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## Local Government Standards Panel

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Complaint Number	SP 2020-099
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Mr Dave Knight</b>
<b>Respondent</b>	<b>Mayor Kevin Bailey</b>
Local Government	<b>City of Swan</b>
Regulation	Regulation 7 of the <i>Local Government (Rules of Conduct)</i> <i>Regulations 2007</i>
Panel Members	Mrs Emma Power (Presiding Member) Cr Peter Rogers (Member) Mr Gordon MacMile (Member)
Heard	7 October 2020 Determined on the documents
Finding	1 x Breach of Regulation 7(1)(b)

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### FINDING AND REASONS FOR FINDING

Delivered 11 November 2020

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#### DEFAMATION CAUTION

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## Summary of the Panel's decision

1. On 7 October 2020, the Panel found that Mayor Kevin Bailey, the Mayor of City of Swan (**"the City"**) did commit a minor breach pursuant to the *Local Government Act 1995 (WA)* (**"the Act"**) and Regulation 7 of the *Local Government (Rules of Conduct) Regulations 2007* (**"the Regulations"**) when on 3 July 2020 he published an "Advertorial" in the Echo Newspaper which allegedly contained disparaging statements about the State Government as set out in paragraph 15 below.

## The Panel's Role

2. Under section 5.110(2) of the Act the Panel is required to consider a minor breach complaint and make a finding as to whether the alleged minor breach occurred.
3. The Act provides for the circumstances in which a council member commits a minor breach.<sup>1</sup>
4. The Panel may make a finding that a councillor has committed a minor breach of the Act and Regulations based on evidence from which it may be concluded that it is more likely that the alleged breach occurred than it did not occur.<sup>2</sup>
5. In order to find a breach, it must be established that each element of the relevant Regulation is more likely than not to have been breached or met.
6. In considering whether a minor breach is established the Panel must consider:
  - a. all evidence provided and, where there are conflicting circumstances, inferences or evidence, must come to a reasonable conclusion that any circumstance, inference or evidence relied upon is more likely than not to have occurred or be accurate<sup>3</sup>; and
  - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding<sup>4</sup>.
7. The Panel does not possess investigative or supervisory powers.<sup>5</sup> The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials published by the relevant local authority's website.
8. It is the responsibility of both complainants and respondents to provide the Panel with all information they wish the Panel to consider when making its determination.
9. The Panel also must have regard to the general interests of local government in Western Australia<sup>6</sup>.

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<sup>1</sup> Section 5.105 of the Act

<sup>2</sup> Section 5.106 of the Act

<sup>3</sup> *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1

<sup>4</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336

<sup>5</sup> *Re and Local Government Standards Panel* [2015] WASC 51 (at paragraph 24)

<sup>6</sup> Section 8(6) of Schedule 5.1 of the Act



10. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

### **Jurisdiction and Procedural Fairness**

11. On 20 August 2020 the Panel received a complaint from Mr Michael Foley acting as complaints officer of the City (**"the Complaints Officer"**). The same enclosed a Complaint of Minor Breach Form dated 14 August 2020.
12. In the complaint form, the Complainant alleges that Mayor Bailey has breached regulation 7 of the Regulations when on 3 July 2020 he published an "Advertorial" in the Echo Newspaper which allegedly contained disparaging statements about the State Government as set out in paragraph 15 (**"the Complaint"**).
13. The Panel convened on 7 October 2020 to consider the Complaint.
14. The Panel:
  - a. accepted the advice of the Department of Local Government, Sport and Cultural Industries (**"the Department"**) that, based on information published on the Western Australian Electoral Commission's website, Mayor Bailey was:
    - i. elected to the Council of the City in October 2017 for a term expiring in October 2021;
    - ii. a council member at the time of the alleged breach; and
    - iii. a council member when the Panel met on 7 October 2020;
  - b. was satisfied the Complaint was made within six months after the alleged breach occurred<sup>7</sup>;
  - c. was satisfied that the City's Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of a minor breach<sup>8</sup>;
  - d. was satisfied the Department had provided procedural fairness to Mayor Bailey; and
  - e. found it had jurisdiction to consider the Complaint.

### **The Specifics of the Complaint**

15. The Complainant provided the following comments and arguments in respect to the Complaint:
  - a. On 3 July 2020 Cr Kevin Bailey published an article on page 4 of the Echo Newspaper. The same had the heading "Advertorial" and was signed "*Mayor Kevin Bailey City of Swan 0407147351*".

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<sup>7</sup> Section 5.107(4) and 5.109(2) of the Act

<sup>8</sup> Section 5.107 and 5.109 of the Act

b. The Advertorial was as follows:

**ADVERTORIAL**

Politician bashing is a national sport in Australia, and no more so than in Local Government. But today, the shoe is on the other foot as this canary in the coalmine calls out to our State Leaders to show some respect and support.

For too long, Councillors have maintained their silence for fear of vital funding being stemmed by an embarrassed State Government.

Councils have always been the whipping boy of the State Government, and in all my time serving the ratepayers of the City of Swan, I've never been more infuriated by a State Government. I'm not sure if their antics are intentionally designed to mislead ratepayers or if they are simply misinformed by their advisers. I've been assuming the latter but recent comments by the WA Treasurer and Minister for Local Government have me perplexed.

