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## Local Government Standards Panel

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Complaint Number	SP 59 of 2017 [DLGSC 20170145]
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Councillor Michael Bennett</b>
<b>Respondent</b>	<b>Councillor L Daniel Harris</b>
Local Government	<b>Shire of Dardanup</b>
Regulation	Regulations 7(1)(a), 8(b), 11(2) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mrs S Siekierka (Presiding Member) Councillor P Kelly (Member) Ms M Strauss (Member)
Heard	25 January 2018 Determined on the documents
Outcome	Breaches of regulations 7(1)(a) and 11(2) No breach of regulation 8(b)

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### FINDING AND REASONS FOR FINDING

Published 21 February 2018

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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 considered whether Councillor Laurance Daniel Harris (known as Councillor Danny Harris), a Councillor for the Shire of Dardanup (the Shire), committed three minor breaches under the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) in the lead up to, during and after an ordinary council meeting on 22 November 2017 when Council considered the allocation of funds contributed by the Eaton Boomers Football Club to the building of a new sports pavilion. The Panel found that Cr Harris committed minor breaches under regulations 7(1)(a) and 11(2) of the Regulations and did not commit a breach of regulation 8(b).

## 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 4 December 2017 the Panel received a Complaint of Minor Breach Form dated 30 November 2017 signed by Cr Michael Bennett, the Shire President (the President), alleging Cr Harris breached regulations 7, 8 and 11 between 18 November 2017 and 23 November 2017 concerning matters discussed at an ordinary council meeting on 22 November 2017 (the OCM).
4. The President included a statement in his Complaint Form. He also provided the following documents with his Complaint Form:
  - An undated, unsigned five-page submission to the Panel headed "Submission of complaint details to the Standards Panel" (the Submission).
  - Copies of 20 emails (Emails 1 to 20) dating between 18 November 2017 and 23 November 2017 passing between Cr Harris, the President, Mr Mark Chester, the Shire's Chief Executive Officer (the CEO) and other Councillors. Some of these Emails were merely forwarded to another person for their information.
  - A copy of 16 pages of Confidential Minutes of the part of the OCM held behind closed doors (the Confidential Minutes).
5. The Panel also considered the "Unconfirmed" minutes of the OCM published on the Shire's website (the Published Minutes). Part of the OCM was held behind closed doors because it involved discussion about a matter that had a commercial value to a person and a contract entered into (page 65 of the Published Minutes). The Panel will make limited references to the Confidential Minutes in this Finding and Reasons for Finding document.
6. By letter dated 6 December 2017 the Department of Local Government, Sport and Cultural Industries (the Department) sent Cr Harris a copy of the Complaint Form and the documents listed in paragraph 4 above inviting Cr Harris to respond to the Complaint. The Department sent another email to Cr Harris on 2 January 2018 inviting him to respond to the Complaint.

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



7. 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. However, if a councillor has previously committed two or more minor breaches, the Panel may send the complaint to the Chief Executive Officer of the Department instead of considering the complaint itself.<sup>2</sup> As Cr Harris had not previously committed any minor breaches the Panel did not consider sending the Complaint to the Chief Executive Officer of the Department.
8. The Panel convened on 25 January 2018 to consider the President's complaint (the Complaint). The Panel:
  - accepted the advice of the Department that, based on information published on the Western Australian Electoral Commission's website, Cr Harris was first elected as a Shire Councillor in October 2011 and was a Shire Councillor at the time of the alleged breaches and when the Panel met on 25 January 2018;
  - was satisfied the Complaint was made within two years after the alleged breaches occurred<sup>3</sup> and 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>4</sup>;
  - noted that Cr Harris responded to the Complaint in an email to the Department on 2 January 2018 (the Response);
  - was satisfied the Department had provided procedural fairness to Cr Harris; and
  - found it had jurisdiction to consider the Complaint.

