

Section 28ZK (7) of the *Local Government Act 1993* requires that any person who receives a determination report must keep the determination report confidential until the report is included within an item on the agenda for a meeting of the relevant council. Failure to do so may result in a fine of up to 50 penalty units.

Local Government Act 1993

CODE OF CONDUCT PANEL DETERMINATION REPORT

HUON VALLEY COUNCIL CODE OF CONDUCT

**Complaint brought by Messrs Patrick Synge and Brian Millar against
Councillors Sally Doyle and Michael Newell**

Code of Conduct Panel

- Jill Taylor (Chairperson)
- Elizabeth Gillam (Local Government Member)
- Steve Bishop (Legal Member)

Date of Determination: 3 June 2022

Content Manager Reference: C23124

Summary of the complaint

A code of conduct complaint was submitted by Messrs Patrick Synge and Brian Millar to the General Manager – Huon Valley Council on 1 November 2021.

The complaint alleges that Councillors (Cr) Sally Doyle and Michael Newell breached the following parts of the Huon Valley Council's Code of Conduct relating to the Conduct of Councillors, Version 3 approved in March 2019.

PART 3 - Use of Office

1. The actions of a Councillor must not bring the Council or the office of Councillor into disrepute

PART 7 - Relationships with community, Councillors and Council employees

1. A Councillor –

(a) must treat all persons fairly

The original complaint by Messrs Synge and Millar was against former Crs Enders and Campbell in addition to Crs Doyle and Newell. However, both these former councillors resigned prior to the determination and finalisation of the complaint.

A second complaint, dated 12 November 2021, was submitted by Ms Elizabeth Smith against Cr Bec Enders in relation to the same matter. The Panel contacted all parties on 17 December 2021 to ascertain whether there were any objections to holding a joint investigation. No objections were received. Ms Smith's complaint subsequently lapsed with the resignation of Cr Enders on 18 March 2022.

Initial assessment

Following receipt of the complaint by Messrs Synge and Millar, the Chairperson conducted an initial assessment of the complaint in accordance with the requirements of section 28ZA of the Act. Having assessed the complaint against the provisions of sections 28ZB and 28ZC of the Act, the Chairperson determined that:

- the complainants had made a reasonable effort to resolve the complaint. The Chairperson arrived at this conclusion for the following reasons:
 - Once the complainants became aware that a conflict of interest had been identified, they wrote to all councillors before the appointment of the new General Manager asking them to consider postponing any final decision until they had certainty that it would not bring the Council into disrepute. They wrote again before confirmation of the General Manager's appointment pointing out flaws in the process.
- the complaint substantially related to a contravention of Huon Valley Council's Code of Conduct, namely Parts 3.1 and 7.1(a).
- the complaint should not be dismissed on the grounds that it was frivolous, vexatious or trivial. The reasons for this conclusion were that sufficient information was provided to suggest a potential breach of the Code.
- having made enquiries of the Code of Conduct Executive Officer, there was no relevant direction under section 28ZB(2) or 28ZI of the Act that would apply to the complainant and the complaint.¹

On this basis, the Chairperson determined to investigate the complaint.

The complainants, respondent councillors and the General Manager were notified of the outcome of the outcome of the initial assessment by letter dated 25 November 2021.

Investigation

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

The Panel determined that further information was required to investigate the complaint. The Panel, on the dates shown, wrote to various people requiring the following information as listed below:

17 December 2021

- General Manager, Huon Valley Council – requesting Edge Legal report dated 14 September 2021, a report by Adriana Taylor, and Council "Fraud control and corruption prevention policy" as at 26 October 2021.

1 February 2022

- Seeking witness statements from :
Mr Paul West (former Acting General Manager),
Mr Mathew Grimsey, Director Legal and Governance Services, Huon Valley Council,
Mr Craig Limkin, Deputy Secretary, Department of Premier and Cabinet and
Ms Adriana Taylor (former Commissioner Huon Valley Council)

15 February 2022

- Seeking witness statement from Andrew Wardlaw (former Acting General Manager)

Copies of these documents, except the Edge Legal report, were circulated to all parties to the complaint.

