

## LOCAL GOVERNMENT STANDARDS PANEL

Established under section 5.122 of the *Local Government Act 1995* (WA)

Complaint Number	SP 49 of 2015 DLG 20150241
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Mr Ian Hill</b>
<b>Subject of complaint</b>	<b>Cr Mark Burns</b>
Local Government	<b>City of Subiaco</b>
Regulation	Regulations 4(2) and 7(1)(b) of the <i>Local Government (Rules of Conduct)</i> <i>Regulations 2007</i>
Date of Minor Breach	25 August 2015
Date of Minor Breach Finding	23 February 2016
Sanction Hearing	2 August 2016
Panel Members	Mr B Jolly (Presiding Member) Councillor P Kelly (Member) Ms M Strauss (Member)
Sanction Decision	Public censure
Date of Sanction Decision	2 August 2016

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### SANCTION DECISION AND REASONS FOR DECISION

Published 23 August 2016

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**1. Two Minor Breach findings on 23 February 2016**

- 1.1 On 23 February 2016 the Panel found that Cr Mark Burns, a councillor of the City of Subiaco (the City), breached regulation 4 of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) by making statements at the Ordinary Council Meeting on 25 August 2015 (the OCM Statements) in relation to Wilson Parking Australia Pty Ltd 1992 (Wilson Parking).
- 1.2 On 23 February 2016 the Panel also found that Cr Burns breached regulation 7 (1)(b) of the Regulations by making statements on 6PR Radio on 27 August 2015 (the 6PR Statements) in relation to Wilson Parking.
- 1.3 The Panel published its Reasons for these findings of two Minor Breaches on 7 April 2016.

**2. Breach of Regulation 4(2)**

- 2.1 In paragraphs 8.2(a) and (b) of its Reasons the Panel said it was satisfied to the required standard that Cr Burns breached regulation 4:
- (a) by stating during 25 August 2015 OCM that Wilson Parking were “corporate psychopaths” Cr Burns used an offensive or objectionable expression in reference to any “other person”, thereby breaching clause 4.16(3) of the City’s Meeting Procedures Local Law 2013 (the Standing Orders); and
- (b) by stating during the 25 August 2015 OCM that Wilson Parking were “like vultures on a barbed wire fence” Cr Burns used an offensive or objectionable expression in reference to any an “other person”, thereby breaching clause 4.16(3) of the Standing Orders.

**3 Breach of Regulation 7(1)(b)**

- 3.1 In paragraphs 10(a) and (b) of its Reasons the Panel said it was satisfied to the required standard that on 27 August 2015 Cr Burns breached regulation 7(1)(b):
- (a) by making the 6PR Statements, Cr Burns made improper use of his office as a councillor of the City in that:
- (i) it is the function of the Mayor of the City, not individual councillors, to speak on behalf of the City;
- (ii) viewed objectively, the 6PR Comments might reasonably have been understood by those who heard them as having the endorsement of the Council or the Mayor, which was not the case;
- (iii) pursuant to clause 3(b) of the Regulations a Council member in his or her capacity as a council member “should avoid damage to the reputation of the local government”; and
- (iv) the 6PR Comments were intemperate and when viewed objectively, might reasonably have been understood by those who heard them as reflecting poorly upon the reputation of the City; and
- (b) Cr Burns made the 6PR Statements to cause detriment (or in the belief that detriment would be suffered) by Wilson Parking as this would be the inevitable consequence of describing Wilson Parking, in the public domain, as “a bunch of corporate psychopaths” and being like “vultures sitting on a barbed wire fence”.

#### **4. Notice to Cr Burns of the Minor Breaches**

- 4.1 By letter dated 7 April 2016, as required by section 5.110(4) and (5) of the *Local Government Act 1995* (the Act), the Department gave Cr Burns:
- (c) notice of the Panel's findings of the Minor Breaches;
  - (d) a copy of the Panel's Reasons; and
  - (e) an invitation to make submissions about how the Panel should deal with the Minor Breaches.

#### **5. Cr Burns' response about sanctions**

- 5.1 On 26 April 2016, Cr Burns emailed this written submission to the Department (his Submission) for the Panel's consideration:

**RE: SP 49 OF 2015 – Local Government Act - Section. 5.110(6)**

Thank you for inviting me to make a Submission under Section 5.110(6) of the Local Government Act (the "Act").

I request that the Local Government Standards Panel (the "Panel") Dismisses the Matter subject to Section 5.110 (6)(a) of the Act, based on the following legalities:

1. It is an indisputable fact that due process was not followed in dealing with this Matter by the complaints officer (being also the complainant) as he failed to comply with Section 5.109 (1)(b) of the Act by not giving me a copy of the Complaint. I fully understand the Panel is not an investigating body nor does it reopen Matters after making their "Findings", however the breach is undeniably confirmed in an email from Mr Neil Wilson, Manager Governance to myself and the CEO Mr Don Burnett dated 12 October, it reads "*Hi Cr Mark, I have had a call from the Local Government Department and in following up can confirm that a number of complaints signed 23/9/2015 were lodged with the Department of Local Government and that no copies of form 1A were forwarded to you (which should have happened)... Regards, Neil*".