### **Panel's role**

9. The Panel is not an investigative body.<sup>5</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 agendas for and minutes of council meetings, codes of conduct and policies. 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>6</sup> This is commonly referred to as "the required standard" or "the required standard of proof".
10. 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>7</sup> The Panel cannot merely choose between two or more conflicting but equally possible versions of events.<sup>8</sup> To accept one of the competing versions of events it must be satisfied that one is more likely to be the correct version.

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<sup>2</sup> Sections 5.110(2)(b), 5.111(1) of the Act.

<sup>3</sup> Section 5.107(4) of the Act

<sup>4</sup> Sections 5.107, 5.108, 5.109 of the Act.

<sup>5</sup> *Re v Local Government Standards Panel* [2015] WASC 51, paragraph 24.

<sup>6</sup> Section 5.106 of the Act.

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

<sup>8</sup> *Bradshaw v McEwens Pty Ltd* (1951) 217 ALR 1, paragraph 5.



11. 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.
12. 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>9</sup>

### **Background to the Complaint**

13. This background information is taken from the Complaint Form, the Submission, the Published Minutes and the Confidential Minutes. Cr Harris did not dispute any of this information when he responded to the Complaint.
14. The Shire had been managing a project to build the Eaton Sports Pavilion (the Project) for the use of a number of sporting clubs, including the Eaton Boomers Football Club (the Club). The building works were completed in June 2017.
15. The Club had contributed \$265,000 to the Project (the Club's Contribution). At the time of the OCM the Shire was holding the Club's Contribution and interest earned on this amount in trust. Litigation about the use of the Club's Contribution had been resolved and the Shire had received legal advice confirming it was legally obliged to put the Club's Contribution towards the costs of the Project.
16. The Published Minutes record that at the OCM the Shire officer's recommendation was that Council resolve to transfer the Club's Contribution plus interest earned on that amount to the Shire's Municipal Fund to be assigned to the Project. Cr Harris moved amended motions, one that the Shire transfer the Club's Contribution plus interest to the Club, the other that the Shire transfer the interest only. Council resolved, in line with the officer's recommendation, that the Club's Contribution plus interest be transferred to the Municipal Fund.

### **The Response**

17. In his Response Mr Harris says only, "No I will not be providing a response, the complaint is so frivolous and personal that I can't believe it was lodged."

### **Allegation 1 – breach of regulation 7**

18. 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.*

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<sup>9</sup> The effect of section 5.106 of the Act.



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

19. The President does not specify whether he alleges a breach of regulation 7(1)(a) or 7(1)(b). However, in his Claim Form the President alleges Cr Harris used his position on Council to gain an advantage for the Club. The Panel therefore considered the Complaint under regulation 7(1)(a).
20. In his Complaint Form the President asserts:
- Despite Council being legally obliged to apply the Club’s Contribution towards the cost of the Project, Cr Harris “vigorously used his position on Council to push (the Club’s) agenda ... to have trust funds paid to the Club”.
  - Cr Harris tried to influence the President to persuade Council to pay the Club’s Contribution and interest to the Club.
  - Cr Harris implied that legal action would be taken and an inquiry called if Council did not pay the Club the money.
  - After the OCM Cr Harris sent emails to the President and three other Councillors making accusations and threats about future action.
  - Cr Harris criticised Council and its decision-making ability.
  - At “every opportunity” Cr Harris used his position to seek an advantage for the Club.

#### Findings of fact

21. The Panel is satisfied to the required standard that:
- (a) In Email 4 (20 November 2017) Cr Harris asked the President to “lead the way on this interest issue” and said, “You could just as easy return the Trust money ... to the Club” because the Shire had adequate funds associated with a different project. Cr Harris also said, “The fact that you alone, without coming to Council for budget approval decided to provide a new pavilion to softball at no cost to them is staggering. You also put the football club funds into a pool and had Council approve that ... It is probable that club members will take up the legal battle against the Council decision, or seek the Local government Dept. to conduct an (inquiry) into the Softball issue.”
- (b) In his email response (Email 5, 21 November 2017) the President said, “I am prepared to move that the interest be made available to the club as per the Council resolution some time ago when we looked at the funds being returned to the club. I will get the wording from that resolution as I believe it was behind closed doors.”
- (c) There is no evidence that the President gave the wording of the earlier resolution to Cr Harris before the OCM but at the OCM the President read aloud Council’s resolution on 7 June 2017. Council resolved that, in line with legal advice it had received, Council would not be returning the Club’s Contribution to the Club as this amount was to be assigned to the construction and fit-out of the building.