The misleading statements that Local Government' have the ability to totally control rates demonstrate our States' top Ministers don't understand the rate setting process.

At a briefing to Local Government Mayors and CEOs, Minister Templeman very theatrically urged us to raid our reserves, borrow more, redeploy staff at full pay rather than standing them down, accelerate capital works programs and increase spending to keep the local economy going. The Job Keeper program specifically excluded Local Government so the hundreds of staff employed in libraries, community centres, leisure centres, gyms, youth centres, and crèches across the State were in a worse position than many in the private sector. While it gave some the opportunity to undertake alternative work, the efficiencies achieved were negligible. However, the cost to the ratepayer is enormous and will continue to be absorbed by the ratepayer while the pandemic continues.

Perplexingly, while our State Ministers from the Premier down demanded we freeze rates and charges and increase spending, there is confirmation that non residential (including Local Governments) will increase. These increased expenses mean councils need to draw more from rates.

Spend more, charge less is not the sustainable model we're working towards, Minister.

Rates revenue needs to be just one part of the Council's income, yet current legislation prevents a Council from entering into significant business ventures with the intent to drive profit to offset rates... the more the business makes, the less residents pay in rates. Hopefully this will be addressed in the modernised Local Government Act.

Council rates are set by multiplying the Rate-in-the-Dollar with the gross rental value (GRV) of your property, regardless of whether you rent it out or not. The GRV is calculated by the State Government's Valuer-General, also known as Landgate, and is based on a three year average – from two years ago. Then you need to add on the waste charges, and the State Government's Emergency Services Levy.

2020 is a revaluation year, meaning that every property in WA will receive a new valuation. Some properties will increase, most will decrease, but almost all will change. Councils have no authority over this, the Minister for Local Government does.

I have written to the Minister imploring him to use his new emergency powers to postpone the revaluation - but to no avail.

Alternatively, the Treasurer could have amended the Land Valuations Act, but he chose to hit the hip pocket of Western Australian mum's and dad's instead.

Council cannot set a differential rate for each of over 61,000 properties in the City of Swan so we have no mechanism to genuinely freeze rates. Instead, Swan, like many Councils, will freeze the overall rate revenue at the same time freezing fees and charges.

The implementation of revaluations will always be unpopular for its opaque process and lack of consultation with homeowners.

Sceptics may see the double standard of a State Government using 2018 data to charge an Emergency Services Levy, 2020 data to charge a sewerage levy but refusing to postpone the 2020 valuations imposed on Local Government rates.

The Premier asked Local Governments to freeze household rates and charges, "No worries Premier, Local Governments are happy to help, but when the time came for your Government to give us the one thing that could ensure that no ratepayers rates increased this year you turned your back on us."

"We're all in this together.....or are we."

**Mayor Kevin Bailey City of Swan 0407147351**

("the Advertorial").





- c. Mayor Bailey would have known or ought to have known that he was not authorised to use his position as the Mayor of the City of Swan to make disparaging statements about the Western Australian State Government.
- d. Mayor Bailey said:

*“I’ve never been more infuriated by a State Government. I’m not sure if their antics are intentionally designed to mislead ratepayers or if they are simply misinformed by their advisers ... The misleading statements that Local Government[sic] have the ability to totally control rates demonstrate our States’ top Ministers don’t understand the rate setting process.”*
- e. In the Advertorial Mayor Bailey stated:

*“The Premier asked Local Governments to freeze household rates and charges, No worries Premier, Local Governments are happy to help, but when the time came for your Government to give us the one thing that could ensure that no ratepayers rates increased this year you turned your back on us.”*
- f. Mayor Bailey would have known or ought to have known that such statement was not a view shared by other City of Swan Councillors and that the City of Swan Council had not endorsed the view
- g. Mayor Bailey did not make clear that his statements had not been endorsed by the City of Swan Council, that these were only his own opinion.
- h. Mayor Bailey would have known or ought to have known that:
  - i. by signing the Advertorial as *“Mayor Kevin Bailey City of Swan”* he improperly used the office of Mayor of the City of Swan to add authority to statements that were his own personal opinion;
  - ii. to an ordinary person it would appear the statements were endorsed by the City of Swan Council and other City of Swan Councillors;
  - iii. that claims and accusations that WA State Government Ministers’:
    - A. *“antics are intentionally designed to mislead ratepayers”* (paragraph 3);
    - B. issued *“misleading statements”* and *“don’t understand the rate setting process”* (paragraph 4); and
    - C. operate under a *“double standard”* (paragraph 14),would cause detriment to the reputation of the City of Swan because it would imply that:
    - D. the City of Swan was in heated disagreement with the State Government when this was not the case; and
    - E. the City of Swan had conducted itself in a way that was reckless and inflammatory.
- i. Mayor Bailey would have known or ought to have known that the City of Swan Councillors who did not endorse his statements would have been disadvantaged

because their reputations would have been detrimentally impacted amongst residents and ratepayers who considered the accusations to be inflammatory and offensive, the claims to be inappropriate, wrong and lacking in integrity.

