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## Local Government Standards Panel

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Complaint Number	SP 11 of 2018 [DLGSC 20180245]
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Mayor Gary Brennan</b>
<b>Respondent</b>	<b>Councillor Michelle Steck</b>
Local Government	<b>City of Bunbury</b>
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Ms M Strauss (Presiding Member) Mr M Beecroft (Member) Councillor P Kelly (Member)
Heard	2 July 2018 Determined on the documents
Finding	Breach of regulation 7(1)(b)

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### FINDING AND REASONS FOR FINDING

Published 13 July 2018

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#### DEFAMATION CAUTION

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## Summary of the Panel's decision

1. Under the provisions of the *Local Government Act 1995* (WA) (the Act) the Panel found that Councillor Michelle Steck, a Councillor for the City of Bunbury (the City), breached regulation 7(1)(b) of the Act and the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) by criticising a Council decision in a letter to the editor of the South Western Times local newspaper (the Paper) published on 1 February 2018. The Council decision was to appoint a representative of the Bunbury Geographe Chamber of Commerce and Industry (BGCCI) to the Council's Policy Review and Development Committee (the Committee).

## Jurisdiction and procedural fairness

2. The Act provides for the circumstances in which a council member commits a minor breach.<sup>1</sup>

3. On 20 February 2018 the Panel received a Complaint of Minor Breach Form dated 15 February 2018, with attachments, signed by Councillor Gary Brennan, the City Mayor, alleging Cr Steck breached regulation 7 of the Regulations by publicly criticising a Council decision in a letter published in the Paper on 1 February 2018, in breach of her obligations as an Elected Member of Council (the Complaint).

4. By email on 16 March 2018 the Department of Local Government, Sport and Cultural Industries (the Department) sent Cr Steck a copy of the Complaint Form and the documents the Mayor provided with his Complaint Form, inviting her to respond to the Complaint.

5. 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 breach occurred.

6. The Panel convened on 2 July 2018 to consider the Complaint. The Panel:

- accepted the advice of the Department that, based on information published on the Western Australian Electoral Commission's website, Cr Steck was last elected as a City Councillor on 21 October 2017, was a councillor at the time of the alleged breach and a councillor when the Panel met on 2 July 2018;
  - was satisfied the Complaint was made within two years after the alleged breach occurred<sup>2</sup>;
  - noted that Cr Steck responded to the Complaint by email on 11 June 2018, attaching a statement dated 8 June 2018 (the Response);
  - was satisfied the Department had provided procedural fairness to Cr Steck;
- and
- found it had jurisdiction to consider the Complaint.

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

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



## The Panel's role

7. The Panel is not an investigative body.<sup>3</sup> It makes decisions about complaints of minor breaches solely upon the evidence presented to it and, when relevant, information published on a local government's website, such as council meeting agendas and minutes, policies and codes of conduct. For the Panel to find that a councillor committed a minor breach it must be satisfied on the evidence before it that it is more likely than not that the alleged breach occurred.<sup>4</sup> This is commonly referred to as "the required standard" or "the required standard of proof".

8. The Panel cannot rely on an alleged fact unless it is satisfied that it is more likely than not that the alleged fact is true.<sup>5</sup> The Panel cannot merely choose between two or more conflicting but equally possible versions of events.<sup>6</sup> To accept one of the competing versions of events it must be satisfied that one is more likely to be the correct version.

9. For a finding that a councillor has breached a particular regulation the Panel must be satisfied to the required standard that every element of that regulation has been established.

10. Where the complainant submits the Panel should come to a particular conclusion, such as that the evidence establishes an element of the regulation, the Panel must be satisfied, after weighing up all the evidence and applying the relevant legal principles, that its conclusion is the one best supported by the evidence.<sup>7</sup>

## The Complaint

11. The Mayor attached copies of the following documents to his Complaint Form:

- Page 10 of the 1 February 2018 edition of the Paper, which includes a letter to the editor titled "Protect council roles", concluding with "Cr Michelle Steck" (the Letter).
- A letter from Mr BH, a member of the public, to the City sent by email on 5 February 2018.
- An email response dated 5 February 2018 to Mr BH's letter from Mr Malcolm Osborne, the City's Chief Executive Officer (the CEO).
- An article published in the Paper on 6 February 2018 titled "Council leaders defend policy committee decision".

