

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
HOBART CITY COUNCIL CODE OF CONDUCT**

Complaint brought by Councillor Louise Elliot against Councillor Ryan Posselt

Code of Conduct Panel

- Robert Winter (Chairperson),
- Roseanne Heyward (Local Government Member)
- Graeme Jones (Legal Member)

Date of Determination: 07 May 2024

Content Manager Reference: C31869

Summary of the complaint

A code of conduct complaint was submitted by Councillor (Cr) Louise Elliot to the General Manager of the Hobart City Council (“HCC”) by email on 20 December 2023. This complaint was supported by a statutory declaration from Cr Elliot dated 22 January 2024.

In the complaint it was alleged that Councillor (Cr) Ryan Posselt had breached the following parts of the HCC’s Code of Conduct effective from 20 February 2023, in relation to Cr Posselt’s participation in and voting on a specific matter dealt with in the closed part of the HCC meeting held on 11 December 2023.

Part 2- Conflict of interests which are not pecuniary.

Following receipt of the complaint, the Chairperson conducted an initial assessment of the complaint in accordance with the requirements of section 28ZA (1) of the *Local Government Act 1993* (the Act) and determined that the whole of the complaint should be investigated and determined by a Code of Conduct Panel.

Having undertaken that initial assessment, the Chairperson determined that these allegations should be further investigated as they substantially related to a contravention of the Code as, if the allegations in Part 2 of the Code were proven, they were capable of constituting a breach in relation to the Code.

A copy of the complaint was provided to the other members of the Panel appointed to investigate the complaint. The Complainant, the Respondent and the General Manager were notified of the outcome of the initial assessment by letter dated 1 February 2024.

Investigation

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

The Panel received a detailed written response to the Complaint from the Respondent under cover of a statutory declaration dated 27 February 2024.

On 18 March 2024 the Respondent’s Statutory Declaration and written response were forwarded to the Complainant, seeking her response, and also her advice as to whether she wished to view the video recording of the closed part of the meeting.

With the Complainant indicating a desire to view this video recording, on the 19 March 2024, a link to this video recording was provided to her.

The Complainant's response to the Respondent's statutory declaration of 27 February 2024 was received by the Panel under cover of a statutory declaration dated 28 March 2024.

On 8 April 2024, the Respondent was provided with a copy of the Complainant's statutory declaration of 28 March 2024, and was also asked if he wished to view the video recording of the closed part of the meeting. He was further requested to advise if he was content for this complaint to be determined by the Panel without the need for a hearing.

Later on, 8 April, the Respondent responded by email, providing further commentary regarding the complaint, and indicating that he was content for the complaint to be determined without the need for a hearing.

On the 8 April 2024, the Complainant was asked if she was content for her complaint to be determined by the Panel without the need for a hearing.

Later on, 8 April, the Complainant responded in an email indicating that she was content for the complaint to be determined without the need for a hearing.

After a Panel meeting on 12 April 2024, a response was sought from the Respondent regarding what, if any, he considered would be an appropriate sanction, if the Panel determined to uphold the complaint, or any part thereof.

The Respondent emailed his response to this request on the same day on 12 April 2024.

Pursuant to section 28ZG (2) (a) and (b) of the Act, the Panel determined that the complaint could be investigated and determined without a hearing, as it was considered that neither the Complainant nor the Respondent, would be disadvantaged if a hearing was not held and it is appropriate in the circumstances not to hold a hearing. Further, the Panel determined a hearing was unnecessary in the circumstances because the investigation could be adequately conducted by means of written submissions or the examination of documents.

As indicated previously in this determination, both the Complainant and the Respondent indicated that they were content for the Panel to determine the complaint without the need for a hearing.