- j. Mayor Bailey should issue a statement in the Echo Newspaper that:
  - i. the statements made by him in the Advertorial are his personal views only, that these views have not been endorsed by City of Swan Council and are not shared by other City of Swan Councillors;
  - ii. acknowledges that he misused the office of Mayor in publishing a personal statement that was not endorsed by City of Swan Council;
  - iii. acknowledges the damage this may have caused to the reputation of the City and its Councillors; and
  - iv. unreservedly apologises for any loss of reputation that he may have caused.

### **The Respondent's Response**

- 16. By an email dated 31 August 2020, Mayor Bailey provided a response to the Complaint.
- 17. Mayor Bailey denies that he has committed any minor breach.
- 18. Mayor Bailey provided the following comments and arguments regarding the Complaint:
  - a. The Advertorial was a piece penned by Mayor Bailey that expressed his opinion.
  - b. The Advertorial was published as a paid advert/commercial on instruction to the ECHO Newspaper. Mayor Bailey paid for the publishing from his own funds and did not seek reimbursement from the City of Swan.
  - c. Everything in the Advertorial is factual.
  - d. Mayor Bailey, along with other Mayors, lobbied the State Government to defer the GRV valuations until 2021 to achieve the request from the Premier Mark McGowan to freeze household rates.
  - e. Mayor Bailey wrote as the Mayor of the City of Swan to both the Treasurer Ben Wyatt and the Minister for Local Government, David Templeman, requesting that they assist Local Governments to achieve a rate freeze in this COVID emergency. Mayor Bailey asked them to use their powers to amend either the *Land Tax Act* or the *Local Government Act* to allow for revaluations to be deferred.
  - f. Mayor Bailey made no secret of his endeavours in this regard and Council was aware of the letters he wrote.
  - g. Mayor Bailey signed the Advertorial as the Mayor of the City of Swan to highlight the fact that he was qualified to make the statements contained in the Advertorial and that he knew what he was talking about.



- h. Following the publishing of the Advertorial Mayor Bailey received a number of calls from other Mayors across Perth complimenting him for saying how it was and for expressing an opinion similar to their own.
- i. At the July meeting of Council a notice of motion was proposed by Cr Andrew Kiely requesting, among other things, that:
  - i. the City pay for an advert in the Echo newspaper quantifying Mayor Bailey's statements as his own; and
  - ii. Mayor Bailey publish a retraction for comments made which brought the City into disrepute.
- j. The motion was subsequently defeated and Mayor Bailey contends that by virtue of that fact, Council did in fact endorse his comments in the ECHO Newspaper.
- k. Mayor Bailey contends his comments were not out-of-line or offensive
- l. Mayor Bailey received no personal advantage from the Advertorial, and no one was disadvantaged from his comments.
- m. The City of Swan was not disadvantaged nor was it discredited.
- n. The opinions expressed were Mayor Bailey's and the details were factual.
- o. Mayor Bailey brings into question the timing of Mr Knight's complaint as he would assume that if he was so outraged a complaint of some kind would have been lodged sooner.

### **Panel's Consideration**

#### **Regulation 7**

19. Regulation 7 prohibits councillors engaging in conduct to either gain an advantage for themselves (or another party) or cause detriment to another party and specifically provides as follows:

#### ***"7. Securing personal advantage or disadvantaging others***

- (1) *A person who is a council member must not make improper use of the person's office as a council member —*
    - (a) *to gain directly or indirectly an advantage for the person or any other person; or*
    - (b) *to cause detriment to the local government or any other person.*
  - (2) *Subregulation (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.*
20. It is not alleged that Mayor Bailey sought any advantage for any party, so the Panel has only considered regulation 7(1)(b) in this Complaint.



21. To make a finding of a minor breach of regulation 7(1)(b) of the Regulations the Panel must be satisfied that it is more likely than not that:
- a. Mayor Bailey was an elected member at the time of the alleged breach and the time of the determination;
  - b. Mayor Bailey made use of his office as Council member of the Shire;
  - c. when viewed objectively, such use was an improper use of Mayor Bailey' office in that it:
    - i. involved a breach of the standards of conduct that would be expected of a person in the position of councillor by reasonable persons; and
    - ii. was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty; and
  - d. Mayor Bailey engaged in the conduct in the belief that detriment would be suffered by another person.

### **Regulation 7**

#### **Mayor Bailey was an Elected Member at the relevant times**

22. Mayor Bailey was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.
23. This element is met.

#### **Mayor Bailey made use of his office as Council Member of the City**

24. Mayor Bailey has asserted that:
- a. as the views expressed were his own;
  - b. he paid for the Advertorial personally; and
  - c. the use of his title as Mayor was only to *"highlight the fact that he was qualified to make the statements"*,
- the Advertorial was therefore written by him in his personal capacity;
25. The mere assertion that a councillor is acting in their personal capacity, or the fact that a statement contains a councillor's personal opinion, is not conclusive evidence that a party is acting in their personal capacity.
26. When an elected member makes statements in public, a number of factors may indicate whether that councillor is acting in their capacity as a councillor such as:
- a. the subject matter or contents of the communication and the degree to which the same are related to the Council or local community;
  - b. the public or private nature of the communication;
  - c. the passive or active nature of the communication; and
  - d. the audience with which the communication is shared.





