebook post were "appalling and totally unacceptable" and caused embarrassment to others. Ald Brumby said that ordinarily she appreciated Ald Kons' sense of humour but on the occasions, identified in her complaint, he had "stepped over the line". Ald Kons on the other hand, rejected Ald Brumby's assessment saying it was a matter of perception.

In undertaking an investigation, the Panel is not limited to considering only breaches of the Code identified by the complainant. The Code of Conduct was introduced as a means of guiding behaviour of elected members and providing a formal process for individuals to access if they considered the Code had been breached by an elected member.

Although the complainant is required to state in the complaint the provisions of the Code alleged to have been breached⁷ the Panel is required to conduct an investigation of the complaint “*in relation to the contravention by the councillor of the relevant council's code of conduct*”⁸ and is not limited to consideration of the provisions identified by a Complainant.

In this instance, the Panel identified the public Facebook post made by Ald Kons on the Advocate’s Facebook page as behaviour that did not meet the intent of the Code. To use statements like “*this boke makes Judas look like an angel*”, “*I cannot fathom the depths he will go to to see this City fall over*” and “*The building will use Tasmanian wood as an integral material which will match his thoughts and character which are rotten to the core*” in relation to former Mayor Boyd breached the Code. Specifically, the Panel identified Part 3.1 of the Code which states; “*The actions of a councillor must not bring the Council or the office of councillor into disrepute*”, as the breach of the Code.

Whilst Ald Kons stated this post was made in his private capacity, the Panel did not accept this proposition. Ald Kons is well known in the Burnie community as a public servant both in State and local government and a reasonable person would not have distinguished him in a public or private role. Therefore, in the Panel’s view he has brought the Council and office of councillor into disrepute.

3. Determination

In making its determination, the Panel noted that the version of the Burnie City Council’s Aldermen’s Code of Conduct applicable at the time of the complaint was that approved on 17 May 2016. The current version of that Code was approved on 19 February 2019. The Panel determined that in considering Ald Brumby’s complaint it was required to have regard to the Code that existed at the time of the complaint. However, in considering sanctions, the Panel considered it appropriate to have regard to whether the breach would have occurred under the revised Code approved in February 2019. The relevant versions of Part 7 of each is outlined below:

Version approved on 17 May 2016

- 1) *A councillor –*
 - a) *must treat all persons with courtesy, fairness, dignity and respect; and*
 - b) *must not cause any reasonable person offence or embarrassment; and*
 - c) *must not bully or harass any person.*

⁷ Section 28V(3)(d)

⁸ Section 28V(1)

Version approved on 19 February 2019

- 1) *A councillor –*
 - a) *must treat all persons fairly; and*
 - b) *must not cause any reasonable person offence or embarrassment; and*
 - c) *must not bully or harass any person.*

Alleged breach of Part 7.1(a)

In her evidence, Ald Brumby contended that Ald Kons' emails and posting on the Advocate newspaper Facebook page was "disrespectful" and as such did not treat his fellow aldermen with dignity and respect. The Panel determined that the contents of Attachments 'A', 'B' and 'D' demonstrated Ald Kons did not treat his fellow aldermen with dignity and respect. However, in the current approved version Part 7.1 (a) the words "courtesy, dignity and respect" have been removed. Part 7.1 (a) now only has the requirement for elected members to treat all persons "fairly". Fairly implies equity and justice. The Panel was not presented with any evidence that any of Ald Kons' colleagues were treated unfairly by him.

Therefore, and although the Panel upholds a breach of Part 7.1(a) of the previous version of the Code it considers it would not be appropriate to apply a sanction given that his conduct would not amount to a breach under the current Code.

Alleged breach of Part 7.1(b)

Ald Brumby submitted that the evidence contained in the Attachments to her complaint was evidence that Ald Kons had embarrassed and offended her and their aldermen colleagues. The Panel concluded that apart from the Advocate's Facebook post, all other comments were circulated to one or more aldermen. In Ald Kons' words he was simply liaising with his colleagues and said that whilst Ald Brumby "set a low level of tolerance" he believed that others did not share her view. This left the issue of the Facebook post for the Panel to consider. The Panel was not presented with evidence that the subject of the post, Ald Boyd was embarrassed or offended by it.

The Panel dismisses this part of the complaint

Alleged breach of Part 7.1(c)

It is the Panel's view that bullying results in harm or intimidation being caused to a person or group of people. To harass an individual or group of people, they need to be subject to unwarranted and unwanted behaviour, again over an extended period. Whilst it appears Ald Kons regularly sent emails to his fellow aldermen it is the Panel's view that none of those emails presented evidence that he was bullying or harassing his colleagues.

The Panel dismisses this part of the complaint

Breach of Part 3.1

Ald Brumby only cited breaches against Part 7.1(a), (b) and (c) of the Code. However the Panel, during its investigation, identified that Ald Kons may have breached Part 3.1 -particularly in regard to his public commentary about former Mayor Alwyn Boyd on the Advocate newspaper's Facebook page.

