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## Local Government Standards Panel

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Complaint Number	20210271
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Mr Stephen Kepert</b>
<b>Respondent</b>	<b>Councillor Jane Edinger</b>
Local Government	<b>City of Melville</b>
Regulation	Regulation 18 of the <i>Local Government (Model Code of Conduct) Regulations 2021</i>
Panel Members	Mr Tim Fraser (Presiding Member) Mrs Emma Power (Member) Cr Peter Rogers (Member)
Heard	3 February 2022 Determined on the documents
Finding	1 x Breach Regulation 18(1)(b)

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### FINDING AND REASONS FOR FINDING

Delivered 17 March 2022

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#### DEFAMATION CAUTION

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#### Summary of the Panel's decision

1. On 3 February 2022, the Panel found that Councillor Jane Edinger a councillor of the City of Melville ("**the City**") did commit one minor breach pursuant to the *Local Government Act 1995 (WA)* ("**the Act**") and Division 4 and Regulation 18 of the *Local Government (Model Code of Conduct) Regulations 2021* ("**the Regulations**") when she made a comment relating to the Complainant intended to cause him a detriment as further set out in paragraph 17 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 and the *Local Government (Administration) Regulations 1996* provide for the circumstances in which a council member commits a minor breach.
4. Section 5.105(1) of the Act provides that a council or committee member commits a minor breach if the council or committee member contravenes a rule of conduct. Division 4 of the Regulations sets out the rules of conduct for council members and candidates.
5. Regulation 34D of the *Local Government (Administration) Regulations 1996* also provides that the contravention of a "local law as to conduct" is a minor breach pursuant to the Act.
6. 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>1</sup>
7. 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.
8. 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>2</sup>; and
  - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding<sup>3</sup>.
9. The Panel does not possess investigative or supervisory powers.<sup>4</sup> The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials in the public domain or published by the relevant local authority's website.
10. 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.
11. The Panel also must have regard to the general interests of local government in Western Australia<sup>5</sup>.
12. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

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<sup>1</sup> Section 5.106 of the Act

<sup>2</sup> *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1

<sup>3</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336

<sup>4</sup> *Re and Local Government Standards Panel* [2015] WASC 51 (at paragraph 24)

<sup>5</sup> Section 8(6) of Schedule 5.1 of the Act



### **Jurisdiction and Procedural Fairness**

13. On 16 November 2021 the Panel received a complaint from Mr Bruce Taylor acting as complaints officer of the City (“**the Complaints Officer**”). The same enclosed a Complaint of Minor Breach Form dated 15 November 2021.
14. In the complaint form, the Complainant alleges that Cr Edinger has breached regulation 18 of the Regulations when she made certain comments in a Facebook Post-dated 23 September 2021 which were allegedly improper and caused a detriment to the Complainant as follows:
  - a. *“I was shocked at the behaviour of the current ward councillor for Applecross and Mount Pleasant. From his behaviour I believe the counsellor (sic) is not representing his ward as he should” (“**Allegation 1**”);*
  - b. *“I truly believe there needs to be a change of representative in that ward.” (“**Allegation 2**”); and*
  - c. *“If you live, or know anyone who lives, in Applecross or Mount Pleasant please vote for Clive Ross to ensure effective representation on council.” (“**Allegation 3**”),*  
as referred to in paragraph 16 below (together “**the Complaint**”).
15. The Panel convened on 3 February 2021 to consider the Complaint.
16. 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, Cr Edinger was:
    - i. elected to the Council of the City d in October 2021 for a term expiring in October 2025;
    - ii. a candidate at the time of the alleged breach; and
    - iii. a Councillor when the Panel met on 3 February 2022;
  - b. was satisfied the Complaint was made within six months after the certain of the alleged breaches occurred<sup>6</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>7</sup>;
  - d. was satisfied the Department had provided procedural fairness Cr Edinger; and
  - e. found it had jurisdiction to consider the Complaint.