27. The standards of behaviour expected of councillors are of a generally higher standard than a member of the public due to their public position. Once a person occupies a public position, and that public status is known (either as a result of a direct acknowledgment [i.e. reference to oneself as a councillor] or due to general reputation), is a difficult undertaking to separate that person's actions undertaken in their public capacity from that person's actions in their capacity as an individual.
28. In this case:
  - a. Mayor Bailey specifically published the Advertorial under the name "*Mayor Kevin Bailey City of Swan*";
  - b. Mayor Bailey refers to himself in his capacity as a councillor within the text of the Advertorial;
  - c. The subject matter of the Advertorial relates to the relationship between the State Government and Local Governments, and specifically the issue of rates;
  - d. The Advertorial was published publicly in a local community newspaper paper with an intended audience of members of the public, including ratepayers of the City; and
  - e. There is no disclaimer or other wording which indicates that the Advertorial was personal opinion only.
29. On the basis of the above, the only reasonable inference is that a member of the public reading the Advertorial would believe Mayor Bailey wrote the Advertorial in his official capacity as Mayor, not as a private individual.
30. The Panel therefore finds that it is more likely than not that Mayor Bailey wrote and published the Advertorial on the basis of his knowledge and authority as Mayor, not a member of the public, and was therefore acting in his capacity as an elected member made use of his office as a council member.
31. This element is met.

Mayor Bailey's use was improper

32. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or lack of wisdom<sup>9</sup>. It requires an abuse of power or the use of the councillor's position in a manner that such councillor knew (or ought to have known) was not authorised.
33. Impropriety does not depend on a councillor's consciousness of impropriety. It is to be judged objectively and does not involve an element of intent<sup>10</sup>.
34. Any decision as to what is "improper" cannot be made in isolation but must be considered in the relevant context including the specifics of the relevant event as well as councillor's formal role and responsibilities.
35. In the case of impropriety arising from an abuse of power, a councillor's alleged knowledge or means of knowledge of the circumstances in which the power is

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<sup>9</sup> Complaint of Minor Breach No. SP 3 of 2013

<sup>10</sup> *Chew v R* [1992] HCA 18

exercised and his purpose or intention in exercising the power will be important factors in determining whether the power has been abused<sup>11</sup>.

36. The City has a “Code of Conduct for Councillors and Committee Members” published September 2015 (“**the Code**”) which sets out certain expectations in respect to the conduct of Councillors to be read in conjunction with the Regulations. The relevant sections of the Code are as below:

a. High Ethical Standard

*“ Councillors and Committee Members of the City of Swan should aspire to high ethical standards including those in Regulation 3(1) of the Local Government (Rules of Conduct) Regulations 2007. The standards in Regulation 3(1) prescribe the following conduct:-*

*....*

*4. Avoid damage to the reputation of the local government; and*

*....*

*7. Treat others with respect and fairness; and*

*.....”*

b. Mayor

*“ The Mayor is elected from amongst Councillors and by Councillors at the first special Council meeting after the City biennial elections in October. The Mayor has a general leadership role with the City. The Mayor is in a position to facilitate good relationships between Councillors, between Councillors and the administration, and between the Mayor and the CEO.*

*The Mayor facilitates good decision making through skilful chairing of the Council meeting.*

*The Mayor has an important role as a facilitator. Concepts such as participation, communication, involvement, consensus, mutual respect and listening are important. The Mayor's facilitation skills play a key role in ensuring the Council operates successfully.*

*The Mayor can also support good governance by modelling good behaviour and ethics in fulfilling Council and community leadership role.*

*As specified in the Act, responsibilities include:*

- Providing leadership and guidance to the community in the district*
- Presiding at Council meetings*
- Carrying out civic and ceremonial duties on behalf of the City*
- Speaking on behalf of the City*
- Liaising with the CEO about City affairs and the performance of its functions*

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<sup>11</sup> Treby and Local Government Standards Panel [2010] WASAT 81 (at 31); Chew v The Queen (1992) 173 CLR 626 (at 640 - 641 [Dawson JJ]); R v Byrnes (1995) 183 CLR 501 – (at 514 - 515 [Brennan, Deane, Toohey and Gaudron JJ] and at 521 [McHugh J]).

