

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST

VCAT REFERENCE NO. Z2992016

CATCHWORDS

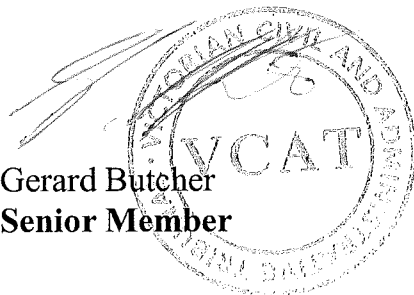
Local Government, Council Code of Conduct, Review of Councillor Conduct Panel, whether applicant breached the Council Code of Conduct.

APPLICANT	Councillor Don Hill
FIRST RESPONDENT	Councillor Conduct Panel
SECOND RESPONDENT	Councillor Lorraine Brunt
THIRD RESPONDENT	Councillor Mohya Davies
FOURTH RESPONDENT	Councillor James Fawcett
WHERE HELD	Municipal Centre, Leongatha
BEFORE	Gerard Butcher, Senior Member
HEARING TYPE	Hearing
DATES OF HEARING	18 and 19 August 2016, 14 and 15 November 2016
DATE OF ORDER	10 August 2017
CITATION	Hill v Councillor Conduct Panel (Review and Regulation) [2017] VCAT 699

ORDER

The decision of the Councillor Conduct Panel made on 12 March 2016 insofar as it applies to Councillor Hill is set aside and complaints 1 and 3 are dismissed.

Gerard Butcher
Senior Member



APPEARANCES:

For Applicant

Mr V. Morfuni, QC

For First Respondent

No appearance (Hardiman position)

For Second, Third and Fourth
Respondents

Cr James Fawcett

REASONS

BACKGROUND

- 1 At all relevant times, Councillor Don Hill, Councillor Lorraine Brunt, Councillor Mohya Davies and Councillor James Fawcett were councillors of the South Gippsland Shire (the Shire).
- 2 By way of an application dated 6 August 2015, Councillors Brunt, Davies and Fawcett made application for a Councillor Conduct Panel to be convened in relation to three allegations that they made against Councillor Hill. I shall refer to Councillors Brunt, Davies and Fawcett collectively as the complainants and the allegations as complaints.
- 3 The complainants alleged that Councillor Hill breached several clauses of the Council Code of Conduct (the Code) which had been adopted by the Council of the Shire of South Gippsland (the Council) on 26 June 2013.

THE COUNCILLOR CONDUCT PANEL

- 4 The Councillor Conduct Panel (the Panel) was convened, held hearings and produced a report dated 12 March 2016. The report identified the issues which the Panel was called upon to determine as follows:

Complaint 1

whether the article in the three local newspapers on 2 & 3 June 2015 relating to the location of the Council's Office was in breach of the following clauses of the Code:-

- 2.2(b) Act honestly and avoid statements (whether oral or in writing) or actions that will or are likely to misled or deceive a person.
- 3.1(e) Acting with courtesy towards Council staff and not displaying intimidatory behaviour.
- 3.2(a) Being honest in all dealings with the community, with other Councillors and with Council staff.

Complaint 2

whether at the meeting of 25 March concerning the 2015/16 budget, Cr Hill made derogatory comments about the Council and the Councillors and was in breach of the following clauses of the Code:-

- 2.2(c) Treat all persons with respect and have due regard to the opinions, beliefs, rights and responsibilities of other Councillors, Council officers and other persons.
- 2.2(e) Endeavour to ensure that public resources are used prudently and solely in the public interest.
- 3.1(e) Acting with courtesy towards Council staff and not displaying intimidatory behaviour.

- 3.2(a) Being honest in all dealings with the community, with other Councillors and with Council staff.

Complaint 3

whether Cr Hill's comments in relation to the Rating Differential Strategy on 3 June 2015 and the Minority Reports on the 2014-208 rating Strategy breached the following causes of the Code:-

- 2.2(b) Act honestly and avoid statements (whether oral or in writing) or actions that will or are likely to misled or deceive a person.
- 3.1(b) Treating fellow Councillors with respect, even when disagreeing with their views or decisions.
- 3.2(a) Being honest in all dealings with the community, with other Councillors and with Council staff.

