

Decision-maker's Title: **LOCAL GOVERNMENT STANDARDS PANEL**
Jurisdiction: Complaints of minor breach by local government council members
Act: *Local Government Act 1995*
File No/s: SP 21 of 2008 (DLGRD 20080097)
Heard: Determined on the documents
Considered: 12 June 2008, 14 August 2008 and 2 October 2008
Coram: Mr Q. Harrington (Presiding Member)
Councillor C. Robartson (Member)
Mr J. Lyon (Member)

SP 21 of 2008

Complainant: Councillor Helen DULLARD

Council member complained about: Councillor Kevin Alan BLACK

Local Government: Shire of Mundaring

Finding

The Panel finds that, for the following reasons, Councillor Black contravened section 2.1.10(1) of the *Shire of Mundaring Standing Orders Local Law 2003* ("the Standing Orders"), and committed a minor breach by such contravention.

Reasons for finding

1. The complainant, Councillor Dullard, is the President of the Council of the Shire of Mundaring and complains about Councillor Black's conduct at the Ordinary Council Meeting on 22 January 2008 ("the OCM").
2. The complaint form itself alleges breaches of sections 2.1.10 and 2.4.11 of the Standing Orders, which is a local law relating to conduct of people at council or committee meetings. Regulation 4(2) of the *Local Government (Rules of Conduct) Regulations 1995* (the Regulations) provides that contravention of a local law as to conduct is a minor breach for the purposes of section 5.105(1)(b) of the *Local Government Act 1995* ("the Act").
3. Standing Order 2.10(1) provides in relevant part that a member present at a meeting shall not reflect adversely upon the character or action of another member or employee. Standing Order 2.4.11(1) provides that any person who uses an expression which, in the opinion of the person presiding, is offensive to any member or employee of the Council is, when required by the person presiding, to unreservedly withdraw the expression and make a satisfactory apology.
4. In the complaint form Councillor Dullard alleges in essence that at the OCM Councillor Black commented that there was "continual basic corruption occurring in the Shire" and that Councillor Black, when requested by Councillor Dullard (who was

presiding) to withdraw the comment and apologise, refused to do so. The confirmed minutes of the OCM support the complaint. They read in relevant part as follows:

“8.59pm – During his right of reply, Cr Black stated words to the effect that having gone through the Code and noting specific matters such as integrity, he did not think the councillors and Shire administration really meant what the Code of Conduct said, or else “why is the continual basic corruption occurring in this Shire”.

Cr Pilgrim stood to raise a Point of Order:

The President asked Cr Black to resume his seat. Cr Black uttered an expletive at Cr Pilgrim.

The President ruled Cr Black out of order.

The President requested Cr Black provide an apology and a withdrawal of Cr Black’s comments about corruption in the Shire. The request was repeated. Cr Black refused to withdraw the comments.

The President requested Cr Black provide an apology and withdrawal for a third time. Cr Black refused and repeated statements that the Shire engaged in corruption.

The President stated Cr Black would not be heard from any further on the item then before the meeting.”

5. The Panel is satisfied that:

- (a) a Notice of the Complaint, dated 18 April 2008, a copy of the complaint, a form of Notice of Admission and a form of Notice of Denial was posted by the Panel Administration to Councillor Black’s last known residential address on 21 April 2008;
- (b) the Notice of the Complaint stated the two allegations mentioned above, invited Councillor Black’s response to the allegations, and advised that his response should be made in writing within 21 days;
- (c) on 21 April 2008 a copy of the Notice of the Complaint, a copy of the complaint, a form of Notice of Admission and a form of Notice of Denial was facsimiled by the Panel Administration to a telephone/fax line number that Councillor Black had used in the then recent past; and
- (d) on 22 April 2008 an officer of the Department of Local Government and Regional Development attended at the Shire’s Council’s Ordinary Meeting of that date, and that prior to the commencement of the meeting the officer:
 - (i) handed to the Shire’s CEO an envelope addressed to Councillor Black and containing a copy of the Notice of the Complaint, a copy of the complaint, a form of Notice of Admission and a form of Notice of Denial; and
 - (ii) witnessed the Shire’s CEO handing this envelope to Councillor Black on the latter entering the Council Chambers.