12. The Mayor has not identified which particular parts of the Letter offend regulation 7 or when Council made the decision to appoint a BGCCI representative to the Committee.

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<sup>3</sup> *Re and Local Government Standards Panel* [2015] WASAC 51, paragraph 24.

<sup>4</sup> Section 5.106 of the Act.

<sup>5</sup> The effect of section 5.106 of the Act.

<sup>6</sup> *Bradshaw v McEwens Pty Ltd* (1951) 217 ALR 1, paragraph 5.

<sup>7</sup> The effect of section 5.106 of the Act.



13. Regulation 7 provides:

*“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 5.9 of the Act or The Criminal Code section 83.”*

14. The Mayor does not specify whether he alleges a breach of regulation 7(1)(a) or 7(1)(b). Based on the assertions in the Complaint Form the Panel treated the Complaint as an allegation of a breach of regulation 7(1)(b).

15. In this case regulation 7(2) does not exclude the operation of regulation 7(1)(b) because the alleged conduct is not conduct that could contravene the parts of the Act and *The Criminal Code* referred to in regulation 7(2).

16. The Mayor asserts in his Complaint Form:

- In the Letter Cr Steck criticised a Council decision, in breach of her obligations as an Elected Member, including her obligation to act in the best interests of Council and the City.
- Cr Steck’s comments reflected adversely on the Council and City employees and by making these comments in public she caused detriment to the City.

17. In his letter Mr BH claims Cr Steck’s statement in the Letter that she had been a City Councillor for over 12 years was false and misleading, as the Western Australian Electoral Commission’s website indicates she had only been on Council for 10 years and 3 months. In his email in response to Mr BH the CEO acknowledges Mr BH’s letter and states, “It is important that individual Councillors making public comments ensure they are factual.” The CEO does not clarify the duration of Cr Steck’s service on Council.

## **The Response**

18. Cr Steck does not deny she sent the Letter, as published, to the Paper for publication. She denies she has breached the Act or regulation 7.

19. Cr Steck says, in summary:

- (a) She “absolutely refutes” the assertion that she has caused detriment to the City, or made any adverse reflections on Council or City employees.
- (b) She wrote the Letter in her personal capacity, using “I” in the first paragraph, as an individual exercising her freedom of speech.
- (c) She only sought to uphold the integrity of the City and the roles and responsibilities of the Councillors under the Act.



- (d) Her comments were fair and reasonable.
- (e) The Complaint is trivial.
- (f) The Mayor has abused his position by making such a trivial complaint against one of the “longest serving members” of Council.
- (g) She wrote the Letter because her “first – highest – obvious - obligation” is as an elected member. She reflected this obligation in the Letter by saying:

*“I am sworn to office ... to uphold the integrity of the council, provide good policy, governance, leadership and to protect the finances of the city and the people within it”; and*

*“Representing the Community as an elected member carries serious responsibility.”*

- (h) Community members of a Council committee are not required to take an oath of office. The Committee is a governance committee. It is the role of councillors alone to perform the work of the Committee. It is not for non-elected members to create policy (although she acknowledges the Committee’s role is to refer matters to Council for decision).
- (i) The position of a community representative on the Committee was not advertised. BGCCI was “hand-picked” by the Mayor, as his representative. Members of the community were already worried that BGCCI had too much influence on the Council.
- (j) Her statements in the Letter about a Council decision concerning signage policy and BGCCI were true, so could not justify a finding of a breach of the Regulations or the Act.