FINDINGS OF THE PANEL

- 5 The Panel found that:
- (a) In relation to Complaint 1, Councillor Hill breached clauses 2.2(b) and 3.2(a) of the Code.
 - (b) In relation to Complaint 2, Councillor Hill's comments about officers constituted a breach of clauses 2.2(c) and 3.1(e) of the Code.
 - (c) In relation to Complaint 3, Councillor Hill's conduct breached clauses 2.2 and 3.1 of the Code.
- 6 The Panel made a finding of misconduct against Councillor Hill, reprimanded him and directed that he attend training for a period of six months directed towards his understanding of Council procedures and practice, improving his communication skills with Councillors and Council Officers and monitoring him in his role as a Councillor with an appropriate mentor. Other orders were made in relation to the council.
- 7 The findings and orders of the panel insofar as they apply to Councillor Hill are the subject of this review.

WITHDRAWAL OF COMPLAINT 2

- 8 The proceeding before this Tribunal is a hearing *'de novo'*. In other words, the Tribunal stands in the shoes of the original decision maker, the Councillor Conduct Panel, and makes what it considers to be the correct and preferable decision.

At a preliminary stage of the proceeding, Complaint 2 was withdrawn, leaving complaints 1 and 3 the subject of the proceeding. The withdrawal of Complaint 2 is given effect by Order 2 of the orders made on 27 June 2016.

STANDARD OF PROOF

- 9 The standard of proof is the normal civil standard of balance of probabilities. In matters such as this, the principles stated in *Briginshaw v Briginshaw*¹ in particular the following passages have been applied:

The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality.²

The seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.³

- 10 However, in *Karakatsanis Racing Victoria Ltd*⁴ Osborne JA observed at paragraphs 38 and 39:

- 38 In *Greyhound Racing Authority v Bragg* ([2003] NSWCA 388) Santow JA expressed in the following way the applicability of the *Briginshaw* concepts to the functions of a tribunal concerned with questions of the type in issue in this case.

The notion of 'inexact proof, and indefinite testimony or indirect references [scil. inferences]' needs to be translated to a comfortable level of satisfaction, fairly and properly arrived at, commensurate with the gravity of the charge, achieved in accordance with fair processes appropriate to and adopted by such a body.

- 39 This formulation captures the relevant sense in which the application of the principles stated by Dixon J in *Briginshaw* must be qualified in cases such as the present.

In recent cases before this Tribunal⁵ the 'comfortable level of satisfaction' formulation has been applied.

COMPLAINT 1

The newspaper article

- 11 This was a 'letter to the editor' written by Councillor Hill and published in local newspapers. The letter is headed 'Save Council Money'. It is not known if the heading is part of the letter or a headline inserted by the editor. The letter then commences with the following two paragraphs:

¹ (1938) 60 CLR 336.

² Per Dixon J at p 361.

³ Per Dixon J at p 362.

⁴ (2013) 42 VR 176.

⁵ *King v Greyhound Racing Victoria* [2016] VCAT 701, *Kavanagh v Racing Victoria Limited* [2017] VCAT 386.

Currently there is a study underway costing over \$100,000 to investigate the building of and/or location of South Gippsland Shire Council's offices.

That is all well and fine but for the fact the conclusion was decided even before the study was put out to tender. This is not just my opinion. I was informed by an officer only last week the outcome is to be a single building in Leongatha.

- 12 The letter then continues by way of argument against the construction of a large office complex. It is the statement concerning pre-determination of the conclusion of the study which is the subject of complaint 1.

The letter of apology

- 13 Following publication of Councillor Hill's letter it appears that Council Nigel Hutchinson-Brooks wrote a letter to the editor of The Star newspaper, which was published on 30 June 2015, calling for a correction by Councillor Hill.

- 14 On 14 July 2015, a further letter by Councillor Hill was published headed 'Councillor Apologises'. This letter reads as follows:

Following the publication of the letter 'Correction Required' in The Star (June 30) by Cr Nigel Hutchinson-Brooks, I have reviewed what I wrote in a letter to the editor titled 'Save Council Money' which was published on June 2.