6. No response from Councillor Black had been received when this matter was considered by the Panel on 12 June 2008. Following that consideration the Panel made a finding of a breach by Councillor Black of the Shire’s standing order 2.10(1) in this matter, and Councillor Black was sent notice of the finding and invited to make submissions on how the Panel should deal with the breach under section 5.110(6) of the Act.

7. On 18 July 2008 Councillor Black sent the Panel Administration a facsimile that made lengthy submissions. These included a request that the Panel take into account submissions Councillor Black had made in relation to the proceedings of SP 10 of 2008.

8. At its meeting on 14 August 2008:

- (1) The Panel discussed its said finding of breach (“the previous finding”), in the light of matters raised in Councillor Black’s facsimile statement of 18 July 2008, received by the Department of Local Government and Regional Development while the Panel was holding its meeting on that date.
- (2) The Panel discussed whether it had power to reconsider the previous finding, and, if so, whether it is appropriate for the Panel to rescind the previous finding and to reconsider the complaint afresh.
- (3) The Panel noted that:
 - (a) the question is whether the statute pursuant to which the decision-maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen (*Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11, per Gleeson CJ at [8]);
 - (b) in relation to that question:
 - (i) by s 5.110(2)(a) of the Act, after receiving a complaint allocated to it, a standards panel is required to make a finding as to whether the breach alleged in the complaint occurred;
 - (ii) by s 5.110(4) a standards panel is required to give each party written notice of the reasons for any finding it makes under subsection (2);
 - (iii) by Clause 8(10) of Schedule 5.1, to the extent that it is not prescribed by regulations a standards panel may determine its own meeting procedure, and other procedure and practice;
 - (iv) there are no such prescribed regulations, and the above mentioned provisions appear to be the only provisions of the Act that may be applicable in this case;
 - (v) the above mentioned provisions do not appear to manifest any intention to prohibit reconsideration in the circumstances that have arisen; and
 - (vi) the Panel had not at that stage of the Panel’s proceedings on the complaint, given to the complainant any notice of the previous finding or any of the Panel’s reasons for it;
 - (c) in making the previous finding, the Panel relied on evidence in the following documents - the contents of which had not been provided by the Panel to Councillor Black for his response and comments:
 - (i) relevant pages of the confirmed minutes of the OCM;
 - (ii) the notes taken by the Shire’s minute taker at the OCM in relation to item 10.9;
 - (iii) Councillor Max Jamieson’s written statement dated 6 May 2008; and
 - (iv) the Shire CEO’s written statement dated 5 May 2008; and

- (d) procedural fairness, which is one aspect of the rules of natural justice, requires that a person who may be affected by a decision be informed of the case against him or her and that he or she be given a reasonable opportunity to answer it.
- (4) The Panel's view was that it has power to and that it was appropriate for it to rescind the previous finding and to reconsider the complaint afresh.
- (5) The Panel agreed, inter alia, that in the circumstances of this matter:
 - (a) the previous finding was rescinded;
 - (b) Councillor Black be sent copies of the following by post:
 - (i) relevant pages of the confirmed minutes of the OCM;
 - (ii) the notes taken by the Shire's minute taker at the OCM in relation to item 10.9;
 - (iii) an extract of Councillor Max Jamieson's written statement, without his name or other identifying details; and
 - (iv) an extract of the Shire CEO's written statement, without his name or other identifying details; and
 - (c) Councillor Black be given an opportunity, for 21 days from the date of posting, to respond to the material described in (5)(b).

