

Final Report
Full investigation - *Ombudsman Act 1972*

Complainant	Mr Roger Sweetman (on behalf of the District Council of Robe)
Council member	Cr David Loxton
Council	District Council of Robe
Ombudsman reference	2018/03278
Agency reference	9.33.3/CONF
Date complaint received	21 March 2018
Issue	Whether Cr Loxton failed to comply with a finding of inappropriate behaviour for the purposes of clause 3.18 of Part 3 of the Code of Conduct for Council Members by failing to comply with a recommendation of EMA Legal adopted by council on 9 January 2018

Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

The complaint alleges a breach of Part 3 of the Code of Conduct for Council Members made pursuant to section 63 of the *Local Government Act 1999*.¹ An act of a council member that may constitute grounds for complaint under the *Local Government Act 1999* is taken to be and 'administrative act' for the purposes of the *Ombudsman Act 1972*.²

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from Councillor David Loxton (**Cr Loxton**)
- clarifying the response with Cr Loxton
- seeking more particulars from the complainant
- considering the Code of Conduct for Council Members (**the Code of Conduct**)
- considering the council's *Elected Members Code of Conduct Complaints Handling Procedure* (**the Complaints Procedure**)
- considering the *Local Government Act 1999*
- providing the council, the complainant and Cr Loxton with my provisional report for comment, and considering their responses
- preparing this report.

¹ The Code of Conduct was gazetted on 29 August 2013.

² *Local Government Act 1999* section 263A(4); *Ombudsman Act 1972* section 3.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.³ It is best summed up in the decision as follows:

The seriousness of an 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 ...⁴

Response to my provisional report

Cr Loxton did not provide a response to my provisional report.

The council responded indicating that it had no comment to make.

Accordingly, this final report is in substantially the same terms as my provisional report.

Background

1. At the council meeting on 13 June 2017, Cr Loxton made comments to the effect that Mayor Riseley was compromised as Mayor, was in breach of the Code of Conduct provisions relating to his role on the council's Development Assessment Panel (**DAP**), and that it was not appropriate for Mayor Riseley to be a member of the DAP.
2. By way of email on 14 June 2017, Mayor Riseley submitted a Code of Conduct complaint against Cr Loxton to the Chief Executive Officer (**CEO**) of the council. The CEO allocated the matter to Deputy Mayor Nolan for preliminary investigation.⁵
3. The council's Complaints Procedure relevantly provides:

Council maintains jurisdiction where the complaint deals with conduct that falls into Part 2 of the Code. Part 2 deals with conduct that reflects reasonable community expectations of how Council Members should conduct themselves. Robust debate within Council which is conducted in a respectful manner is not a breach of this Part.

Having regard to the seriousness of the allegation and information provided, the Principal Member may:

- (a) seek to resolve the matter internally, including through conciliation or mediation
 - (b) refer the complaint to the Local Government Governance Panel
 - (c) dismiss the allegation.
4. Deputy Mayor Nolan completed a preliminary investigation and formed the view that Cr Loxton had breached the following clauses of the Part 2 Behavioural Code:
 - Act in a way that generates community trust and confidence in the Council
 - Show respect for others if making comments publicly

³ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

⁴ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

⁵ It was appropriate for the Deputy Mayor to be considered the Principal Member given the original complainant was the Mayor.

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- Endeavour to establish and maintain a respectful relationship with all council members, regardless of differences of view or opinion
 - Not bully or harass other Council members
 - Not bully or harass Council staff.
5. Deputy Mayor Nolan proceeded to refer the complaint to the Local Government Governance Panel for an independent investigation.
 6. The Local Government Governance Panel referred the complaint to one of its panel members, EMA Legal.
 7. EMA Legal completed an investigation and formed the view that Cr Loxton had breached the following clauses of the Part 2 Behavioural Code:
 - Act in a way that generates community trust and confidence in the Council
 - Show respect for others if making comments publicly
 - Endeavour to establish and maintain a respectful relationship with all council members, regardless of differences of view or opinion.
 8. In its report dated 7 December 2017, EMA Legal recommended that:

Council resolve to require an apology from Councillor Loxton for any unintended offence caused to the Mayor by reason of his conduct at the June 2017 meeting at the next appropriate Council Meeting, and that upon giving that apology, Council resolve not to take further action.
 9. The minutes for the council meeting on 9 January 2018 relevantly record:

Moved Cr Polomka
Seconded Cr Nolan

Resolved that the District Council of Robe having considered Report No 12.1.1 “Code of Conduct Complaint Mayor Riseley and Cr Loxton”:

 - (a) Receives the Final report on the investigation into the Code of Conduct complaint presented by EMA Legal,
 - (b) Records a finding of a breach by Cr Loxton:
 - a. Clause 2.2 Act in a way that generates community trust and confidence in the Council
 - b. Clause 2.4 Show respect for others if making comments publicly
 - c. Clause 2.9 Endeavour to establish and maintain a respectful relationship with all council members, regardless of differences of view or opinion.

Of the Code of Conduct for Elected Members, and
 - (c) Requires an apology from Cr Loxton for any unintended offence caused to the Mayor by reason of his conduct at the June 2017 meeting at the next appropriate Council Meeting, and that upon giving that apology, Council resolve not to take further action.

Carried
 10. Cr Loxton sought a review of the council motion under section 270 of the *Local Government Act 1999*. The CEO of the council determined it was most appropriately dealt with by an external body. The CEO requested that Mr Mark McShane, Chief Executive Officer of the City of Mount Gambier, conduct the section 270 review. By way of email on 18 January 2018, Mr McShane accepted the request.