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 dated 20 December 2023 under cover of statutory declaration dated 22 January 2024.
2. Statutory Declaration from Councillor Posselt dated 27 February 2024
3. Statutory Declaration from Cr Elliot dated 28 March 2024 with attachments responding to Cr Posselt's statutory declaration of 27 February 2024.
4. Email Respondent to Panel dated 8 April 2024 responding to Complainants' statutory declaration of 28 March 2024
5. Copy HCC Meeting Agenda and Minutes for the closed section of the Council meeting 12th December 2023
6. VDO of the closed section of the Council meeting 12 December 2023
7. Email Respondent to Panel dated 8 April 2024
8. Email Complainant to Panel dated 8 April 2024
9. Email from Respondent to Panel dated 12 April 2024 in response to the invitation to make submissions in respect to possible sanctions.

Determination

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

Reasons for determination

The factual basis for Cr Elliot's complaint is not in dispute, and the Panel makes findings as clearly depicted in the video of the closed section of the HCC meeting on 11 December 2023.

When the Lord Mayor asked if there were any conflict-of-interest declarations to be made at the commencement of the closed part of the meeting, Cr Posselt advised, in relation to Agenda item 10- relating to a specific childcare centre in Hobart that he wished to raise a matter. (As this matter was dealt with in the closed part of this meeting, the Panel has determined to anonymise the specific childcare centre).

The video clearly records Cr Posselt then saying:

"I wish to declare that both of my children attend the childcare centre I don't believe this precludes me offering (sic) debate, but I'd like it marked that I have declared that transparently".

Thereafter, when Agenda Item 10 came on for debate, Cr Posselt actively participated in the debate, and when a vote was called for, he was the only one of the nine Aldermen present to vote against the motion.

Having considered the complaint, the material accompanying it, the other materials referred to in this Determination and in accordance with the video of the meeting, the Panel has determined that part of the complaint is substantiated for the following reasons.

Part 2 of the HCC's Code of Conduct adopted on 20 February 2023 provides:

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 interests 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 him 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 him or herself physically from any council discussion and remain out of the room until the matter is decided by the Council.*
7. *This Part does not apply in relation to a pecuniary interest.*

The Panel is satisfied that Cr Posselt has breached Part 2 clause 1 of the Code, by both his participation in the debate, and voting on, Item 10 on the agenda for the closed part of the HCC meeting on 11 December 2023.

His disclosure of his two children attending the Early Learning Centre, clearly had the potential for him to be at least;” seen to be unduly influenced, by personal or private interest”. A reasonable person, with the knowledge of Cr Posselt (having two children attend the childcare centre), and whilst exercising his public duty when dealing with Council matters involving the childcare centre, would see Cr Posselt as being unduly influenced by his personal or private interest, in particular his interest in the relevant motion being voted down. It was his duty to not be seen in this light. In the Panel’s view he would inevitably, even if unconsciously, have been unduly influenced in that matter.

Further, the Panel notes the following extract from Page 67 of the *Good Governance Guide for Local Government in Tasmania*, published on the Department of Premier and Cabinet website, in relation specifically to non-pecuniary interests:

“Non-pecuniary conflicts of interest may arise if;

‘Other emotional or social ties might influence you”.

Page 64 of the *Good Governance Guide for Local Government in Tasmania*, is also relevant and states:

“You may from time to time find you have a private interest (social, familial, or financial) that may improperly influence (or be perceived to improperly influence) decisions that need to be made as an elected member. It is your responsibility to ensure that you do not put yourself in the situation where personal interests impact, or are perceived to impact, on your decision-making.”

The Panel has had the benefit of considering a Panel Determination in matter C31347, *Ford v Cr Arnol*- delivered on 13 March 2024.

In that Determination the High Court’s decision of *Isbester v Knox City Council* [2015] HCA 20 (footnotes omitted) was referred to as it was considered to be of relevance to that complaint.

The Panel considers it also has relevance to this complaint and concurs that whilst *Isbester v Knox City Council* dealt with the issue of apprehension of bias, the principles discussed are equally applicable to questions involving apprehended or “perceived” conflicts of interest.