9. The Panel is satisfied that:

- (1) A further Notice of the Complaint, dated 18 August 2008, that stated the allegation of a breach by Councillor Black of the Shire's standing order 2.10(1) in this matter, and was accompanied by copies of the material described in paragraph 7(5)(b) above, was sent by post to Councillor Black on 18 August 2008.
- (2) On 18 and 19 August 2008 the Panel Administration tried on 3 occasions to fax a copy of this letter to Councillor Black, but each attempt was unsuccessful due to a "no answer" response.
- (3) On 5 September 2008 the Panel Administration received a fax, on Councillor Black's letterhead, from an unidentified person who advised:

"To whom it may concern,

Cr. Black has current commitments and is not available until the 30 October 2008.

Responses will be made within 14 days from that date."

- (4) The Panel Administration understood that advice to be in reference to this matter and another matter (SP 10 of 2008) in relation to which:
 - (a) Councillor Black is the person complained about; and
 - (b) the Panel Administration had sent him material for his response.

- (5) On 22 September 2008 the Panel Administration sent a letter by Express Post to Councillor Black, referring to this matter, such other matter and the fax mentioned in (3) above and stating, inter alia, that:

"Your facsimile provides no reasons for the Panel to consider why it should not proceed with hearing each of the complaints on the evidence currently before it. In the absence of written evidence of special circumstances to support the Panel deferring these matters they will continue to be listed for consideration by the Panel on the 2 October 2008.

I draw your urgent attention to providing, as soon as possible, evidence of your unavailability for consideration by the Panel."

- (6) On 26 September 2008 the Panel Administration received a fax, on Councillor Black's letterhead, from an unidentified person who advised:

"Further to my fax dated 5th September 2008 to the Local Government Standards Panel.

With regard to the express post letter recently received. I confirm that this letter remains unopened as Mr. Black is not in Perth, has no access to phones, faxes, emails or other communication and is not available until the 30 October 2008.

Responses will be made within 14 days from that date."

- (7) At the time of signing of these Reasons, no other response by or purportedly on behalf of Councillor Black had been made in this matter.

10. In the Panel's view:

- (a) Councillor Black has been given sufficient notice of the allegations in this matter;
- (b) Councillor Black has been given notice that:
 - (i) after 8 September 2008 the Panel will consider Councillor Black's submissions (if he makes any) and proceed to make a finding in this matter; and
 - (ii) this matter was listed for consideration by the Panel on the 2 October 2008;
- (c) Councillor Black has had reasonable opportunity to prepare his case in response to the allegation that he breached the Shire's standing order 2.10(1) in this matter;
- (d) the interest of local government in Western Australia would be best served by not deferring this matter until some time after 14 November 2008; and
- (e) on balance, Councillor Black has received procedural fairness in this matter and there is no sufficient reason why the Panel should not proceed to make its finding in this matter.

11. On the basis of: the confirmed minutes of the OCM; the notes taken by the Shire's minute taker at the OCM in relation to item 10.9; Councillor Max Jamieson's written statement dated 6 May 2008; the Shire CEO's written statement dated 5 May 2008; Councillor Black's facsimile statement of 18 July 2008; the Panel Administration letter of 18 August 2008 to Councillor Black; the Panel Administration letter of 22 September 2008 to Councillor Black; the faxes of 5 and 26 September 2008 received by the Panel Administration; and Councillor Black's submissions in SP 10 of 2008 (which submissions Councillor Black asked the Panel to also consider in this matter); the Panel's view is that it is more likely than not that at the OCM Councillor Black said words to the effect that, having gone through the Code of Conduct and noting specific matters such as integrity, he did not think the councillors and Shire administration really meant what the Code said and proceeded to make the observation "why is the continual basic corruption occurring in this Shire".

12. The Panel's view is that Standing Order 2.1.10(1) is contravened if a Council member is present at a Council meeting and reflects adversely upon the character of other Council members or Shire employees.

13. In the Panel's view, an adverse reflection is a reflection that would be perceived by a reasonable person as tending to lower a person in the estimation of his or her fellow persons by making them think less of him or her.

14. In the Panel's view, when Councillor Black referred to the other Shire councillors and the Shire administration and then made the statement or query "why is the continual basic corruption occurring in this Shire", Councillor Black reflected adversely on the character of other Council members or Shire employees. Accordingly, the Panel finds that Councillor Black contravened standing order 2.1.10(1) and committed a minor breach by such contravention.