The Panel is required to observe the rules of natural justice⁹ and wrote to Ald Kons on 14 August 2020 in terms which included the following:

However, in undertaking an investigation, the Panel is not limited to considering breaches of the Code identified by the complainant. In this instance, the Panel has determined that the evidence supports a finding that you have breached Part 3.1 – Use of Office of the Code of Conduct in force at the date of the alleged breach as follows:

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

Specifically, that you have brought the Council and office of councillor into disrepute because of your post on the Advocate newspaper's Facebook page on 9 July 2018. This is a public forum and you have denigrated Ald Boyd by stating "This bloke makes Judas look like an Angel", "I cannot fathom the depths he will go to to see this City fall over" and "The building will use Tasmanian wood as an integral material which will match his thoughts and character which are rotten to the core".

The Panel does not accept your evidence that you did this as a "private citizen".

Given that breach of that provision was not expressly put to you at the hearing, you are invited to provide submissions as to:

- 1. why the Panel should not find a breach of Part 3.1 of the Burnie Aldermen's Code of Conduct as outlined above; and*
- 2. what, if any, sanction the Panel ought apply on finding a breach of Part 3.1 of the Code of Conduct.*

Ald Kons responded through his solicitor. Ald Kons is not entitled to representation by a lawyer at a hearing. Given that Ald Kons is entitled to obtain legal advice and given that the submissions were ones that Ald Kons could have adopted and presented himself the Panel is, in this case, willing to accept them as submissions by Ald Kons, without making any determination as to whether this course will be appropriate in every case. Rather than take up the invitation to make submissions as to why the Panel should not find a breach of Part 3.1 on the facts, the response was confined to contending that the potential breach identified as being open on the facts amounted to a new complaint. The Panel does not accept that the consideration of whether the facts alleged and found within the complaint constitute a breach of the Code of Conduct amounts to a new complaint.

The Panel did not accept Ald Kons' evidence that this Facebook post was done in his capacity as a private citizen.

Ald Kons is a well-known high-profile member of the Council who would be expected by the public to well understand the issues within the Council and to be privy to information not disclosed to the public. The comments publicly posted on Facebook by Ald Kons, as outlined above, asserting that the then Mayor was attempting to sabotage the City and was rotten to the core, were not couched in terms that were apparently hyperbolic or ironic, but were on their face apparently intended to be taken as assertions of fact. These assertions, by a person

⁹ Section 28ZE(1)(c)

who is in a position to know, would tend to lower the reputation of the Council and councillors in the eyes of ordinary members of the public to a significant extent and so bring them into disrepute.¹⁰

The Panel did not consider any evidence that was not before it, but rather, based on the evidence before it, concluded that the Code has been breached in relation to Ald Kons' post on the Advocate newspaper's Facebook, and identified the relevant Part of the Code.

The Panel determined that Ald Kons brought the Council and the role of councillor into disrepute.

The Panel determines that Ald Kons has breached Part 3.1 of the Code.

4. Sanction

On 14 August 2020, the Panel wrote to Ald Kons advising him that it had determined that he had breached Part 7.1(a) of the Code, and dismissed the alleged breaches of Parts 7.1.(b) and (c) of the Code. Whilst it upheld part of the complaint, the Panel further advised that owing to a change in the Code from the time of the complaint until the present time, the Panel exercised its powers not to impose a sanction on this occasion.

The advice to Ald Kons also advised that during the investigation of this complaint, the Panel determined that evidence supported Ald Kons had breached of Part 3.1.

As noted above, the Panel wrote to Ald Kons inviting him to make submissions on sanction. Mr Kons' solicitor submitted that no sanction be imposed, and a more appropriate response should be dismissal of the complaint. He argued that in acknowledging the changes to Part 7.1(a) of the Code between the time of the complaint and currently, the Panel was attempting to "pick and choose." However, the Panel was simply stating that its obligation was to apply the law at the time of the complaint but in acknowledgement of the changes made, it exercised its option not to apply a sanction.

In considering whether a sanction should be applied in relation to the breach of Part 3.1 of the Code, the Panel noted that this was the first occasion that a complaint had been made against Ald Kons and that the drawn out nature of the complaint had caused some anguish to both the complainant and Ald Kons.

In this instance, the Panel determined that Ald Kons should be cautioned in relation to this breach of Part 3.1 of the Code.

5. Delay in determining complaint

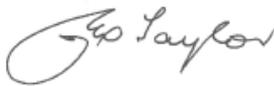
Section 28ZD (1)(a) of the Act requires the determination to be made within 90 days after the initial determination by the Chairperson to investigate and determine the complaint or reasons be provided as to why this requirement could not be met. In this instance the 90 day period concluded on 30 June 2020.

¹⁰ E.g. see *Darcy v Australian Olympic Committee* (2008) 3(1) ANZSportsLawJl 119 at 69

The delay in determining this complaint was caused by an unusual number of email exchanges regarding procedural matters, the need to hold a direction hearing and time taken to organise a mutually convenient time for the hearing.

6 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