2. The complaints officer failed to fulfil the legal requirements of Section 5.109 (1)(c)(ii) "sending - anything the complaints officer has that is relevant to the complaint". Documents and information relevant to this Matter exist, but were not provided by the complaints officer to the Panel and as such denied the Panel relevant evidence upon which to formulate their "Findings".

The complaints officer disregarded two (2) Sections of the Act (one procedural and one evidentiary) and either contravention when viewed in isolation establishes the complaints officer did not observe to the Act. As such I was denied procedural fairness and due process, both rights that must be adhered to under this Act of Parliament, unless the Panel has the out-and-out legal right to ignore these Sections of the Act and rely solely on Section 5.106 to make its "Findings".

If the Panel decides to look exclusively to 5.106, it is a very sorry day for the principles of natural justice.

Yours sincerely,



Cr Mark Burns

5.2 In his Submission Cr Burns asks the Panel to dismiss the complaint on the grounds that he was denied due process and procedural fairness because:

- (a) he was not given a copy of the complaint or a copy of Form 1A, which means the complaints officer did not comply with section 5.109(1) of the Act; and
- (b) the Panel was not given all the relevant documents and information before it decided that Cr Burns had committed the two Minor Breaches.

5.3 Section 5.109(1) of the Act provides:

*5.109. Complaint initiated by complaints officer*

- (1) *A person who is a complaints officer may make a complaint of a minor breach by —*
  - (a) *preparing the complaint in the form required under section 5.107(2); and*
  - (b) *giving the council member about whom the complaint is made a copy of the complaint; and*
  - (c) *sending —*
    - (i) *the complaint; and*
    - (ii) *anything the complaints officer has that is relevant to the complaint including, where that the council member has previously been found to have committed,*

*to the member of the primary standards panel who is appointed under Schedule 5.1 clause 2(a).*

5.4 Form 1A is the part of the minor breach complaint form that contains the complainant's contact details. This information is used by the Department for corresponding with the complainant and is not provided to the person complained about.

5.5 In relation to paragraph 5.2(a) above, before this Panel considered the matter of sanction on 2 August 2016 the Department advised the Panel in its Sanction Report dated 9 July 2016 that:

- (a) Cr Burns is correct in that the complaints officer who first initiated the complaint against Cr Burns (the initial complaints officer) did not comply with section 5.109(b) of the Act in that he failed to give Cr Burns a copy of the complaint;
- (b) by the time the Panel considered, on 23 February 2016, whether Cr Burns had committed any of the breaches alleged in the complaint the subsequent complaints officer had sent Cr Burns a copy of the complaint;
- (c) the Department also sent Cr Burns a copy of the complaint on 23 November 2015, along with the Department's summary of the allegations in the complaint, inviting Cr Burns to comment on the allegations;

(d) Cr Burns acknowledged he had been invited to comment when he sent his Submission to the Department in his email dated 17 November 2015; and

(e) the Department included Cr Burns' entire response in the Assessment Report it gave the Panel before the Panel's considered whether Cr Burns had committed any breaches.

5.6 The Panel is satisfied that Cr Burns received all the information that was before the Panel when it decided that the alleged breaches had occurred.

5.7 The Panel is satisfied that:

(a) Cr Burns was invited to comment on all the information the Department later submitted to the Panel before it considered whether Cr Burns had committed the alleged breaches; and

(b) the Panel had Cr Burns' entire response to the complaint before it considered whether Cr Burns had committed the alleged breaches.

5.8 The Panel finds that Cr Burns was given procedural fairness. The Panel therefore rejects Cr Burns' Submission that the complaint should be dismissed due to lack of procedural fairness. However, the Panel should, under section 5.110(6) of the Act, consider whether the complaint should be dismissed for other reasons.

## **6. Possible sanctions for Minor Breaches**

6.1 Section 5.110(6) of the Act specifies the sanctions the panel may impose for a Minor Breach. The Panel may:

(a) dismiss the complaint;

(b) order that the councillor —

(i) be publicly censured as specified in the order;

(ii) apologise publicly as specified in the order; or

(iii) undertake training as specified in the order;

or

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

## **7. General interests of local government**

7.1 Pursuant to clause 8(6) of Schedule 5.1 to the Act, each Panel member is to have regard to the general interests of local government in the State.

7.2 Section 1.3(2) of the Act provides:

*This Act is intended to result in*

*(a) better decision-making by local governments; and*

*(b) greater community participation in the decisions and affairs of local governments; and*

*(c) greater accountability of local governments to their communities; and*

*(d) more efficient and effective local government.*

- 7.3 The effect of section 5.105 of the Act is that a breach of a “rule of conduct” in the Regulations can amount to a “minor breach”.
- 7.4 Regulation 3(1) sets out the “general principles to guide the behaviour of council members”. Although a councillor does not commit a minor breach just because he or she contravenes the principles in regulation 3(1)(a) to (h)<sup>1</sup> these principles, along with sections in the Act, rules of conduct in the Regulations, local laws (including Standing Orders) and Codes of Conduct indicate the standards of conduct expected of a councillor.<sup>2</sup>
- 7.5 The Panel’s view is that the materials referred to in 7.4 above help councillors, local government employees, individual members of the community, community organisations, businesses and the Standards Panel identify the standards of conduct expected of councillors.
- 7.6 Under Schedule 5.1 clause 8(6) of the Act members of the Standards Panel must have regard to the general interests of local government. The Panel’s view is that it is in the interests of local government that councillors behave in a way that earns the community’s trust and respect. Councillors who maintain high standards of conduct are more likely to get individuals and organisations engaged with the local government, which in turn will lead to better decision-making, a more effective local government and a healthier and more harmonious community.