### **Panel’s consideration**

20. In the Complaint Form the Mayor himself does not assert Cr Steck breached regulation 7 by misrepresenting the length of time she had served on Council. He merely attaches a copy of Mr BH’s letter and almost in passing mentions Mr BH’s concern. The Panel treats the Complaint as being limited to the allegation that Cr Steck breached regulation 7(1)(b) by criticising a Council decision in the Paper.

21. The Letter was published shortly after the ordinary council meeting on 23 January 2018 (the OCM). Taking into account the content and timing of the Letter, and the published minutes of the OCM, the only reasonable inference is that Cr Steck was referring to a Council decision at that meeting.

#### Ordinary council meeting on 23 January 2018

22. The Panel has no reason to doubt the accuracy of the minutes of Council meetings published on the City’s website.

23. The published minutes of the OCM indicate that under Item 10.14 “Policy Review and Development Committee – Review Terms of Reference” Council discussed a



Recommendation from the Policy Review and Development Committee (PRDC) that, among other things, Council:

*“2. Pursuant to section 5.9(2)(d) of the Local Government Act 1995, establish the membership composition of the Policy Review and Development Committee as 4 Elected Members plus 1 representative from the Bunbury Geographe Chamber of Commerce and Industry.*

*3. Request the Chief Executive Officer contact the Bunbury Geographe Chamber of Commerce and Industry to facilitate the participation of a nominated representative on the Policy Review and Development Committee.”<sup>8</sup>*

24. The Mayor put recommendations 2 and 3 to the vote separately. Council agreed to both recommendations by 7 votes to 6, with Cr Steck voting against both recommendations.<sup>9</sup>

#### The Article

25. The Mayor does not indicate which parts of the Article, if any, support the issues to be considered by the Panel. Much of the Article attributes comments to the Mayor made after the OCM in which he justifies the decision to appoint a BGCCI representative to the Committee. It is not the Panel’s role in this case to assess the merits of the decision.

#### First element of regulation 7(1)(b) – whether Cr Steck was a councillor when she sent the Letter to the Paper

26. Cr Steck does not deny she was a City Councillor when she sent the Letter. This element is established.

#### Second element - whether Cr Steck used her office as a councillor when she sent the Letter

27. Cr Steck does not admit she sent the Letter in her capacity as a Councillor. Her submissions relevant to this element are unclear. On the one hand she says she used “I” and sent the Letter as an individual exercising her right of freedom of speech. On the other hand, she does not say the sign-off line at the bottom of the Letter, “Cr Michelle Steck” wrongly indicates she sent the Letter in her capacity as a Councillor. In her Response Cr Steck refers to her oath to uphold the integrity of Council, her training as a councillor to act in good faith and her “first – highest” obligation as an elected member.

28. Any suggestion that Cr Steck did not write the Letter in her capacity as a Councillor is untenable. This element is established.

#### Third element – whether Cr Steck made improper use of her office as a councillor

29. The dictionary definition of “improper” is “not in accordance with propriety of behaviour, manners, etc.; unsuitable or inappropriate for the purpose or occasion; abnormal or irregular.”<sup>10</sup>

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<sup>8</sup> Pages 52 and 53 of the minutes of the OCM.

<sup>9</sup> Page 54 of the minutes of the OCM.

<sup>10</sup> Macquarie Dictionary, Revised Third Edition.



30. The meaning of “improper” must be considered in the context of relevant legislation, such as the Act and the Regulations, other rules and standards that apply to a councillor’s role and conduct, such as the local government’s Code of Conduct, and the circumstances and context of the case.<sup>11</sup>

31. Whether there is impropriety is to be assessed objectively: would a reasonable person with knowledge of the duties, powers and authority of a councillor, and all the circumstances of the particular case, form the view that the councillor had breached the standards of conduct expected of a councillor?<sup>12</sup>

32. Under the Act Panel members must have regard to the general interests of local government in Western Australia.<sup>13</sup> It is in the interests of local government that councillors avoid damage to the reputation of the local government, employees and councillors and treat others with respect and fairness.<sup>14</sup> Councillors must respect, and be seen to respect, the processes and authorised decisions of Council. Councillors have a duty to be faithful to their Council.<sup>15</sup>

33. Regulation 3 of the Regulations sets out general principles to guide councillors’ behaviour, although contravention of any of any of these does not amount to a minor breach.<sup>16</sup> Regulation 3 provides, among other things, that councillors should act with reasonable care, diligence, honesty and integrity; avoid damage to the reputation of the local government; and treat others with respect and fairness.