The following documents have been presented to the Panel to consider as evidence in this matter:

¹ Section 28ZB(2) and 28ZI of the Act enable the Chairperson or the Panel (as applicable) to issue a direction to a complainant in prescribed circumstances not to make a further complaint in relation to the same matter unless the complainant provides substantive new information in the further complaint.

- *Edge Legal Employment & Safety – Huon Valley Council – Review of the recruitment process for the new General Manager appointment report – dated 14 September 2021*. As mentioned above, this report was not circulated as it was a confidential report tabled in a closed Council meeting.
- *Report of the Auditor-General No. 2 of 2021-22: Council general manager recruitment, appointment and performance assessment – 12 October 2021* (available to the public on Auditor-General's website)

After examining the written evidence provided, the Panel was satisfied that there was no dispute regarding facts in the matter under investigation. In accordance with section 28ZG(2)(b) of the Act, the Panel considered that a hearing would be unnecessary in the circumstances because the investigation could be determined on the basis of the of the written material provided and, in the Panel's view, neither party would be disadvantaged.

By letters dated 11 March 2022, the complainants and respondent councillors were notified of the Panel's intention to proceed to determine the complaint without a hearing. All parties were invited to provide objection in writing within 14 business days. No objections were received.

Determination

As per section 28ZI of the Act the Panel determines that Crs Doyle and Newell have breached the Code of Conduct, and therefore the Panel upholds the complaint.

Reasons for determination

In investigating this complaint, it was not the Panel's role to review the actual selection process to appoint a General Manager for the Huon Valley Council. Rather it was to consider whether there has been a breach of the Code of Conduct by the respondents in the process of undertaking that task, specifically once the conflict of interest by the Recruitment Consultant, Joanne Inches, had been declared.

The Panel received a significant amount of written documentation submitted in response to the complaint, in addition to reports referred to above. The Panel carefully considered all the documentary evidence to ensure it could construct a chronological sequence of events that took place over a period of several months. The written evidence presented to the Panel included the reports by Edge Legal and the Tasmanian Auditor General, and the documents detailed in the following list:

1. Complaint by Messrs Patrick Synge and Brian Millar covered by statutory declarations dated 25 October 2021
2. Huon Valley Code of Conduct relating to the conduct of Councillors dated March 2019
3. Cr Campbell's response to complaint dated 2 December 2021 contained in:
 - a. statutory declaration
 - b. Annexure 'A' resignation from selection committee
 - c. Annexure 'B' Chronological Statement of Events dated 11 August 2021
4. Cr Newell's statutory declaration dated 7 December 2021
5. Cr Doyle's statutory declaration dated 8 December 2021
6. Cr Enders' statutory declaration dated 8 December 2021 with:
 - a. Attachment I - undated statement by Communications and Media Officer, Huon Valley Council.
7. Cr Enders' statutory declaration dated 4 January 2022 with attachments A-j:
 - a. Attachment A statement of relationships of community members
 - b. Attachment B -Mercury article dated 10 December 2021
 - c. Attachment C - Letter to Huon News – edition 22 December 2021