15. Turning to consider the complaint of a breach of Standing Order 2.4.11(1), it is to be noted that amongst the meanings of the word "expression" in the Macquarie Dictionary is "a particular word, phrase, or form of words". Standing order 2.4.11(1) appears to be aimed at the use of abusive language. In the Panel's view the phrase "why is the continual basic corruption occurring in this Shire" does not constitute the use of "an expression". Therefore, in the Panel's view, there was no cause for the person presiding to apply Standing Order 2.4.11(1), and Councillor Black did not breach that standing order.

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Quentin Harrington (Presiding Member)

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Clive Robartson (Member)

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John Lyon (Member)

Decision-maker's Title: **LOCAL GOVERNMENT STANDARDS PANEL**

Jurisdiction: Complaints of minor breach by local government council members

Act: *Local Government Act 1995*

File No/s: SP 21 of 2008

Heard: Determined on the documents

Considered: 12 June 2008, 14 August 2008, 2 October 2008 and 1 December 2008

Coram: Mr Q. Harrington (Presiding Member)
Councillor C. Robartson (Member)
Mr J. Lyon (Member)

SP 21 of 2008

Complainant: Councillor Helen DULLARD

Council member complained about: Councillor Kevin Alan BLACK

Local Government: Shire of Mundaring

Regulation alleged breached: Regulation 4(2) (breach of a provision of a local law as to conduct at a council or committee meeting)

Finding

The Panel has made a finding ("the finding") that Councillor Black contravened standing order 2.1.10(1) of the *Shire of Mundaring Standing Orders Local Law 2003* ("the Standing Orders"), and that by such contravention he committed a minor breach ("the breach") by virtue of the operation of regulation 4(2) of the *Local Government (Rules of Conduct) Regulations 2007*.

Decision:

The Panel's decision on how the breach is dealt with under section 5.110(6) of the *Local Government Act 1995* ("the Act") is that, for the following reasons, pursuant to paragraph (c) of that section it orders two of the sanctions described in paragraph (b) of that section, as set out in the attached Minute of Order.

REASONS FOR DECISION

1. The Panel has found, inter alia, that the breach was committed at the Shire of Mundaring's Council's Ordinary Council Meeting on 22 January 2008 ("the OCM") when members of the public were present, when Councillor Black said words to the effect that, having gone through the Code of Conduct and noting specific matters such as integrity, he did not think the councillors and Shire administration really meant what the Code said and proceeded to make the observation "why is the continual basic corruption occurring in this Shire".

2. The Panel has given to Councillor Black:

- (a) notice of the finding;
- (b) a copy of the Panel's written *Reasons for Finding* in regard to the finding; and
- (c) an opportunity for him to make submissions to the Panel about how the breach should be dealt with under section 5.110(6) of the Act.

3. Councillor Black has not made any submission on the finding. However, in relation to the Panel's earlier rescinded finding of a minor breach in this matter, which was the same as the present finding, on 18 July 2008 Councillor Black sent to the Panel his facsimile copy of his 12-page Statement ("Councillor Black's Statement"), which commences with the following passages:

"My position and submissions in this reply will include, but are not limited by, the submissions and response of mine already on file MG 10 – 18.

I consider the laws dealing with corruption and improper illegal activity to be an over riding law that surpasses any other law.

My primary role as a councillor is to not allow corruptions in any form, expose those when I become aware of them and in any reasonable way stop those corruptions from happening."

4. In the Panel's view, the reference by Councillor Black to "the submissions and response of mine already on file MG 10 – 18" is a reference to his 20-page submissions in response to a Panel *Notice of Complaint* in relation to another complaint that has been dealt with by the Panel (Complaint No. SP 10 of 2008: Throssell v Black) ("Councillor Black's Response"). In Councillor Black's Response, he states:

"That the Standing Orders are for the running of the meeting and are not designed to suppress issues of corruption and illegal and improper activities by employees and members."