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

17. The Complainant provided the following comments and arguments in respect to the Complaint as summarised by the Panel:

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<sup>6</sup> Section 5.107(4) and 5.109(2) of the Act

<sup>7</sup> Section 5.107 and 5.109 of the Act



- a. On 23 September 2021, Cr Edinger breached Regulation 18 of the Regulations by causing a detriment to then-Cr Steve Kepert in a post she authored on her Facebook page.
- b. The offensive post on Cr Edinger’s Facebook page reads:

*“Last night I attended the “meet and greet” for Clive Ross, who has nominated as a candidate in the Applecross-Mt Pleasant ward.*

*I believe Clive will be an outstanding representative for the residents and ratepayers of Applecross-Mount Pleasant ward. Over the past few years Clive has worked hard for the local area to improve or remedy untenable situations, such as the building height issue within the Canning Bridge precinct, created by the Council administration.*

*On Tuesday evening, when I attended in person the ordinary meeting of council for the first time in a long time, I was shocked at the behaviour of the current ward councillor for Applecross and Mount Pleasant. From his behaviour I believe the counsellor (sic) is not representing his ward as he should<sup>[OBJ]</sup>.*

*I truly believe there needs to be a change of representative in that ward.*

*If you live, or know anyone who lives, in Applecross or Mount Pleasant please vote for Clive Ross to ensure effective representation on council.*

*Thank you.”*

**(“the Post”)**
- c. The page is very clearly authored by Cr Edinger.
- d. It is very clear that Cr Edinger was referring to Cr Kepert in the Post as he was the Councillor for the Applecross – Mt Pleasant ward as he was one of the two Councillors representing that ward and the one which was up for election in the 2021 ordinary elections. Cr Edinger cannot be referring to any other individual.
- e. The offensive comments in the Post are as follows:
  - i. *“I was shocked at the behaviour of the current ward councillor for Applecross and Mount Pleasant. From his behaviour I believe the counsellor (sic) is not representing his ward as he should” (“Comment 1”);*
  - ii. *“I truly believe there needs to be a change of representative in that ward.” (“Comment 2”);* and
  - iii. *“If you live, or know anyone who lives, in Applecross or Mount Pleasant please vote for Clive Ross to ensure effective representation on council.” (“Comment 3”).*
- f. Cr Edinger publicly broadcasted a comment which blatantly attacks an elected Councillor of the City of Melville, based on nothing.
- g. She makes no reference to anything specific but attacks Cr Kepert first by saying that she was “shocked” at Cr Kepert’s “behaviour” before offensively stating that Cr Kepert was “not representing his ward as he should”.
- h. Cr Edinger is in no position to speak on behalf of anyone in the Applecross-Mt Pleasant Ward and this statement is an offence to them, to their elected representative Cr Kepert and to the City of Melville.



- i. Cr Edinger's comments were so wrong and offensive but also untrue.
  - j. There was nothing wrong whatsoever with then-Cr Kepert's "behaviour" or otherwise and this comment was committed with intent to cause him detriment in hope to promote herself and another candidate in a local government election.
  - k. To promote another candidate "to ensure effective representation" is a direct attack on Cr Kepert (and indeed the three other Candidates who took part in that ward's election) in that it insinuates that Cr Kepert (and any candidate) would not be able to provide effective representation. This is grossly offensive.
  - l. The actions were committed for political gain, were performed with intent, and detriment was suffered by then-Cr Kepert.
  - m. Cr Edinger's post was also liked by former Mayor Russell Aubrey's latest fake Facebook profile and shared by him on at least one of his troll pages, compounding the detriment inflicted on then-Cr Kepert by Cr Edinger.
  - n. The Regulations apply to Cr Edinger as she was a candidate in the 2021 ordinary elections.
  - o. Furthermore, the post still appears on the same page where she now refers to herself as a Councillor. Her actions were committed with intent, are unbecoming of an elected Councillor and were clearly so wrong and offensive that an apology to Cr Kepert and to the City of Melville is warranted.
18. The Complainant also provided a copy of the Post.

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

19. By an email dated 20 December 2021, Cr Edinger provided a response to the Complaint.
20. Cr Edinger denies that she has committed any minor breach.
21. Cr Edinger makes the following comments in respect to the Complaint as summarised by the Panel:
  - a. Cr Edinger accepts that she posted the comment on her campaign Facebook page.
  - b. Cr Edinger believes her comments in the Facebook post were factual.
  - c. Cr Edinger had been advised that Cr Kepert had, for many months, been making the following declaration in relation to all motions put forward:

*" Disclosure of Interest - Member Cr S Kepert  
Type of Interest - Interest under the Code of Conduct.  
Nature of Interest - I do not possess all the information I require to make an informed decision."*
  - d. Further Cr Kepert had refused to vote on motions being put forward but had stayed and participated in discussion of motions, which in itself is a serious breach of the Act.