In that letter I wrote the following (the two paragraphs referred to above).

The project reference group has not and will not determine its recommendation until later this year and so I must clarify my original comment by saying I in no way intended to imply this group had already determined its outcome.

I apologise for any misunderstandings caused by my poorly worded sentence.

- 15 On the evidence I cannot be satisfied to the required standard that Councillor Hill was being dishonest when he wrote the letter. He may have been mistaken or he may have been misled but there is no evidence of dishonesty.
- 16 In any case, I am satisfied that this complaint was resolved by the publication of the letter of apology.

COMPLAINT 3

The 3 June 2105 Council Briefing

- 17 This concerned the issue of whether a 70% differential rate farm rate be extended to hobby or rural lifestyle properties. Debate centred on whether certain information had been omitted from the briefing proper and whether

this had been done at the direction of the Rating Strategy Review Steering Committee.

- 18 The witness statement of Thomas Lovass, a council officer, stated that Councillor Hill said words to the effect that the briefing paper was misleading. The complaint alleges that Councillor Hill accused staff of providing misleading information in the report. There is a subtle but important difference between these two versions.
- 19 Mr Lovass in his statement goes on to say that he took 'these sorts of things as being part of the job'. It is apparent from his statement that this was in the context of other councillor or councillors seeking to have Mr Lovass complain about Councillor Hill. Councillor Hill did later apologise to the CEO of the Shire.
- 20 I am satisfied that Councillor Hill was not accusing any council officers of misleading Council. The focus of his criticism was on the information. In the context of debate on the subject this is not disrespectful to council officers nor does it necessarily indicate any dishonesty on Councillor Hill's part.

The Minority report

- 21 A minority report was prepared by Councillor Hill in relation to the 2014-18 Rating Strategy Committee deliberation. The complaint alleges that Councillor Hill misrepresented that the report was the view of multiple members. Councillor Fawcett alleges that no other councillors participated in or assisted authorising the report.
- 22 I conclude that Councillor Hill was entitled to prepare a minority report. On the evidence I am satisfied that the report had the concurrence of at least one other councillor.
- 23 I am not satisfied that the production of the minority report involved any dishonesty on Councillor Hill's part.

THE HEARING

- 24 The hearing took place over the course of four days. Evidence was given by Councillor Fawcett, Ms Christine Van der Arc, an officer of the Shire; Mr Thomas Lovass, an officer of the Shire; Councillor Hill, Mr Malcolm Davies, a member of the 2014 Rating Review Committee; Mr David Amor and Councillor Andrew Mc Ewan.
- 25 Written submissions were filed and served subsequent to the hearing.

GENERAL COMMENTS

- 26 As is often the case in the local government environment, there were differences of opinion between members of the Council, concerning various matters. This was particularly so between Councillors Hill and Fawcett. I have no doubt that these differences of opinion led to the making of the

complaints against Councillor Hill. In the arena of council affairs there is often debate of a robust nature which is not in itself inappropriate. It is the means by which proposals are tested and refined. In many cases, these proposals are initiated by council officers and are then the subject of scrutiny and debate of councillors. Criticism of such proposals does not in itself constitute criticism of the officer or officers responsible for its initiation.

FINDINGS

- 27 I am unable to be comfortably satisfied that there was any element of dishonesty in Councillor Hill's actions. He was exercising his role as a Councillor and I cannot conclude that this was carried out other than in good faith. There may be a contrary opinion expressed by others but that is no more than an opinion (to which they are entitled). However, in the context of Tribunal proceedings such as this, there is a need to meet the standard of proof set out above. This has not been done.
- 28 Similarly, I am not comfortably satisfied that Councillor Hill was discourteous or intimidatory towards Council staff. Opposition to recommendations made by members of Council staff is not of itself a personal attack.
- 29 As to Councillor Hill's accusations against Councillor Fawcett, I am not satisfied that they are more inappropriate than that which one would expect in the context of a robust debate.

Gerard Butcher
Senior Member

