



Local Government Standards Panel

Complaint Number	SP 1 of 2018 [DLGSC 20180212]
Legislation	<i>Local Government Act 1995 (WA)</i>
Complainant	Mr Gary Evershed
Respondent	Councillor Michael Smart
Local Government	Shire of Augusta Margaret River
Regulation	Regulation 11(2) of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i>
Panel Members	Mrs S Siekierka (Presiding Member) Mrs E Power (Member) Councillor P Kelly (Member)
Heard	9 th August 2018 Determined on the documents
Outcome	Training

DECISION AND REASONS FOR DECISION

Published: 29 August 2018 (updated 16 October 2018)

DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005 (WA)*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents



Introduction

1. At its meeting on 30th April 2018, the Panel found that Councillor Michael Smart, a Councillor for the Shire of Augusta Margaret River (“**the Shire**”) committed one breach of the *Local Government (Rules of Conduct) Regulations 2007* (WA) (“**the Regulations**”) of Regulation 11(2) when he failed to disclose an interest affecting impartiality in one item at the November OCM concerning the adoption of the Flinder’s Bay Protection and Management Plan and the installation of a handrail and rubber matting at a boat ramp (“**the Minor Breach**”).

Jurisdiction

2. The Panel convened on 9 August 2018 to consider how it should deal with the Minor Breach.
3. The Panel accepted the advice of the Department of Local Government, Sport and Cultural Industries (“**the Department**”) that on this date there was no available information to indicate that Cr Smart had ceased to be or was disqualified from being a councillor.

Possible Sanctions

4. Section 5.110(6) of the *Local Government Act 1995* (WA) (“**the Act**”) provides that the Panel is to deal with a minor breach by:
 - (a) *dismissing the complaint;*
 - (b) *ordering that —*
 - (i) *the person against whom the complaint was made be publicly censured as specified in the order;*
 - (ii) *the person against whom the complaint was made apologise publicly as specified in the order; or*
 - (iii) *the person against whom the complaint was made undertake training as specified in the order;*
 - or*
 - (c) *ordering 2 or more of the sanctions described in paragraph (b).*

Councillor Smart’s Submissions

5. If the Panel finds that a councillor has committed a minor breach, it must give the councillor an opportunity to make submissions to the Panel about how it should deal with the breach under section 5.110(6).¹
6. By letter dated 17th April 2018, Cr Smart was:
 - (a) notified of the Panel’s finding of the Minor Breach;
 - (b) provided with a copy of the Panel’s Finding and Reasons for Finding; and
 - (c) offered an opportunity to make submissions as to how the Minor Breach should be dealt with under section 5.110(6) of the *Act*.

¹ *Local Government Act 1995* (WA), s 5.110(5).

7. By email dated 19 April 2018, the Department received a response from Cr Smart requesting the Minor Breach be dismissed as:
 - (a) the Panel did not appear to take into consideration the fact a proximity notice has been declared in the prior November OCM and that he had left the room when the matter relating to the Flinder's Bay Management Plan was dealt with;
 - (b) after his return to the room the relevant vote only related to the ramp and handrail matters where there was no proximity interest found;
 - (c) the Friends of Flinder's Bay ("**FOFB**") association was not formed until December 2016, but Cr Smart had been endeavouring to have a handrail installed since May 2016;
 - (d) the Panel did not find he needed to declare an impartiality interest in further items relating solely to the boat ramp and hand rail in the remainder of the decision, so that finding should also apply in this instance; and
 - (e) the Panel does not appear to have considered the Local Government Operational Guidelines No 1 - 2011 relating to Disclosures of Interests Affecting Impartiality.
8. In his email of the 19 June 2018, Cr Smart also attempted to add additional email evidence relating to the Minor Breach. This is not appropriate and such additional evidence cannot be considered by the Panel at this time when a decision has already been made.
9. Cr Smart also submitted that he is happy to make a public apology, however, due to the fact he has been a councillor for over 10 years with no prior minor breaches he does not feel that training is necessary.

Panel's consideration

10. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach. The Panel may dismiss a complaint under section 5.110(6)(a), not to reverse the Panel's finding of a breach but to indicate that in all the circumstances the councillor should not be penalised and the breach should not be recorded against the councillor's name.
11. The Panel notes that Cr Smart does not agree with the Panel's findings of a breach nor make any apology for the same.
12. The Panel considers that Cr Smart has misunderstood the findings of the Panel. The Panel found that Cr Smart had both proximity and partiality interests in meeting item 11.2.3 of the October OCM regarding Flinder's Bay Management Plan. The Panel found that although Cr Smart did disclose his proximity interest, he did not disclose an impartiality interest relating to his membership of the FOFB.
13. The fact that Cr Smart left the room is immaterial, the relevant interest was not disclosed in the manner required by the Regulations.
14. Regulation 11 is intended to address any reasonable perceptions of bias. The Panel found that in all the circumstances it would be reasonable for a member of the community to perceive that Cr Smart may not consider all the relevant issues in the way expected of a councillor and that he may vote solely to achieve the outcomes the FOFB wanted.