- e. Cr Edinger did not name Cr Kepert in the Facebook post and therefore people would have had to find out for themselves which Councillor she was referring to.

### **Regulation 18**

- 22. Regulation 18 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:

**“18. Securing personal advantage or disadvantaging others**

*(1) A council member must not make improper use of their office —*

*(a) to gain, directly or indirectly, an advantage for the council member or any other person; or*

*(b) to cause detriment to the local government or any other person.*

*(2) Subclause (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.”*

- 23. To make a finding of a minor breach of regulation 18(1)(b) of the Regulations the Panel must be satisfied to the required standard that:
  - a. Cr Edinger was an elected member or a candidate at the time of the alleged breach and the time of the determination;
  - b. Cr Edinger made use of her office as Council member or candidate of the City;
  - c. when viewed objectively, such use was an improper use of Cr Edinger’ 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. Either:
    - i. In respect to regulation 18(1)(a) – Cr Edinger engaged in the conduct with the intention of gaining an advantage for herself or another party; and
    - ii. In respect to regulation 18(1)(b) – Cr Edinger engaged in the conduct in the belief that detriment would be suffered by another person.
- 24. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or lack of wisdom. 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.
- 25. 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.
- 26. 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.



27. 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 exercised and his purpose or intention in exercising the power will be important factors in determining whether the power has been abused<sup>8</sup>.
28. The definitions of the noun 'advantage' in the Shorter Oxford English Dictionary (6th ed) include: a favouring circumstance; something which gives one a better position, benefit; increased well-being or convenience or pecuniary profit.
29. The Panel considers the term 'advantage' in regulation 7(1)(a) is to be construed widely, and includes a financial or a non-financial benefit, gain or profit, or any state, circumstance, opportunity or means specially favourable.
30. It is not necessary to find whether any advantage actually gained but an intent to gain such advantage must be established.
31. "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.
32. It is not necessary to find whether any detriment was actually suffered<sup>9</sup>, but an intent to cause such detriment must be established.

### **Code of Conduct**

33. The City has a Code of Conduct Elected Members, Committee Members and Candidates adopted by Council 3 May 2021 ("**the Code**").
34. The relevant provisions of the Code are as follows:

**" 4. Personal integrity**

(1) *A council member, committee member or candidate should —*

(a) *act with reasonable care and diligence; and*

(b) *act with honesty and integrity; and*

.....

(e) *avoid damage to the reputation of the local government."*

**"5. Relationship with others**

(1) *A council member, committee member or candidate should —*

(a) *treat others with respect, courtesy and fairness; and*

(b) *respect and value diversity in the community.*

(2) *A council member or committee member should maintain and contribute to a harmonious, safe and productive work environment."*

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<sup>8</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].

<sup>9</sup> Yates and Local Government Standards Panel [2012] WASAT 59 at [72]



**“ 8. Personal integrity**

(1) *A council member, committee member or candidate -*

(a) *must ensure that their use of social media and other forms of communication complies with this code; and*

(b) *must only publish material that is factually correct.*

....”

**“ 9. Relationship with others**

*A council member, committee member or candidate —*

(a) *must not bully or harass another person in any way; and*

(b) *must deal with the media in a positive and appropriate manner and in accordance with any relevant policy of the local government; and*

(c) *must not use offensive or derogatory language when referring to another person; and*

(d) *must not disparage the character of another council member, committee member or candidate or a local government employee in connection with the performance of their official duties; and*

(e) *must not impute dishonest or unethical motives to another council member, committee member or candidate or a local government employee in connection with the performance of their official duties.”*

**PANEL’S CONSIDERATION**

**Regulation 18 - Allegation 1**

Cr Edinger was an Elected Member or a candidate at the relevant times

35. In Regulation 2(1) of Schedule 1 of the Regulations, candidate is defined as follows:

*“**candidate** means a candidate for election as a council member;”*

36. Cr Edinger was a candidate at the time of the alleged breach and was an Elected Member at the date the Panel considered the Complaint.

37. This element is met.

Cr Edinger made use of her office as Council Member or candidate of the City

38. As the relevant conduct was posted on Cr Edinger’s Facebook page that she was using in her capacity as a candidate of the upcoming election, the Panel finds that it is more likely than not that Cr Edinger was acting in her capacity as an elected member and made use of her office as a council member when undertaking the relevant conduct.