*The Mayor also assists Councillors to balance their accountability to their constituents and their accountability to the City as a whole."*

c. Personal Behaviour

*"(a) Councillors and Committee Members will:*

*(i) act, and be seen to act, properly and in accordance with the requirements of the law and the terms of this Code;*

*.....*

*(iv) make no allegations which are improper or derogatory (unless true and in the public interest) and refrain from any form of conduct, in the performance of their official duties, which may cause any reasonable person unwarranted offence or embarrassment; and...."*

d. Corporate Obligations

*"(b) Communication and Public Relations*

*As a representative of the community, Councillors need to be not only responsive to community views, but to adequately communicate the decisions and policies of the Council. In doing so Councillors should acknowledge that:*

- the decision-making processes of Council, which are based on the decisions of the majority of Councillors, should be respected;*
- information relating to decisions of the Council on approvals and permits ought only be communicated in an official capacity by a designated officer of the Council;*
- the Mayor is authorised to speak to the media on behalf of the Council. In the Mayor's absence, the Deputy Mayor may speak to the media on behalf of Council. Alternatively, Council will appoint a Councillor to speak to the media.*
- if making statements to the media about a Council decision or policy, Councillors must clearly indicate that they are expressing their personal views and are not speaking on behalf of the City."*

37. The City also has a published Policy "*POL-C-134 Media Protocols*" which governs the manner in which councillors and employee of the City interact with the Media. The Media Protocol relevantly provides as follows:

a. 2.1 General Provisions

*" .....*

*b) The Mayor, or delegate, shall be the spokesperson for a media release or comment unless the content relates to a staff or organisational issues. In this instance, the CEO, or delegate, will be the spokesperson.*

*.....*



- e) *All comments to the media shall be presented positively, reflect the values of the City and must not promote community groups or businesses unless the City is directly involved in a partnered activity or event.*
- f) *All media releases and responses to the media must be approved by the CEO or the Mayor."*
- b. 2.2.1 Council Protocols
  - "a) *The Mayor speaks to the media on behalf of the Council on matters related to the governance of the City except when the Mayor is unavailable to perform this function. In which case, the Deputy Mayor may speak to the media.*  
  
*If the Mayor and Deputy Mayor are both unavailable to speak to the media, then another councillor or the CEO may be appointed by the Mayor or Deputy Mayor to speak on the Council's behalf.*
  - b) *Councillors who speak to the media and who have not been authorised to speak on behalf of the Council, must make it clear to the journalist that their statements and comments are their own and not those of the Council."*
- c. 2.3 Media Management
  - "a) *Marketing and Public Relations is responsible for managing and initiating the City's media liaison. The Coordinator, Corporate Communications, Coordinator, Branding and Communications or Manager, Marketing and Public Relations are responsible for the preparation and distribution of all media releases. Written material must not be forwarded to the media without prior clearance by the Coordinator, Corporate Communications, Coordinator, Branding and Communications or Manager, Marketing and Public Relations and approved by the CEO or Mayor...."*
- 38. The adopted codes and policies of a local government provide a framework for consideration of the expected standards of behaviour of elected members and as to whether certain conduct can be viewed as "improper".
- 39. The Complainant argues that Mayor Bailey acted improperly as several statements were misleading and he knew that these statements would be wrongfully taken to be representative of the position of the City.
- 40. Mayor Bailey asserts that:
  - a. his comments were not out-of-line or offensive;
  - b. all councillors and the City knew Mayor Bailey's stance on this issue; and
  - c. the fact that a subsequent motion of Council (at the July Ordinary Council Meeting) that the City pay for an advert to confirm the statements were Mayor Bailey's and that he publish a retraction failed, implies that the Council endorsed the Advertorial.
- 41. The Panel considers that there are two issues to be contemplated when considering whether Mayor Bailey's conduct was improper:



- a. the fact that the Advertorial was published under the name "*Mayor Kevin Bailey City of Swan*"; and
  - b. the specific contents of the Advertorial.
42. It is clear from:
  - a. section 2.8(1)(d) of the Act;
  - b. the Code of Conduct,
  - c. section 2.2 of the Media Protocols,that it is intended that the Mayor is the official spokesman for the relevant Local Government and Council.
43. Although a Mayor does not usually need any express permission or a direction from Council to act in his role as spokesperson, it is apparent from the Media Protocol that public statements are intended to be subject to an authorisation process.
44. From the circumstances it is apparent that the Advertorial:
  - a. was not an official statement of the City's position relating to the subject but is clearly Mayor Bailey's personal opinion; and
  - b. was purposefully prepared and published outside of Mayor Bailey's official spokesperson role.
45. When Mayor Bailey signed the Advertorial as "*Mayor Kevin Bailey City of Swan*" he was creating the misleading impression that the statements in the Advertorial were the official position of the City.
46. It is clearly possible that the majority of Council agreed with Mayor Bailey's views on the subject, however, the relevant motion at the July Ordinary Council Meeting does not, in fact, establish this.
47. In addition, the fact that Mayor Bailey went to the effort of paying for and publishing the Advertorial indicates that he was likely aware that it would not be appropriate to publish the same in his capacity as spokesperson of the City.
48. There is also no part of the Advertorial which clearly indicate(s) that he is expressing his personal views and are not speaking on behalf of the City in breach of the Code of Conduct.
49. The Panel does not consider that the use of the word "Advertorial" itself implies that the Advertorial was a private statement, it simply establishes that the same had been paid for by an unknown party. The occasional use of a first person narrative does not establish this position either.
50. Once in the position of Mayor, it is incumbent on that elected member to:
  - a. be aware of his or her statutory obligation to speak on behalf of the Local Government and Council;
  - b. consider all public statements in light of this official role; and