11. Mr McShane completed the section 270 internal review and informed the council, by way of letter dated 7 March 2018, that he had identified no error in the processes of the previous investigations and there was no fault found with the finding that Cr Loxton was in breach of the Code of Conduct. Mr McShane stated:

It is now for the Council to ensure Cr David Loxton's compliance with the formal resolution of Council seeking an apology, and to act accordingly with regard to any non-compliance.

12. The agenda for the council meeting on 20 March 2018 provides the following:

Officer's Reports - Chief Executive

12.1.3 Code of Conduct Complaint Mayor Riseley and Cr Loxton

Purpose

Providing an opportunity for Cr Loxton to comply with Council's resolution requiring that Cr Loxton apologise to Mayor Riseley relating to the Code of Conduct complaint Riseley v Loxton.

13. The minutes for the council meeting on 20 March 2018 provide the following in relation to agenda item 12.1.3:

Mayor Riseley declared a conflict of interest in item 12.1.3 and left the meeting at 6.54pm.

Cr Loxton declared a conflict of interest in item 12.1.3 and left the meeting at 6.54pm.

Deputy Mayor, Cr Harvey Nolan, assumed the Chair at 6.54pm to conduct [sic] of item 12.1.3.

Code of Conduct Complaint Mayor Riseley and Cr Loxton

Cr Loxton entered the meeting at 7.00pm at the request of the Deputy Mayor to be provided with the opportunity to apologise to Mayor Riseley.

Cr Loxton advised the meeting that he refused to make an apology to Mayor Riseley and left the meeting at 7.02pm.

Moved Cr Enright
Seconded Cr Polomka

Resolved that the District Council of Robe having considered Report No 12.1.3 "Code of Conduct Complaint Mayor Riseley and Cr Loxton" requires an apology from Cr Loxton for any unintended offence caused to the Mayor by reason of his conduct at the June 2017 meeting to be made at the March Council meeting:

(b) As Cr Loxton did not apologise to Mayor Riseley for any unintended offence caused [to] the Mayor by reason of his conduct at the June 2017 Council meeting and therefore Council refer the matter to the SA Ombudsman for investigation under Part 3 of the Code of Conduct for Elected Members Clause 2.22 which provides that:

"a failure of a Council Member to comply with a finding of an investigation under this Part (Part 2), adopted by the Council, may be referred for investigation under Part 3"

Carried

Mayor Riseley entered the meeting at 7.05pm.

Cr Loxton entered the meeting at 7.05pm.

14. In his capacity as Chief Executive Officer of the council, Mr Roger Sweetman complained to my Office on 21 March 2018.

Relevant law

15. Section 63 of the *Local Government Act 1999* provides:

63 - Code of conduct for members

- (1) The Governor may, by regulation, prescribe a code of conduct to be observed by the members of all councils.
- (2) Council members must observe the code of conduct.

16. Clause 3.18 of Part 3 of the Code of Conduct provides:

A failure to comply with a finding of inappropriate behaviour (by the Council, independent investigator or Ombudsman) under Part 2 is also grounds for a complaint under this Part.

Whether Cr Loxton failed to comply with a finding of inappropriate behaviour for the purposes of clause 3.18 of Part 3 of the Code of Conduct for Council Members by failing to comply with a recommendation of EMA Legal adopted by council on 9 January 2018

17. I consider that EMA Legal qualifies as an independent investigator for the purpose of clause 3.18 of the Code of Conduct. I note that EMA Legal made a finding of inappropriate behaviour against Cr Loxton. I consider that Cr Loxton has failed to comply with EMA Legal's finding and recommendation as adopted by the council.
18. During the course of my investigation, Cr Loxton was provided with an opportunity to explain whether he attempted to apologise to Mayor Riseley and if not, to explain why.
19. Cr Loxton's response to my investigation was that he did not believe he had breached the Code of Conduct. He also raised a number of issues regarding the investigations and reviews of Deputy Mayor Nolan, EMA Legal and Mr McShane, stating 'because of the lack of due process, I cannot apologise for something I did not do'.
20. Cr Loxton's issues have been separately assessed by my Office and I have determined that procedural fairness was afforded to Cr Loxton.
21. I do not consider that Cr Loxton has provided a satisfactory reason as to why he has refused to comply with the council's resolution requiring him to apologise to Mayor Riseley.
22. In my view, Cr Loxton's failure to abide by the recommendation of EMA Legal that he apologise to Mayor Riseley, as adopted by the council on 9 January 2018, amounts to a failure to comply with a finding of inappropriate behaviour for the purposes of clause 3.18 of the Code of Conduct. A failure to observe the Code of Conduct is also a breach under section 63 of the *Local Government Act 1999*.

Opinion

In light of the above, I consider that Cr Loxton has failed to comply with a finding of inappropriate behaviour for the purposes of clause 3.18 of Part 3 of the Code of Conduct and section 63 of the *Local Government Act 1999*. In this way, Cr Loxton acted in a manner that appears contrary to law within the meaning of section 25(1)(a) of the *Ombudsman Act 1972*.

To remedy this error, I recommend under section 25(2) of the *Ombudsman Act 1972* that the council reprimand Cr Loxton for his refusal to apologise to Mayor Riseley in accordance with the resolution of item 12.1.3 at the council meeting on 20 March 2018.

Final comment

I now report Cr Loxton's breach of the Code of Conduct to the principal officer of the council, as required by section 18(5) of the Ombudsman Act.

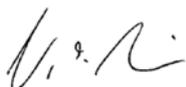
In accordance with Part 3 of the Code of Conduct for Council Members, this report must be provided to a public meeting of the council within two ordinary meetings of the council receiving my report.

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by 31 August 2018 on what steps have been taken to give effect to my recommendation/s above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.

I have also sent a copy of my report to the Minister for Local Government as required by section 25(3) of the *Ombudsman Act 1972*.



Wayne Lines
SA OMBUDSMAN

12 July 2018