39. This element is met.

Cr Edinger’s use was improper



40. The Complainant has alleged that the following Comment 1 was improper as it was offensive and untrue
- “ I was shocked at the behaviour of the current ward councillor for Applecross and Mount Pleasant. From his behaviour I believe the counsellor (sic) is not representing his ward as he should”*
41. In this case the Panel finds that the first sentence, that Cr Edinger is “shocked” is not improper.
42. This refers to Cr Edinger’s personal opinion as to Cr Kepert which, in the context of a continued refusal to vote at Council meetings as an elected member, being a deliberate breach of the Act, would be reasonable to categorise as “shocking”.
43. However, the second sentence goes further than this in that it not only asserts a personal opinion, but goes so far as to assert that Cr Kepert was not acting properly.
44. Although the Panel appreciates that, on a reasonable reflection of the actions of Mr Kepert in his capacity as councillor, it may be reasonable to come to that conclusion, the Panel finds that such sentence was improper as:
- a. Cr Edinger should have been aware that such sentence would disparage the character of another council member in breach of clause 9 (d) of the Code; and
  - b. a public Facebook Post is not the appropriate forum to accuse a councillor or improper conduct. There are complaint mechanisms through the Act by which such conduct should be addressed.
45. For the reasons given above, the Panel finds that it is more likely than not that the second sentence of Comment 1 was improper as:
- a. the conduct was in breach of the Code; and
  - b. the conduct 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. the conduct is deserving of a penalty.
46. This element is met.

Regulation 18(1)(a) - Cr Edinger intended to gain an advantage

47. The Complainant has argued that Comment 1 was made by Cr Edinger to:
- a. promote herself;
  - b. promote another candidate; and
  - c. caused the Complainant a detriment.
48. With respect to whether a promotion of herself is considered an “advantage” the Panel notes that the type of “advantage” gained by attempting to make oneself look better, or generally attempting to gain support of your stance is not the type of advantage which falls under regulation 18(1)(a). These are general (and somewhat necessary) personality traits for people in politics and the public eye;
49. The Panel does consider that the intended the promotion of another candidate is an “advantage” that could fall under Regulation 18(1)(a), however, in this case, the conduct the subject of the Complaint Comment 1 made by Cr Edinger.



50. Comment 1 does not deal with the promotion of another candidate, only the perceived failings of the Complainant. Therefore, this more properly falls under regulation 18(1)(b) as considered below.
51. This element is not met.

#### Regulation 18(1)(b) - Cr Edinger intended to cause a disadvantage

52. In this case the Panel finds, to the required standard, that the words "*From his behaviour I believe the counsellor (sic) is not representing his ward as he should*" can only be reasonably construed as an attempt to make members of the public think less of the Complainant.
53. The Panel notes that there had been public concern regarding the conduct of the Complainant and that it could be reasonable to hold this opinion, however, the Post was simply not the correct forum to air such concerns.
54. In respect to Cr Edinger's assertion that she did not name the Complainant, the Panel notes that in the context:
  - a. there was only 2 Applecross-Mt Pleasant Ward Councillors she could be referring to;
  - b. any person who was even marginally familiar with the then current Council, would be aware that Cr Edinger was referring to the Complainant; and
  - c. any person wishing to find out the party she was referring to could do so with minimal effort.
55. As such the Panel finds that it was apparent who Cr Edinger was referring to in the Post.
56. The Panel finds to the required standard Cr Edinger did have an intention to cause a detriment to the Complainant or any other party.
57. This element is met.

#### Conclusion

58. Given the above:
  - a. the elements required to find a breach of regulation 18(1)(a) of the Regulations have not been met; and
  - b. the elements required to find a breach of regulation 18(1)(b) of the Regulations have been met.

### **Regulation 18 - Allegation 2**

#### Cr Edinger was an Elected Member or a candidate at the relevant times

59. In Regulation 2(1) of Schedule 1 of the Regulations, candidate is defined as follows:  
"**candidate** means a candidate for election as a council member;"
60. Cr Edinger was a candidate at the time of the alleged breach and was an Elected Member at the date the Panel considered the Complaint.
61. This element is met.



Cr Edinger made use of her office as Council Member or candidate of the City

62. As the relevant conduct was posted on Cr Edinger's Facebook page that she was using in her capacity as a candidate of the upcoming election, the Panel finds that it is more likely than not that Cr Edinger was acting in her capacity as an elected member and made use of her office as a council member when undertaking the relevant conduct.