#### **8. Panel’s views - breach of regulation 4(2) - OCM Statements**

- 8.1 Cr Burns made the comments about Wilson Parking at a time when the OCM was open to the public.
- 8.2 Councillors should act with integrity, avoid damage to the reputation of the local government and treat others with respect and fairness (regulation 3(1)(b),(d) and (g)).
- 8.3 Cr Burns had been a councillor continuously since he was elected on 19 October 2013. He should have been well aware of the standards of behaviour expected of a councillor and should have known that this language was unacceptable at any part of an OCM open to the public.
- 8.4 In response to the invitation to comment on penalty Cr Burns did not accept the Panel’s finding that his language was “offensive or objectionable”. He asked that the Panel dismiss the breach, not because his conduct was not serious enough to warrant a more severe penalty, but because he had not been given procedural fairness.
- 8.5 Cr Burns could have expressed his concerns about Wilson Parking’s operations in a more measured, professional way. Cr Burns did not acknowledge this or express any humility or remorse after the Panel found he had breached the Standing Order.

#### **9. Panel’s views – breach of regulation 7(1)(b) - 6PR Statements**

- 9.1 On 27 August 2015, two days after the OCM, Cr Burns breached regulation 7(1)(b) by making the 6PR Comments.

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<sup>1</sup> Regulation 3(2).

<sup>2</sup> *Steck and Local Government Assessment Panel* [2011] WASAT 117, page 15, referring to *Treby and Local Government Standards Panel* [2010] WASAT 81.

- 9.2 There are two aspects of this breach to consider when deciding on penalty. Firstly, Cr Burns made statements about Wilson Parking that the reasonable listener could think he was making on behalf of the Council or the Mayor.<sup>3</sup> Secondly, the Panels' view is that the language used was offensive, vitriolic<sup>4</sup>, unnecessary and unprofessional and could have caused the reasonable listener to think poorly of the Council and the City, which had been involved in engaging Wilson Parking to provide parking services.
- 9.3 Cr Burns was an experienced councillor and should have known not to express his personal views in a way that might imply that he was speaking on behalf of the Council, the Mayor or the City.
- 9.4 After making the OCM Statements Cr Burns repeated the offensive comments on 6PR Radio. During the interview Cr Burns said three times that Wilson Parking were "corporate psychopaths" and once that "they were like vultures sitting on a barbed wire fence". Cr Burns had the opportunity to reconsider and temper the language he used at the OCM but he had no qualms about repeating the words he had used at the OCM. The 6PR Statements would have been heard by many thousands of people, either live on 6PR Radio or via the WA Today website.
- 9.5 Cr Burns could have expressed his personal views about whether Wilson Parking was the right company for the job in a more measured way.
- 9.6 Cr Burns submitted that the Panel should dismiss the breach because he had not been given procedural fairness. He did not mention the offending language in his Submission. He clearly had no regrets about repeating the offending language.

## **10. Penalty**

- 10.1 It is not appropriate to dismiss either breach. This would trivialise the breaches and indicate that such language, even when deliberately repeated, is acceptable.
- 10.2 A public apology is not a sufficient sanction for either breach. This was extremely offensive and unprofessional language, which was first used in a public forum then deliberately broadcast to thousands of people. Cr Burns could have apologised by now. The fact that he hasn't indicates he doesn't accept the need to apologise. An order to apologise would be unlikely to change Cr Burns' views about the breaches. The Panel's view is that any public apology would not be genuine.
- 10.3 There is no value in ordering that Cr Burns undergo training.
- 10.5 Whilst the 6PR Statements would have been broadcast to, or accessible by, thousands of people, the OCM Statements were also very serious because they were made in an open forum that could have included ratepayers, other members of the Subiaco community, visitors, journalists and representatives of other organisations doing or seeking to do business with the City.
- 10.6 The only suitable penalty is that Cr Burns be publicly censured for breaching regulations 4 and 7(1)(b).

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<sup>3</sup> As found by the Standards Panel on 23 February 2016, paragraph 10.1(a)(ii).

<sup>4</sup> "Severely caustic or scathing", Macquarie Dictionary Revised Third Edition.

**11. Panel decision**

- 11.1 The Panel's decision on how the Minor Breach is to be dealt with under section 5.110(6) of the Act, is that pursuant to subsection (b)(i) of that section, Cr Burns be publicly censured as set out in Attachment "A" hereto.



Brad Jolly (Presiding Member)



Paul Kelly (Member)



Merranie Strauss (Member)

Date of Reasons – 23 August 2016