- d. Attachment D – Undated statement by Huon Valley Residents and Ratepayers Association (HVRRA)
 - e. Attachment E- Questions without notice – 24 November 2021
 - f. Attachment F - Email from Alison Viner and Archie Donley dated 16 September 2021 to elected members
 - g. Attachment G – Correspondence dated 30 July 2021 from Craig Limkin, Director of Local Government, to all councillors
 - h. Attachment H – Series of emails, dated 5-16 October 2021, between community members
 - i. Attachment I – Petition by some ratepayers for public meeting
 - j. Attachment J – Media release dated 14 December 2021 by HVC re training for managing conflict of interest
8. Copy of Huon Valley “Fraud Control and Corruption Prevention Policy” dated November 2015
 9. Cr Campbell’s email dated 10 January 2021 with the following attachment:
 - a. Various emails between Selection Panel members
 10. Paul West’s statutory declaration dated 3 February 2022
 11. Andrew Wardlaw’s statutory declaration dated 16 February 2022
 12. Ms Elizabeth Smith’s Complaint dated 12 November 2021 covered by statutory declaration
 13. Cr Enders response, under cover of statutory declaration dated 8 December 2021, with the following attachment:
 - a. Attachment I Communications and Media Officer Huon Valley Council
 14. Mathew Grimsey’s statutory declaration dated 17 February 2022
 15. Craig Limkin’s statutory declaration dated 18 February 2022
 16. Adriana Taylor’s statutory declaration dated 24 February 2022
 17. Messrs Syngé and Millar’s submission dated 25 March 2022
 18. Messrs Syngé and Millar’s submission dated 4 April 2022
 19. Cr Campbell’s resignation letter dated 3 April 2022
 20. Cr Doyle’s statutory declaration dated 20 April 2022
 21. Cr Newell’s statutory declaration dated 26 April 2022

Crs Doyle and Newell were provided with the material under consideration but, despite being given more than one opportunity, did not provide any qualifying information or detail in their responses. In his statutory declaration, Cr Newell stated, *“I am pleading innocent of any wrongdoing, at no stage through the recruitment process did I ever think that I was doing anything wrong”*. In her statutory declaration, Cr Doyle stated *“I listen to the public and also the professional advice put before me. I decided that professional advice was what I needed to adhere to.....so I declare not guilty”*. Therefore, the Panel had regard to evidence contained in statutory declarations submitted by Cr Enders and Cr Campbell prior to their resignations.

On 22 April 2021, the Council accepted a proposal from Red Giant to be its recruitment consultant during the selection process to appoint a General Manager. Applications for the vacancy were submitted to Red Giant who undertook a process of shortlisting. From a field of 85 applications, Red Giant shortlisted to a list of 14 which was presented to the Selection Panel on 4 July 2021. This was the date that Ms Inches revealed that she had a conflict of interest in that she was in a personal relationship with one of the shortlisted applicants, Mr Browne. In discussions that ensued, Ms Inches gave a commitment that she *“would manage the conflict”*. It was unclear as to how Ms Inches proposed to do that, but the Selection Panel accepted this commitment from her. The Panel noted however, that Ms Inches appeared to still be involved beyond that date as she arranged the

appointment of a consultant to undertake psychometric testing on 17 August 2021 of two remaining candidates, one of whom was Mr Browne.

In her statutory declaration former Cr Enders acknowledged that she has “no expertise in the HR recruitment”. The Panel accepts that it was appropriate therefore to contract in that expertise, in this case Red Giant. Whilst some elected members of the Selection Panel were unfamiliar with recruitment processes, they are or ought to be familiar with conflicts of interest. At the commencement of each Council meeting, councillors are asked to declare any conflict of interest in relation to any item of the agenda.

It is the action taken by the Selection Panel once the conflict was identified that is the core of this complaint.

Evidence before the Panel indicated that Crs Doyle and Newell were aware that concern had been expressed about continuing with the selection process once the conflict was identified. Former Cr Campbell stated, “I had a heightened sense that the conflict was a very real problem for the panel and Council (hence my resignation because the other three members of the panel refused to discuss these concerns)”. Ms Campbell resigned from the Selection Panel on 13 August 2021 and from Council on 3 April 2022.