34. Conduct can be improper even though the councillor’s judgment is that it isn’t improper. A councillor’s use of his or her office can be improper even though the councillor is intending to benefit the local government, the council or the ratepayers and residents.<sup>17</sup>

35. The City’s Code of Conduct, as currently published on its website, applied at the time of the alleged breach.<sup>18</sup> It provides:<sup>19</sup>

*“Dealing with the Media – Making Public Comment*

*Unless otherwise authorised to do so, Elected Members, Committee Members or Employees making public statements, express them as opinions only, which do not necessarily represent the City’s position. Elected Members, Committee Members and Employees who speak publicly against any Council resolution without authorisation to do so may be using the information, or be seen to use the information improperly and run the risk of causing detriment to the City.*

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<sup>11</sup> *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 10, referring to *Treby and Local Government Standards Panel* [2010] WASAT 81 (*Treby* 2010).

<sup>12</sup> *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 27, referring to *R v Byrnes* (1995) 183 CLR 501.

<sup>13</sup> Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).

<sup>14</sup> Regulations 3(1)(d) and (g) of the Regulations.

<sup>15</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59 paragraph 64(5), *Treby and Local Government Standards Panel* [2009] WASAT 224 paragraph 19.

<sup>16</sup> Regulation 13.

<sup>17</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64(4), referring to *Treby* 2010.

<sup>18</sup> The Code was amended by Council resolution on 19 September 2017.

<sup>19</sup> Pages 15 and 16.



*All contact Elected Members, Committee Members and Employees have with the public outside the City, media or otherwise, should be positive, informative and appropriate.”*

36. In the Letter Cr Steck is clearly speaking about recommendations 2 and 3 quoted in paragraph 23 above.

37. Applying the tests for improper use of office outlined in paragraphs 29 to 34 above the Panel is satisfied to the required standard that Cr Steck made improper use of her office when making the following statements in the first and eighth paragraphs of the Letter (the Statements), considered in the context of the Letter as a whole:

*“As a Bunbury Councillor for over 12 years, I have major concerns about the recent decision of the council to appoint “hand-picked” representation such as the (BGCCI) to the Policy Review and Development Committee ...*

*...*

*Fobbing-off and blatantly watering down the role and responsibilities of an elected member should be concerning for all.”*

38. The Panel forms this view because:

- (a) It is more likely than not that a reasonable reader of the Statements, in the context of the Letter as a whole, would form the view that Cr Steck was, in her capacity as a Councillor, criticising a recent Council decision to appoint a member of the BGCCI to the Committee.
- (b) Councillors have a duty to be faithful to Council decisions. There is nothing to indicate that Council made the decision to appoint a BGCCI representative to the Committee without authority or due process.
- (c) It is more likely than not that Cr Steck had the opportunity to consider the relevant officer’s report and to explain her opposition to these recommendations before Councillors voted. She has not submitted otherwise. Once Council made its decision she had a duty to respect and be faithful to it.
- (d) Although a councillor may advise the public after a council meeting why they voted against a proposal they must be careful to word their comments in a way that indicates respect for the views of all other councillors and a commitment to their council’s decision.
- (e) It is more likely than not that other City Councillors would find the use of “hand-picked” and “fobbing-off” offensive and disrespectful. Cr Steck’s comments show disrespect for the views of the several Councillors who voted to accept recommendations 2 and 3.
- (f) It is more likely than not that a reasonable reader of the Letter would consider Cr Steck was accusing the Councillors who voted in favour of the recommendations of adding an inappropriate outsider to the Committee thereby devaluing the role of Councillors and limiting Councillors’ responsibilities.
- (g) The Code of Conduct warns Councillors who wish to speak publicly about the risk



of damaging the City and the need to be positive, informative and appropriate. Cr Steck did not take sufficient care to ensure her comments met the standards espoused in the Code of Conduct.