63. This element is met.

Cr Edinger's use was improper

64. The Complainant has alleged that the following Comment 2 was improper as it was offensive and untrue:

*"I truly believe there needs to be a change of representative in that ward."*

65. In this case the Panel finds that Comment 2 relates solely to Cr Edinger's personal opinion as to the representation of the Applecross Mt-Pleasant Ward.

66. There is nothing inherently improper in this particular sentence and would be considered reasonable and non-offensive irrespective of the identity of the candidate or then current sitting councillor.

67. The endorsement and support of election candidates is a common and usual feature of the political system in Australia.

68. Provided that a councillor provides such support in an objective, honest and fair manner and without resorting to negatively referring to other candidates, then there is nothing inherently improper in simply endorsing or supporting certain candidate over others.

69. It is not unreasonable or improper for an elected member to support a particular candidate for a Local Government election and to express their view or opinion in that respect. Comment 2 goes not further than this.

70. For the reasons given above, the Panel finds that it is more likely than not that Comment 2 was not improper as:

- a. the support of candidates is a normal and accepted part of the political system in Australia;
- b. the conduct was not in breach of the Act or Code;
- c. the conduct was not 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
- d. the conduct is not deserving of a penalty.

71. This element is not met.

Regulation 18(1)(a) - Cr Edinger intended to gain an advantage and Regulation 18(1)(b) - Cr Edinger intended to cause a disadvantage

72. As the above element has not been met, the Panel has not further considered these elements.



### Conclusion

73. Given the above, the elements required to find a breach of regulation 18 of the Regulations have not been met.

### **Regulation 18 - Allegation 3**

#### Cr Edinger was an Elected Member or a candidate at the relevant times

74. In Regulation 2(1) of Schedule 1 of the Regulations, candidate is defined as follows:

*“**candidate** means a candidate for election as a council member;”*

75. Cr Edinger was a candidate at the time of the alleged breach and was an Elected Member at the date the Panel considered the Complaint.
76. This element is met.

#### Cr Edinger made use of her office as Council Member or candidate of the City

77. As the relevant conduct was posted on Cr Edinger’s Facebook page that she was using in her capacity as a candidate of the upcoming election, the Panel finds that it is more likely than not that Cr Edinger was acting in her capacity as an elected member and made use of her office as a council member when undertaking the relevant conduct.

78. This element is met.

#### Cr Edinger’s use was improper

79. The Complainant has alleged that the following Comment 2 was improper as it was offensive and untrue:

*“ If you live, or know anyone who lives, in Applecross or Mount Pleasant please vote for Clive Ross to ensure effective representation on council.”*

80. In this case the Panel finds that Comment 3 is purely an endorsement of the proposed candidate.
81. The words *“to ensure effective representation on council”* do not, in and of themselves, amount to a comment that relates to the Complainant.
82. Although in the context of the Post itself, the Complainant may have consider the same to be an adverse comment regarding his performance, the Panel finds that a reasonable person would not find the relevant comment to be offensive or objectionable.
83. As noted in paragraphs 66 to 68 inclusive above the endorsement and support of election candidates is a common and usual feature of the political system in Australia.
84. Comment 3 only asserts support for a candidate and asks people to vote for that candidate.
85. The Panel finds that it is more likely than not that Comment 3 was not improper as:
- the support of candidates is a normal and accepted part of the political system in Australia;
  - the conduct was not in breach of the Act or Code;



- c. the conduct was not 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
- d. the conduct is not deserving of a penalty.

86. This element is not met.

Regulation 18(1)(a) - Cr Edinger intended to gain an advantage and Regulation 18(1)(b) - Cr Edinger intended to cause a disadvantage

87. As the above element has not been met, the Panel has not further considered these elements.

Conclusion

88. Given the above, the elements required to find a breach of regulation 18 of the Regulations have not been met.

**Panel's Findings**

- 89. With respect to Allegation 1, Cr Edinger did commit a breach of Regulation 18(1)(b) of the Regulations and therefore did commit a minor breach.
- 90. With respect to Allegation 2, Cr Edinger did not commit a breach of Regulation 18 of the Regulations and therefore did not commit a minor breach.
- 91. With respect to Allegation 3, Cr Edinger did not commit a breach of Regulation 18 of the Regulations and therefore did not commit a minor breach.

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Tim Fraser (Presiding Member)

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Emma Power (Legal Member)

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Peter Rogers (Member)