In addition to Ms Campbell’s expressed concern, Mr Craig Limkin, Deputy Secretary, Department of Premier and Cabinet had engaged in discussions with then Cr Enders and Cr Doyle once the conflict had been declared. In his statutory declaration he advised that he had “several conversations with Councillors Enders, Gibson and Doyle” and as a result of these conversations and the developing community concerns, he sent an email on 23 August 2021 to Cr Enders which contained the following: -

“I invited Councillor Enders to consider whether in the circumstances it would be appropriate for the GMRP or the Council to ensure public confidence by seeking an independent review of the process”; and “to provide me with written assurance that the General Manager’s selection process was conducted professionally and with the necessary integrity to enable Council to make an appropriate determination on the matter”.

Also, Mr Paul West, Acting General Manager, stated in his statutory declaration that on 11 August 2021 (the then) Mayor Enders provided him with an email advising him of the three final shortlisted candidates and the preferred candidate. It was at this time Mr West became aware of “the conflict between the HR consultant and Mr Browne”. He went on to say that he raised concerns with the then Mayor and was advised that “the conflict had been handled properly”.

At the Council meeting on 25 August 2021, he provided a number of options ranging from appointing Mr Browne through to recommencing the recruitment process.

At its meeting on 25 August 2021 Council resolved to proceed with the appointment of Mr Browne, subject to contract negotiations and to conduct an independent review. On 15 September 2021 Council considered the review (Edge Legal report) and decided to proceed to appoint Mr Browne.

Following the resignations of Ms Enders and Ms Campbell, the complainants submitted two further statements, one on 25 March 2022 and another on 4 April 2022. In their statement dated 4 April 2022, they referred to Ms Campbell’s letter of resignation where she stated, “I understand the consultant had previously advised other councillors on the recruitment panel of this relationship on 24 May”. This assertion was put to Crs Doyle and Newell who each, under cover of a statutory declaration, denied this, stating that they did not know until July.

The task before the Panel is to evaluate the conduct of Crs Doyle and Newell and decide if they have breached Parts of the Code as alleged.

The Edge Legal report stated that the Selection Panel had options to take a different course of action once the conflict of interest was divulged by the Recruitment Consultant, options which included

referring the matter to the full Council, replacing the Recruitment Consultant and re-engaging with another recruitment consultant to consider the appropriateness of continuing the process.

Whilst during the selection process there was much dialogue between several parties and the Chairperson, former Cr Enders, the Panel accepts that in some instances this may not have been passed on to all members of the Selection Panel. However, the Edge Legal report was presented to all councillors at a closed Council meeting held on 15 September 2021, at which Crs Doyle and Newell were present. Therefore, Crs Doyle and Newell were aware that the Selection Panel had a range of options available to them from recommencing the selection process through to the appointment of Mr Browne as General Manager.

Despite this, Crs Doyle and Newell relied heavily on the belief that they had received legal advice that the actions of the Selection Panel were acceptable. This advice included that a breach of the code of conduct had not occurred. Whilst this may be an opinion, the Code of Conduct Panel is the statutory body that has ultimate responsibility to investigate potential breaches of the Code and determine accordingly.

It must be stressed that the Edge Legal report focussed only on whether the recruitment decision was tainted by actual bias. The Panel accepts that it was not and states clearly that in its view, no person on the Selection Panel displayed actual bias. What the Selection Panel did was fail to take an appropriate management strategy in the face of a clear and present danger that the appointment of the General Manager would be perceived by fair minded persons as tainted by bias because of the relationship between the Recruitment Consultant and the successful appointee.

There was an unacceptable ignorance of the proper mode of dealing with the situation which falls below the standard of conduct one can reasonably expect from a councillor. This failure by the respondents is exacerbated by the respondents taking no notice, or not sufficient notice, of the eminently sensible suggestions from the persons mentioned above.

As the Auditor-General states in the report, the conflict constitutes potential for perceived bias. The apparent bias or apprehended bias is assessed objectively from a perspective of a "fair minded person".