- (d) In his next email to the President (Email 7, 21 November 2017) Cr Harris said, “You can just as easily lead the way to returning the Club’s trust funds (\$265K) and avoid future ramifications. ... This matter can be tidied up on Wednesday by your strong leadership.”
- (e) “Wednesday” in the 21 November 2017 email is a reference to the OCM, which was held on Wednesday 22 November 2017.
- (f) In his next email (Email 9, 23 November 2017) Cr Harris told the President, “... you let me down last night by backing away from your commitment to support the return of the interest accrued on the club money ... You should have lead the way to resolve this matter but didn’t ... The money the Shire will need to spend to defend its actions will not go well amongst ratepayers.”
- (g) On 23 November 2017 (Email 11) Cr Harris sent an email to one of the other three Councillors referred to in the Complaint (C1) criticising her conduct at the OCM and the extent of her knowledge of the issues. C1 forwarded Email 11 to the President and the CEO, saying her comments at the OCM were based on facts she had received and that she felt intimidated and bullied by this email.
- (h) On 23 November 2017 Cr Harris sent an email (Email 12) to another Councillor (C2) saying he (C2) had been a named person’s “conduit” into Council “just as your father was”; that C2 had “obviously influenced (another named Councillor) to talk rubbish she (knew) nothing about; and “You and others have now gotten the Council into litigation and or a Local Government (inquiry)”.
- (i) In an email to Cr Harris on 23 November 2017 (Email 18) the President said “Your comments about councillors shows a disrespect for fellow councillors ... Your attempts to bully me during the week (with) your threats that the club will take legal action against council and to send the issue to the Department are way out of order for any councillor ... ”
- (j) On 23 November 2017 (Email 19) C2 sent a copy of email 12 to the President and the CEO, saying he found the reference to his father “repugnant” and that although he had made allowances for Cr Harris in the past his claims in Email 12 went beyond what C2 was prepared to tolerate.
- (k) Based on the Published and Confidential Minutes the Council’s decision-making process at the OCM appears to have been appropriate. The Shire officer reported to Council on the issues, including the Council’s legal obligations in relation to allocating the Club’s Contribution. Cr Harris had the opportunity to speak to the officer’s recommended motion, which he did. Cr Harris also had the opportunity to move alternative motions, which he did.

#### Whether Cr Harris was a council member using his office at times of the alleged breaches

- 22. Cr Harris used his Shire email address in the emails sent with the Complaint Form and attended the OCM in his capacity a council member. There can be no doubt that Cr Harris was using his office as a councillor at the time of the alleged breach of regulation 7(1)(a).
- 23. These two elements are established.



### Whether Cr Harris used his office improperly

24. 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>
25. 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>11</sup> “For behaviour to be improper it must be such that a right-thinking person would regard the conduct as so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty.”<sup>12</sup> Councillors have a duty to be faithful to the proper workings of the local government and their council.<sup>13</sup>
26. Under the Act Panel members must have regard to the general interests of local government in Western Australia.<sup>14</sup> It is in the interests of local government that councillors are, and are seen to be, professional and to act consistently with authorised decisions of Council and the administration. Councillors must also respect, and be seen to respect, the local government’s processes and the roles of its officers and their lawful decisions.
27. 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>15</sup> Regulation 3 provides, among other things, that councillors should act with reasonable care and diligence, act lawfully, avoid damage to the local government’s reputation and base decisions on relevant and factually correct information.
28. 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>16</sup>
29. 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>

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

<sup>11</sup> *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 27, referring to *R v Byrnes* (1995) 183 CLR 501.

<sup>12</sup> *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 9, referring to *Robbins v Harness Racing Board* [1984] VR 641.

<sup>13</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>14</sup> Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).

<sup>15</sup> Regulation 13.