- c. ensure that they provide leadership and model appropriate behaviour to other elected members and employees of the City.
51. While the Panel can appreciate that this matter was of particular importance to Mayor Bailey, due to the nature of the role of Mayor as spokesperson of the City, a degree of restraint and balance is required when making public statements due to the public nature of that role and the implication that statements by a Mayor are officially authorised and represent the formal position of the City.
52. It is simply not appropriate for a Mayor, or any elected member, to indulge in a public tirade without due consideration of how the same may be viewed by the public.
53. The Panel finds that it is more likely than not that in publishing the Advertorial Mayor Bailey acted improperly as he:
  - a. failed to properly consider his statutory role as spokesperson of the City;
  - b. acted outside of the intended scope of the Code of Conduct and Media Protocol;
  - c. knew it would not be appropriate to publish the Advertorial officially in his capacity as Mayor of the City, but made no effort to assert the same was his personal views; and
  - d. wilfully or negligently did not consider the impression that publishing the Advertorial under the name "*Mayor Kevin Bailey City of Swan*" would have on members of the public reading the same.
54. In respect to the actual contents of the Advertorial the Complainant asserts that the particular following phrases are improper:
  - a. *"I've never been more infuriated by a State Government. I'm not sure if their antics are intentionally designed to mislead ratepayers or if they are simply misinformed by their advisers ... The misleading statements that Local Government[sic] have the ability to totally control rates demonstrate our States[sic] top Ministers don't understand the rate setting process"*;
  - b. *"The Premier asked Local Governments to freeze household rates and charges, No worries Premier, Local Governments are happy to help, but when the time came for your Government to give us the one thing that could ensure that no ratepayers rates increased this year you turned your back on us."*; and
  - c. the State Government used a *"double standard"*.
55. Although there is an established legal principle that "*public acts of a public man*" may be the subject of fair comment or even criticism, such criticism should not extend to any assertion of misconduct<sup>12</sup>.
56. The Panel finds to the required standard that the use of the words "*antics*", "*intentionally mislead*", "*simply misinformed*", "*misleading statements*" and "*Ministers don't understand*" question both the ability and the integrity of State Ministers and, in particular, the Premier, Treasurer and Minister for Local Government who are expressly referred to in the Advertorial.

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<sup>12</sup> *Davis v Shepstone (1886) 11 App Cas Lord Herschell LC (at 190)*



57. Further, while not necessarily improper when considered in isolation the use of expressions such as:
- "turned your back on us";*
  - "Councils have always been the whipping boy of the State Government";*
  - "the Treasurer....chose to hit the hip pocket of Western Australian mum's and dad's instead.";*
  - "We're all in this together.... or are we.",*
- indicate that Mayor Bailey has the clear opinion that the State Government has acted against the best interests of the rate payers of Western Australia and thereby attacks the credibility of the State Government.
58. In addition to the particular comments identified above, the Panel also finds that the general tone and character of the Advertorial is aggressive, combative and sarcastic.
59. The Panel considers that the above comments, when considered in the context of the whole Advertorial, go beyond a simple criticism or robust comment in the spirit of political freedom, and would be considered by a reasonable person to be discourteous and intentionally disparaging.
60. When considered in context of the Code and Media Protocol, the Panel finds it is more likely than not that Mayor Bailey was in breach of the following clauses:
- "Avoid damage to the reputation of the local government"* – the Advertorial had the capacity to damage the reputation of the City in that it incorrectly represented the formal position of the City to the public and the State Government;
  - "Treat others with respect and fairness"* – the Advertorial was not respectful in tone or content;
  - "The Mayor can also support good governance by modelling good behaviour and ethics in fulfilling Council and community leadership role"* – Mayor Bailey did not model good behaviour to other councillors by:
    - attempting to circumvent his role as spokesperson of the City, while still speaking with the authority of an elected Mayor; and
    - using discourteous and disparaging remarks to make public comment;
  - "All comments to the media shall be presented positively, reflect the values of the City"* – Although the Panel does not consider that this policy should prevent justified criticism, the Advertorial was presented in a actively negative manner and, as discussed above, did not reflect the official position or values of the City.
61. As noted in Treby (albeit with respect to comments made regarding other councillors):
- "A councillor is able to meaningfully participate in the good government of the persons in the district and to duly, faithfully, honestly and with integrity fulfil the duties of the office for the people in the district according to his or her best judgment and ability, without reflecting adversely upon the character or actions of, or imputing any motive to, another member or an officer of the local*



*government. Indeed, good government requires courtesy amongst those elected to govern.<sup>13</sup>*

62. The purpose of Regulation 7 is not to prevent political discussion and comment, or even to prevent criticism, but is intended to regulate the manner in which such discussion or comment is undertaken.
63. The Panel considers that it would have been possible for Mayor Bailey to publicly disseminate his views in a manner which was fair and respectful rather than inflammatory.
64. The Panel acknowledges that in the relevant circumstances, Mayor Bailey is being held to a higher standard than other councillors may be due to his statutory role of publicly representing the City and Council.
65. The Panel finds it is more likely than not that the comments contained in the Advertorial and the general tone of the publication was improper as the same:
  - a. was in breach of the Code and the Media Protocol;
  - b. was of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
  - c. is deserving of a penalty.
66. This element not met.