Findings

1. Disrepute

The Panel is of the view that the Selection Panel should have, from the time that it became aware of the relationship between the Recruitment Consultant and Mr Jason Brown, removed the Recruitment Consultant from the recruitment process and engaged a replacement consultant to either start again or advise on the appropriateness of continuing the process that had been begun.

In light of the previous difficulties experienced by the prior Council, the potential for minute examination of governance processes, the cost to the community of the General Manager, and the vital importance of the General Manager to the community as the new driver of management in a new Council, this failure of procedure does bring the Council and the office of Councillor into disrepute. It is irrelevant that the Respondents were not actuated by any improper motive.

The failure was unsatisfactory governance conduct of such significance that it brought the Council into disrepute. The community deserved better.

The Auditor General stated in the report - "*the Tasmanian community is entitled to have confidence that local government recruitment processes are carried out in an impartial, ethical, efficient and professional manner*". The Panel determines that this selection process fell well short of meeting the requirement to carry out the process in a professional manner, in that the Recruitment Consultant was not removed from the process and replaced. The Selection Panel, including Crs Doyle and Newell, were at best naïve, resulting in a loss of public confidence.

2. Treating all persons fairly

In relation to the allegation that the respondents did not treat all persons fairly, the Panel supports this contention. The candidates in this selection process were not apprised of the conflict and were not given the opportunity to consider the ramifications of the relationship between the Recruitment Consultant and Mr Browne, to take legal advice, and possibly to seek an injunction restraining the further conduct of the recruitment process in that way. The Panel concludes that the appointee was also not treated fairly. Given the amount of public scrutiny relating to this matter, he is now the subject of all sorts of uncertainty, doubts and criticism, either genuine or misplaced.

The Panel determines that the behaviour of Crs Doyle and Newell have brought the Council and office of councillors into disrepute and that candidates for the position of General Manager, including the appointee were treated unfairly because of this process.

Sanctions

The Panel wrote to the parties on 11 May 2022 seeking their views on whether or not a sanction should be imposed and, if so, what should that sanction be. Both Crs Doyle and Newell agreed that a caution was warranted but both also advised that they have undertaken training in relation to conflict of interest. Messrs Synge and Millar, who originally called for the suspension of councillors in their complaint, acknowledged that given only two of the original four respondents remain and any further loss of numbers in Council would be result in a loss of a quorum, sought an apology.

Whilst the Panel has determined that breaches of the Code of Conduct have occurred, Crs Doyle and Newell were not the only councillors who made the ultimate decision to appoint Jason Browne as General Manager despite the revelation of a conflict of interest during the process.

The Panel also acknowledges that there has been significant public scrutiny in relation to this matter, which has prompted Council to ensure that all councillors receive appropriate training to avoid similar incidents in the future. The Panel does not believe that any further apology is warranted as Cr Doyle has stated that she has already made a public apology.

Therefore, it is the Panel's view that Crs Doyle and Newell be cautioned in relation to this breach of the Code of Conduct.

Timing of the Determination

In accordance with section 28ZD (1) a Code of Conduct Panel is to make every endeavour to investigate and determine a code of conduct complaint within 90 days of the chairperson's determination that the complaint is to be investigated.

The Panel has been unable to determine the complaint within 90 days owing to the following:

- The number of parties to the complaint, especially with another complaint initially joined for investigation.
- The amount of time required to review the significant documentation submitted by parties
- Delays due to Christmas and Easter holiday periods and non-availability of Panel members from time to time.
- The need to seek follow up information from some of the parties
- The requirement to give 14 days for responses to requests from the Panel
- The resignation of two of the elected members

Right to review

A person aggrieved by the determination of the Code of Conduct Panel, on the ground that the Panel failed to comply with the rules of natural justice, is entitled under section 28ZP of the Act to apply to the Magistrates Court (Administrative Appeals Division) for a review of that determination



Jill Taylor
Chairperson



Steve Bishop
Legal Member



Liz Gillam
Member

DATE : 3 June 2022