From para 23 the High Court 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 Honours’ 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 there is an incompatibility of roles greater consideration must be given to procedural fairness and natural justice and there is greater potential for an apprehended or perceived conflict of interest, if not an actual conflict of interest, to arise.”

In this complaint, the Panel also considers that this is a matter concerning the incompatibility of roles. Cr Posselt's relevant roles being that of a parent of children attending the childcare centre, whereby it must be taken that he was interested in the relevant motion being voted down, and his role as a member of the Council dealing with it.

The Complainant's allegation of a conflict of interest (in fact an actual conflict of interest), also draws attention to Cr Posselt's interest in seeing the motion voted down. Once that interest was identified as one which (at the very least) points to an apprehension or perception of a conflict of interest, the connection is drawn between that interest and the possibility of a deviation from proper decision making. This becomes obvious. It matters not if Cr Posselt carried out his duties appropriately, it is a question (at the very least) of apprehension or perception.

As in *Ford v Arnol* (supra), the fundamental question in this complaint is also whether he should have been taking part in that process at all, by reason, at the very least, of an apprehended or perceived conflict of interest. As previously indicated, the Panel is satisfied that, owing to the irreconcilability of his competing roles in the matter, he had an actual conflict of interest.

Given his disclosure that his two children attended the childcare centre and his inevitable interest in seeing the relevant motion voted down (he is being the only Councillor to vote against the motion), the Panel finds that although the Respondent declared the conflict of interest and the nature of the interest, he should have removed himself from the room when agenda item 10 came on for debate.

Accordingly, the Panel further finds he breached clause 6(b) of Part 2 of the Code, which involves an objective test, which required him to act in good faith, and exercise reasonable judgement to determine whether a reasonable person would consider that the relevant conflict of interest required him to remove himself from the debate and remain out of the room until that matter was decided.

While Cr Posselt may have acted in good faith, the Panel finds that he failed to exercise the required reasonable judgment because had he done so, he would have determined that a reasonable person would have considered that his actual conflict of interest required him to remove himself from the debate and remain out of the room.

As to the remaining clauses of Part 2 of the Code, in light of these findings, the Panel finds:

- Cr Posselt has not breached Part 2 clauses 2 and 3 as the Panel finds that he acted openly and honestly (although mistakenly) and was transparent in his declaration of interest at the meeting on 11 December 2023. He did disclose an interest, but his error lay elsewhere in his decision making. The Panel does not find he acted dishonestly.
- Although the Panel does not find he acted in bad faith when he remained in the meeting when item 10 came on for debate, the Panel finds he breached Part 2, clause 4. The Panel finds for the reasons discussed, he did not exercise reasonable judgment to determine whether he had an actual potential or perceived conflict of interest.
- Cr Posselt has not breached Part 2 clause 6(a) as he did declare his conflict of interest and the nature of the interest.
- Based on its findings regarding Part 2 clause 6(b) above, the Panel finds that Cr Posselt was also in breach of Part 2 clause 5.

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.

In her complaint, the Complainant did not seek the imposition of a sanction if the complaint, or any part of it was substantiated.

Although Cr Posselt did at least make some effort to advise of his “interest” in item 10 on the agenda it is the Panel’s view that it is appropriate to impose a sanction as provided for by the Act.

There is little point ordering Cr Posselt to undergo counselling or a training course. His involvement in this process will have made him more acutely aware of the need to consider conflicts of interest more carefully.

The Panel does not consider a suspension is warranted.

The Panel has considered Cr Posselt’s submissions regarding what he considers appropriate by way of sanction if the complaint, or any part thereof is upheld. The Panel considers a caution to be an appropriate sanction to impose upon Cr Posselt.

Timing of the Determination

In accordance with section 28ZD (1)(a) 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 (whole) complaint is to be investigated.

This complaint has been determined within this 90 days period.

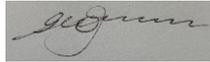
Right to review

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. 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.



Robert Winter
Chairperson

DATE: 07 May 2024



Graeme Jones
Legal Member



Roseanne Heyward
Member