Mayor Bailey intended detriment to be suffered by another person

67. "Detriment" means loss, damage or injury. It is construed widely and includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage.
68. It is not necessary to find whether any detriment was actually suffered<sup>14</sup>, but an intent to cause such detriment must be established.
69. The Complainant argues that:
  - a. detriment was caused to the reputation of the City of Swan as the Advertorial implied the City of Swan:
    - i. was in heated disagreement with the Western Australian State Government and
    - ii. had conducted itself in a way that was reckless and inflammatory; and
  - b. City of Swan Councillors were disadvantaged because their reputations would have been detrimentally impacted.
70. Mayor Bailey asserts that:

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<sup>13</sup> *Treby and Local Government Standards Panel [2009] WASAT 224 at 19.*

<sup>14</sup> *Yates and Local Government Standards Panel [2012] WASAT 59 at [72]*



- a. he received no personal advantage from the Advertorial, and no one was disadvantaged from his comments; and
  - b. the City of Swan was not disadvantaged nor was it discredited.
71. It is not required that a disadvantage actually occurs, only that the party intended the disadvantage when undertaking the relevant conduct.
  72. The Panel does not find that Mayor Bailey intended to cause a detriment to the City of Swan. Rather, it was Mayor Bailey's intent to air his frustrations and publicly criticise the manner in which the particular rates issue had been handled by the State Government.
  73. Similarly, the Panel considers that Mayor Bailey had no conscious intent to disadvantage the other councillors of the City of Swan.
  74. Although it is possible that the City and certain councillors suffered some reputational damage due to the inflammatory nature of Advertorial, this does not establish intent.
  75. Despite the above, the Panel does find to the required standard that the only reasonable inference is that Mayor Bailey intended the Advertorial to diminish the reputation of the Premier, the Minister of Local Government and the Treasurer (and the State Government in general) by attempting to cause others to think less favourably of them.
  76. The various comments and particular language used (as discussed above) was also insulting and derogatory in that it called into question the intelligence, capability and integrity of the Ministers concerned.
  77. Irrespective of the fact that the State Government and particular Ministers may often be the subject of significant public debate and criticism, or that it is generally accepted that politicians should be held accountable for their actions and policies, *"the desirability of that public scrutiny and accountability does not have a correlation in a right to engage in derogatory personal attacks"*<sup>15</sup>.
  78. As such, the Panel finds, to the required standard that Mayor Bailey did intend to cause a detriment to the Premier, the Minister of Local Government, the Treasurer and the State Government in general.
  79. This element is met.

### Conclusion

80. The elements required to find a breach of regulation 7(1)(b) of the Regulations have been met.

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<sup>15</sup> *Treby and Local Government Standards Panel [2010] WASAT 81 at 88*



### **Panel's Findings**

81. Mayor Bailey did commit a breach of Regulation 7(1)(b) of the Regulations and therefore did commit a minor breach.

A handwritten signature in black ink, appearing to read 'E Power'.

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Emma Power (Presiding Member)

A handwritten signature in black ink, appearing to read 'P Rogers'.

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Peter Rogers (Member)

A handwritten signature in blue ink, appearing to read 'G MacMile'.

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Gordon MacMile (Deputy Member)





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## Local Government Standards Panel

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Complaint Number	SP 2020-099
Legislation	<i>Local Government Act 1995 (WA)</i>
<b>Complainant</b>	<b>Mr David Knight</b>
<b>Respondent</b>	<b>Mayor Kevin Bailey</b>
Local Government	<b>City of Swan</b>
Regulation	Regulation 7 of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i>
Panel Members for	Mr Michael Connolly (Presiding Member)
Penalty Consideration	Cr Peter Rogers (Member) Mrs Emma Power (Member)
Heard	7 October 2020 Determined on the documents
Penalty Considered	15 January 2021
Outcome	Public Apology

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## DECISION AND REASONS FOR DECISION

Delivered 9 February 2021

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### 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 7 October 2020, the Panel found that Mayor Kevin Bailey, Mayor for the City of Swan (**“the City”**), committed one minor breach under the Local Government Act 1995 (WA) (**“the Act”**) and regulation 7 of the *Local Government (Rules of Conduct) Regulations 2007* (WA) (**“the Regulations”**) when he published an “Advertorial” in the Echo Newspaper which contained disparaging statements about the State Government (**“the Minor Breach”**).

## Jurisdiction and Law

2. The Panel convened on 15 January 2021 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 Mayor Bailey had ceased to be, or was disqualified from being, a councillor.
4. 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).<sup>1</sup>
5. By a letter dated 17 November 2020, Mayor Bailey was:
  - a. notified of the Panel’s finding of the Minor Breaches;
  - 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*.

## Possible Sanctions

6. 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) *ordering that no sanction be imposed; or*
  - (b) *ordering that —*
    - (i) *the person against whom the complaint was made be publicly censured as specified in the order;*  
*or*
    - (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*
    - (iv) *the person against whom the complaint was made pay to the local government specified in the order an amount equal to the amount*

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<sup>1</sup> *Local Government Act 1995* (WA), s 5.110(5).