15. The Panel notes that Cr Smart has acted as a councillor for an extended period of service. He has recently been found to have committed another three minor breaches for the first time.
16. It is not appropriate to dismiss the Minor Breach as this would condone Cr Smart's conduct and trivialise the breach.
17. The Panel has considered all available sanctions under section 5.110(6).
18. In these circumstances, the appropriate penalty is that Cr Smart undertake training so that he may properly identify different types of conflict and appropriate disclosure methods.
19. The sanction of an order to undertake training would align with the intent of the Act and the purpose of the civil penalties under the Act to ensure future compliance with the statutory obligations imposed on councillors for the better protection of the public.

Panel's decision

The Panel orders that in relation to the breach of regulation 11(2) of the Regulations and section 5.110(6)(b)(iii) of the Act, Cr Smart undertake training pursuant to section 5.110(6)(b)(i) of the Act as set out in the attached Order.

Sheryl Siekierka (Presiding Member)

Emma Power (Member)

Paul Kelly (Member)

Date of Decision and Reasons: 22 August 2018



Attachment

Complaint Number	SP 1 of 2018 [DLGSC 20180213]
Legislation	<i>Local Government Act 1995</i> (WA)
Complainant	Mr Gary Evershed
Respondent	Councillor Michael Smart
Local Government	Shire of Augusta Margaret River
Regulation	Regulations 7(1)(a), 8(b) and 9(1) of the <i>Local Government (Rules of Conduct)</i> <i>Regulations 2007</i> (WA)
Panel Members	Mrs S Siekierka (Presiding Member) Mrs E Power (Member) Councillor P Kelly (Member)
Heard	30 April 2018 Determined on the documents
Outcome	Training

ORDER

Published: 29 August 2018

DEFAMATION CAUTION

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THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

Within 4 months of the date of this Order, Councillor Michael Smart, a Councillor for the Shire of Augusta Margaret River, shall undertake:

1. the training course for Elected Members “Conflicts of Interest” provided by WA Local Government Association (WALGA) for a period of no less than 3 hours; or
2. a training course with substantially similar learning outcomes provided by an alternative registered training organisation for a period of not less than 3 hours.

Date of Order: 29 August 2018



NOTICE TO THE PARTIES TO THE COMPLAINT

RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (the Panel) advises:

- (1) Under section 5.125 of the *Local Government Act 1995* the person making a complaint and the person complained about each have the right to apply to the State Administrative Tribunal (the SAT) for a review of the Panel's decision in this matter. In this context, the term "decision" means a decision to dismiss the complaint or to make an order.
- (2) By rule 9(a) of the *State Administrative Tribunal Rules 2004*, subject to those rules an application to the SAT under its review jurisdiction must be made within 28 days of the day on which the Panel (as the decision-maker) gives a notice [see the Note below] under the *State Administrative Tribunal Act 2004 (SAT Act)*, section 20(1).
- (3) The Panel's *Breach Findings and these Findings and Reasons for Finding – Sanctions*, constitute the Panel's notice (i.e. the decision-maker's notice) given under the *SAT Act*, section 20(1).

Note:

- (1) This document may be given to a person in any of the ways provided for by sections 75 and 76 of the *Interpretation Act 1984*. [see s. 9.50 of the *Local Government Act 1995*]
- (2) Subsections 75(1) and (2) of the *Interpretation Act 1984* read:
 - "(1) Where a written law authorises or requires a document to be served by post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, **service shall be deemed** to be effected by properly addressing and posting (by pre-paid post) the document as a letter to the last known address of the person to be served, and, **unless the contrary is proved, to have been effected at the time when the letter would have been delivered in the ordinary course of post.** [Bold emphases added]
 - (2) Where a written law authorises or requires a document to be served by registered post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, then, if the document is eligible and acceptable for transmission as certified mail, the service of the document may be effected either by registered post or by certified mail."
- (3) Section 76 of the *Interpretation Act 1984* reads:

"Where a written law authorises or requires a document to be served, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, without directing it to be served in a particular manner, service of that document may be effected on the person to be served —

 - (a) by delivering the document to him personally; or
 - (b) by post in accordance with section 75(1); or
 - (c) by leaving it for him at his usual or last known place of abode, or if he is a principal of a business, at his usual or last known place of business; or
 - (d) in the case of a corporation or of an association of persons (whether incorporated or not), by delivering or leaving the document or posting it as a letter, addressed in each case to the corporation or association, at its principal place of business or principal office in the State."