<sup>16</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>17</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64(4), referring to *Treby* 2010.



30. Applying the tests for impropriety referred to in paragraphs 24 to 29 above the Panel finds that Cr Harris acted improperly by sending Emails 4, 7 and 9 to the President; and sending Emails 11 and 12 to C1 and C2 respectively. All these Emails were offensive and demeaning, written in a threatening tone and challenged the integrity of the President, C1 and C2 without any apparent or reasonable basis.
31. In Email 9 (sent after the OCM) Cr Harris cast aspersions on the President's professionalism by saying the President had "let (him) down by backing away from (the President's) commitment" to Cr Harris. There is no evidence that the President made any commitment to Cr Harris to seek to have the Club's Contribution paid back to the Club, or to do anything inconsistent with the Council's legal advice. In relation to the interest, the President said in Email 5 that he "would be prepared to move that the interest be made available to the club as per the council resolution some time ago". He said he would find that resolution to check the wording. Email 5 does not amount to a commitment to pay the interest to the Club. There is no other evidence indicating the President made a commitment about the interest.
32. By sending Emails 4, 7, 9, 11 and 12 Cr Harris breached the standards of conduct expected of a councillor. His conduct was so inappropriate that it warrants a penalty. The Panel finds he made improper use of this office as a councillor when sending these Emails.

Whether Cr Harris used his office improperly to gain directly or indirectly an advantage for himself or any other person.

33. "Advantage" is defined as "favouring a circumstance; something which gives one a better position ... benefit; increased well-being or convenience ... pecuniary profit ..."<sup>18</sup> Another dictionary definition is "any state, circumstance, opportunity or means specifically favourable to success, interest or any desired end ... benefit gain, profit".<sup>19</sup>
34. "To" in "to gain directly or indirectly an advantage" indicates that for this element to be satisfied the councillor must have intended to gain an advantage. He must be found to have taken action for the purpose of, or with a view to, gaining an advantage for the Club or himself.
35. For this element to be satisfied, it is not necessary to establish that the councillor's actions did, or reasonably could have, delivered the result sought.<sup>20</sup>
36. By the time Cr Harris sent Email 4 he would have known that the matter of the allocation of the Club's Contribution was to come before Council at the OCM. Cr Harris directly asked the President to, as an individual with special authority, support money being paid to the Club because other Councillors would agree with the President.
37. In Email 7 Cr Harris again directly asked the President to use his position to "lead the way" in what Cr Harris referred to as a tidy up of the matter. Cr Harris sought to have money taken from another fund to pay back the Club. Email 9, sent after the OCM, reinforces the proposition that Cr Harris expected the President to actively seek the outcome Cr Harris wanted – in Email 9 Cr Harris said the President had let him down.

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<sup>18</sup> Shorter Oxford English Dictionary, Sixth Edition.

<sup>19</sup> Macquarie Dictionary, Revised Third Edition.

<sup>20</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraphs 71, 72.



38. Cr Harris sent Emails 11 and 12 after the OCM, by which time Council had made its final resolution not to return the Club's Contribution to the Club. The Panel is not satisfied that by sending these Emails Cr Harris attempted to gain any advantage for himself within the meaning and intent of regulation 7(1)(a). Neither is the Panel satisfied that Cr Harris was attempting to gain an advantage for the Club in these Emails, as Council had made its decision.
39. The Panel finds that by sending Emails 4 and 7 to the President on 20 November 2017 and 21 November 2017 respectively Cr Harris intended to directly or indirectly gain an advantage for the Club.

The Panel finds that Cr Harris breached regulation 7(1)(a).