*of remuneration and allowances payable by the local government in relation to the complaint under Schedule 5.1 clause 9;*

*or*

*(c) ordering 2 or more of the sanctions described in paragraph (b).*

### **Respondent's Submissions**

7. Mayor Bailey did not make any submissions regarding how the Minor Breach should be dealt with.

### **Panel's Consideration**

8. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach.
9. The Panel may order under section 5.110(6)(a), that no sanction be imposed with respect to the complaint, not to reverse the Panel's finding of a breach, but to indicate that in all the circumstances the relevant councillor should not be penalised further.
10. Guidance as to the factors which the Panel may consider in determining the appropriate penalty to impose include, but are not limited to, the following:
  - a. the nature and seriousness of the breaches;
  - b. the councillor's motivation for the contravention;
  - c. whether or not the councillor has shown any insight and remorse into his/her conduct;
  - d. whether the councillor has breached the Act knowingly or carelessly;
  - e. the councillor's disciplinary history;
  - f. likelihood or not of the councillor committing further breaches of the Act;
  - g. personal circumstances at the time of conduct, and of imposing the sanction;
  - h. need to protect the public through general deterrence and maintain public confidence in local government; and
  - i. any other matters which may be regarded as aggravating conduct or mitigating its seriousness<sup>2</sup>.
11. In this instance the conduct was highly public and Mayor Bailey was aware that his public statements were not authorised by the City.
12. Mayor Bailey has not indicated any remorse or insight into his actions.
13. In this instance, the Panel considers that the appropriate penalty is that Mayor Bailey publicly apologise.

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<sup>2</sup> Chief Executive Officer, Department of Local Government and Communities and Scaffidi [2017] WASAT 67 (S)



14. Making a public apology is a significant sanction, being a personal admission by the individual of wrongdoing. It is a suitable and appropriate penalty when a councillor's conduct:
- a. adversely affects particular individuals<sup>3</sup>; and/or
  - b. does not meet the standards other councillors seek to uphold.

**Panel's decision**

15. The Panel orders pursuant to section 5.110(6)(b)(ii) of the Act that, in relation to the Minor Breach of regulation 7 of the Regulations, Mayor Bailey publicly apologise as set out in the attached Order.

Mick Connolly (Presiding Member)

Emma Power (Member)

Peter Rogers (Member)

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<sup>3</sup> *Treby and Local Government Standards Panel* [2010] WASAT 81 [127] (Pritchard J).



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## ORDER

Delivered 9 February 2021

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### DEFAMATION CAUTION

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### THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Mayor Kevin Bailey, a councillor for the City of Swan **publicly apologise**, as specified in paragraph 2, or failing compliance with paragraph 2, then paragraph 3 below shall apply.
2. At the ordinary council meeting first occurring after the expiration of **28 days** from the date of service of this Order on him, Mayor Bailey shall:
  - a. attend the relevant ordinary council meeting;
  - b. ask the presiding person for his or her permission to address the meeting to make a public apology to the public;
  - c. make the apology immediately after Public Question Time or during the Announcements part of the meeting, or at any other time when the meeting is open to the public, as the presiding person thinks fit; and
  - d. address the Council and public as follows, without saying any introductory words before the address, and without making any comments or statement after the address:

"I advise this meeting that:

- i. A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened *the Local Government (Rules of Conduct) Regulations 2007 (WA)* when I published an Advertorial in the Echo Newspaper which contained disparaging statements about the State Government.
- ii. The Panel found that I breached regulation 7(1)(b) of the said Regulations and that my conduct was in breach of the City's Code of Conduct and Media Policy and deserving of a penalty.
- iii. I accept that I should not have engaged in the relevant conduct.
- iv. I now apologise to the Premier, the Treasurer, the Minister for Local Government as well as the State Government in general, the public and my fellow Councillors."





3. If Mayor Bailey fails to, or is unable to, comply with the requirements of paragraph 2 above THEN, within the next **28 days** following the ordinary council meeting referred to in paragraph 2 above, the Chief Executive Officer shall arrange for the following notice of public apology to be published in no less than 10 point print or font:
- on the Facebook Page of the City of Swan;
  - on an appropriate page of the website of the City of Swan; and
  - be published in every City of Swan public or community newsletter (whether in electronic or print copy) (if any):

**PUBLIC APOLOGY BY MAYOR KEVIN BAILEY**

A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened the Local Government (Rules of Conduct) Regulations 2007 (WA) when I published an Advertorial in the Echo Newspaper which contained disparaging statements about the State Government.

The Panel found that I breached regulation 7(1)(b) of the said Regulations and that my conduct was in breach of the City's Code of Conduct and Media Policy and deserving of a penalty.

I accept that I should not have engaged in the relevant conduct.

I now apologise to the Premier, the Treasurer, the Minister for Local Government as well as the State Government in general, the public and my fellow Councillors.

Mick Connolly (Presiding Member)

Emma Power (Member)

Peter Rogers (Member)



## 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."*