- (h) The Panel is satisfied to the required standard that any reasonable person who reads the Letter, knowing about Council's decision and the rules that govern the conduct of councillors, would come to the view that Cr Steck did not meet the standards of professionalism and respect for the Council decision, and for her fellow Councillors, that she is expected to uphold.

39. This element is established.

Fourth element – whether Cr Steck intended to cause detriment to the local government or any other person

40. "Detriment" means loss, damage or injury.<sup>20</sup> It includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage. A person or organisation can suffer detriment through others thinking less favourably of them or of it.<sup>21</sup>

41. For regulation 7(1)(b) to be satisfied it is not necessary to show that the local government or the person concerned actually suffered detriment.<sup>22</sup> And it is not enough to show that the local government or the person concerned suffered detriment, or could have suffered detriment. The Panel must find that the councillor believed that his or her actions would cause detriment and took the action to cause detriment.<sup>23</sup>

42. "To cause detriment" means "in order to" or "for the purpose of" causing detriment, or "with the will to" cause detriment.<sup>24</sup> There can be a finding of intent if, after considering all the evidence, the only reasonable inference is that the councillor intended to cause detriment.<sup>25</sup>

43. The Statements, when considered in the context of Council's decision and the other paragraphs in the Letter, say in effect that Council made a bad decision. Although it is not clear when she wrote to the Paper, 8 clear days elapsed between the OCM and the publication of the Letter. Cr Steck was not speaking impulsively; the Statements did not arise out of an interview; she initiated the communication and would have, or should have, taken time to reflect on her words.

44. In her Response Cr Steck does not resile from her Statements, even after time to reflect on the effect of regulation 7. She affirms her view that the Councillors who voted in favour of BGCCI representation on the Committee were wrong. She is more explicit about "hand-picked", saying the Mayor had hand-picked BGCCI to join the Committee. She says she was responding to community concerns about BGCCI. However, the proper action would have been to tell any concerned members of the community that, after consideration at the OCM and a close vote, the majority had made a decision which should

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<sup>20</sup> Macquarie Dictionary Revised Third Edition, 2001.

<sup>21</sup> *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraphs 31, 32.

<sup>22</sup> *Treby* 2010, paragraph 96, referring to *Chew v The Queen* 1992 CLR 626 (*Chew* 2010).

<sup>23</sup> *Re and Local Government Standards Panel* [2014] WASAT 111, paragraph 51, referring to *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd* [2013] FCA 1342.

<sup>24</sup> *Chew* 2010.

<sup>25</sup> *Treby* 2010.



be upheld unless Council chose at some point to reconsider the matter. Instead she set out to blame the Mayor personally and other Councillors for making a wrong decision.

45. The only reasonable inference is that by sending the Letter Cr Steck wanted to tell the community that the Mayor and the other Councillors who voted in favour of the recommendations had made a damaging decision. She intended to cause members of the community to think less favourably of them for allowing BGCCI to join the Committee.

46. This element is established.

### **Panel's finding**

47. The Panel finds that Cr Steck breached regulation 7(1)(b) when she made the Statements referred to in paragraph 37 above in a letter to the South Western Times, intending to cause detriment to the Mayor and the other Councillors who voted in favour of the recommendations referred to in paragraph 23 above. Cr Steck therefore committed a minor breach.

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Merranie Strauss (Member)

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Paul Kelly (Member)

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Mark Beecroft (Deputy Member)

Date of Reasons for Decision      11 July 2018