### **Allegation 2 – breach of regulation 8**

40. Regulation 8 provides:

*“8. Misuse of local government resources*

*A person who is a council member must not either directly or indirectly use the resources of a local government —*

*(a) for the purpose of persuading electors to vote in a particular way at an election, referendum or other poll held under the Act, the Electoral Act 1907 or the Commonwealth Electoral Act 1918; or*

*(b) for any other purpose,*

*unless authorised under the Act, or authorised by the council or the CEO, to use the resources for that purpose.”*

41. The President alleges Cr Harris breached this regulation by using his internet allowance and the Shire's iPad to “behave inappropriately (towards) him and other Councillors”. Only regulation 8(b) could possibly apply.
42. Clearly Cr Harris was a councillor at the time he is alleged to have committed the breach. The first element of regulation 8 is established.
43. For Cr Harris to have breached regulation 8 it must be established that he used the Shire's resources. “Resource” is defined as “a source of supply, support, or aid ... money, or any property which can be converted into money, assets ...”<sup>21</sup> Cr Harris' internet allowance and the Shire's iPad were resources to which regulation 8 applies.
44. Cr Harris' emails concerned Council business. Shire Councillors must communicate with other Councillors about Council business outside meetings. There can be no doubt that Shire Councillors had been given an internet allowance and a Shire iPad to enable them to communicate with other Councillors by email about Council business.

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<sup>21</sup> Macquarie Dictionary, Revised Third Edition.



45. The Panel considered the likely purpose and scope of regulation 8. Although the Panel finds it was improper for Cr Harris to send some of the email content, the Panel is not satisfied to the required standard that the use of the internet service and the iPad in this way amounts to a breach of regulation 8(b).

46. Cr Harris did not breach regulation 8.

### **Allegation 3 – breach of regulation 11**

47. The relevant parts of regulation 11 are:

*“11. Disclosure of interest*

*(1) In this regulation —*

*interest means an interest that could, or could reasonably be perceived to, adversely affect the impartiality of the person having the interest and includes an interest arising from kinship, friendship or membership of an association.*

*(2) A person who is a council member and who has an interest in any matter to be discussed at a council or committee meeting attended by the member must disclose the nature of the interest —*

*(a) in a written notice given to the CEO before the meeting; or*

*(b) at the meeting immediately before the matter is discussed.”*

48. The President alleges Cr Harris failed to disclose an interest of the type referred to in regulation 11(1), commonly referred to as an impartiality interest. He asserts in the Submission that Cr Harris had made it “very clear” during various debates and discussions at ordinary council meetings that he was a Life Member of the Club. Cr Harris does not deny he was a Life Member or that he had any other connection with the Club that might be seen to affect his impartiality when voting on matters affecting the Club.

49. The Confidential Minutes (page 13) record that Cr Harris refuted a Councillor’s assertion that he had an impartiality interest. At another point in the discussion (Confidential Minutes page 14) he said both “I represent the (Club)” and “I am not (the Club’s) spokesman”. He also states “It is the members of the Club and the Members for Life that will take action. We are \$9,000 down.” (Confidential Minutes page 14).

50. The Panel is satisfied to the required standard that Cr Harris had an interest in the Club which could cause a person to reasonably perceive that he may not be impartial when discussing and voting on matters affecting the Club.

51. The Published and Confidential Minutes record that Cr Harris was present during discussion about Item 16.1, “Pavilions Project Report”. The Published Minutes for Item 11, “Declaration of Interest” do not record any disclosure of any interest by Cr Harris. Another Councillor declared an impartiality interest which should have prompted Cr Harris to consider his own position.

52. Cr Harris does not say he disclosed an impartiality interest to the CEO before the OCM [regulation 11(2)(a)]. Neither the Published Minutes nor the Confidential Minutes indicate that Cr Harris disclosed an impartiality interest just before Councillors considered Item 16.1 [regulation 11(2)(b)].



53. The Panel is satisfied to the required standard that Cr Harris breached regulation 11(2) by failing to disclose an impartiality interest at or before the OCM.

Cr Harris breached regulation 11(2).

### **Panel's findings**

54. The Panel finds that Cr Harris has breached regulations 7(1)(a) and 11(2) of the *Local Government (Rules of Conduct) Regulations 2007*, however did not breach regulation 8(b). Cr Harris therefore committed two minor breaches.

Sheryl Siekierka (Presiding Member)

Paul Kelly (Member)

Merranie Strauss (Member)

Date of Reasons – 20 February 2018