"That Cr. Black has been consistent in his bringing to the attention of council, CEO and Presidents those corrupt activities of the CEO, some of his staff and their supporting councillors. Cr. Blacks statements were based on fact and were not malicious whereby the Standing Orders are not the relevant law as the superior law is the Local Government Act that requires councilors in their role to raise issues of corrupt, illegal and improper activity."

5. In regard to Councillor Black's statements set out in paragraphs 3 and 4, the Panel observes that under standing order 2.1.10(1) of the Shire's standing orders a member present at a meeting shall not reflect adversely upon the character of another member or employee.

6. Councillor Black's Statement, and Councillor Black's Response where relevant to this matter, consist largely of statements in relation to alleged corruption matters that he refers to. He does not deny having made the statement or query "why is the continual basic corruption occurring in this Shire" at the OCM when members of the public were present. Despite the length of Councillor Black's Statement and Councillor Black's Response, his only relevant submission on how the Panel should deal with the breach under section 5.110(6) of the Act, is: "For the Panel to dismiss the complaint outright".

7. The Panel considers Councillor Black's conduct in this matter to be inappropriate and deserving of censure, for the following reasons:

- (1) The Panel agrees with Priestly JA's view on the meaning of "corrupt" in *Drummoyne Municipal Council v Australian Broadcasting Corp*n ((1990) 21 NSWLR 135) where he said, at 155:

"I agree ... that [the word "corrupt"] has at least three substantial meanings [that the plaintiff was open to bribery, was dishonest or was lacking integrity]. I would add also that the word has at least one other common meaning in many contexts; that is a very general and unspecific meaning conveying the idea that the person using the word considers that the person spoken of has a condition of corruptness which would make ordinary, decent members of the community think less of or tend to shun the person."

- (2) Councillor Black said words to the effect that, having gone through the Code of Conduct and noting specific matters such as integrity, he did not think the councillors and Shire administration really meant what the Code said and made the statement or query "*why is the continual basic corruption occurring in this Shire*". A reasonable person would perceive his statement or query as at least an implication that some or all the other Shire members and some or all of the Shire's employees were engaging in corrupt activities.

8. In considering an appropriate sanction or sanctions for the present breach the Panel noted that:

- (a) on one prior occasion Councillor Black has been found under Part 5 Division 9 of the Act to have committed a minor breach ("the previous breach");
- (b) the previous breach, found in relation to Complaint No. SP 10 of 2008, was a breach of standing order 2.1.10 of the Shire's standing orders and was committed by Councillor Black during a part of the OCM when it was closed to members of the public, when he adversely reflected on the actions of the Shire's Chief Executive Officer; and
- (c) the Panel dealt with the previous breach pursuant to paragraph (c) of section 5.110(6) of the Act, by ordering two of the sanctions described in paragraph (b) of that section - that Councillor Black be publicly censured as specified in the Panel's order, and that Councillor Black apologise publicly as specified in the Panel's order.

9. Having regard to the *Reasons for Finding* relating to the breach, the above matters and the general interests of local government in Western Australia, the Panel's decision in this matter is that it deals with the breach under paragraph (c) of section 5.110(6) of the Act, by ordering two of the sanctions described in paragraph (b) of that section, as set out in the attached Minute of Order. Two sanctions are ordered due to the seriousness of the implications of the statement made or query raised by Councillor Black at a Council meeting when members of the public were present. Councillor Black ought to be admonished by the Panel and also ordered to publicly apologise to the other Shire's councillors and its employees.

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Quentin Harrington

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Clive Robartson

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John Lyon

NOTICE TO THE PARTIES TO THE COMPLAINT

RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (“the Decision-maker”) hereby gives notice that:

- (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 (“SAT”) for a review of the Panel’s decision in this matter. *In this context “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 SAT under its review jurisdiction must be made within 28 days of the day on which the decision-maker gives a notice under the *State Administrative Tribunal Act 2004* (“SAT Act”) section 20(1).
- (3) The Decision-maker’s *Reasons for Finding* and these *Reasons for Decision* constitute the Decision-maker’s notice given under the SAT Act section 20(1).