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## Local Government Standards Panel

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Complaint Number	SP2018-110 and SP2018-111
Legislation	<i>Local Government Act 1995</i>
<b>Complainants</b>	<b>Mr Geoffrey McDonald-Appleby</b> <b>Mr Larry Graham</b>
<b>Respondent</b>	<b>Councillor Brian Rayner</b>
Local Government	<b>Shire of Toodyay</b>
Regulation	Regulations 4, 7(1)(b) and 8 of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Ms Sarah Rizk (Presiding Deputy Member) Ms Elanor Rowe (Deputy Member) Ms Rebecca Aubrey (Deputy Member)
Heard	26 April 2019 Determined on the documents
Outcome	One breach of regulation 4

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### FINDING AND REASONS FOR FINDING

Published 30 May 2019

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## Summary of the Panel's decision

1. The Local Government Standards Panel ("the Panel") considered Councillor Brian Rayner's conduct ("Cr Rayner"), a councillor for the Shire of Toodyay ("the Shire") under the *Local Government Act 1995 (WA)* ("the Act") and regulations 4, 7(1)(b) and 8 of the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations") when he approved the publication of a column written by the Shire's CEO in the community newsletter and when he made statements at the council meeting on 24 April 2018 regarding the column. The Panel found Cr Rayner:
  - i. committed one breach of regulation 4 when he made statements at the April council meeting;
  - ii. did not commit any breaches of regulation 7(1)(b) or regulation 8 in relation to the other allegations.

## Jurisdiction and procedural fairness

2. The Act makes provision for the circumstances in which a council member commits a minor breach.<sup>1</sup>
3. On 12 November 2018 the Department of Local Government, Sport and Cultural Industries ("the Department") received two Complaint of Minor Breach Forms ("Complaints"); SP2018-110 dated 5 November 2018 submitted by Mr Geoffrey McDonald-Appleby ("First Complainant") and SP2018-111 dated 26 October 2018 submitted by Mr Larry Graham ("Second Complainant"). The Complaints contained a total of six allegations of breaches of regulations 4, 7(1)(b) and 8 against Cr Rayner and related to the same conduct when he approved the publication of a column written by the Shire's CEO in the community newsletter and when he made statements at the April 2018 council meeting regarding the column.
4. On 14 November 2018, the Department advised Cr Rayner of the Complaints and invited him to respond. The Department sent Cr Rayner a copy of the original Complaints and all the supporting documents provided by the Complainant.
5. Under the Act the Panel is required to consider a complaint of a minor breach and make a finding as to whether the alleged breach occurred.<sup>2</sup> On 26 April 2019 the Panel convened to consider the Complaints.
6. The Panel:
  - (a) accepted the Department's advice, based on information from the Western Australian Electoral Commission, that Cr Rayner was a councillor at the time of the alleged breaches, having been elected on 21 October 2017, and was still a Councillor when the Panel met on 26 April 2019;
  - (b) was satisfied the Complaints had been made within two years after the alleged breaches are said to have occurred<sup>3</sup>;

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

<sup>2</sup> Section 5.110(2)(a) of the Act.

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



- (c) was satisfied the Complaints had been dealt with in accordance with the administrative requirements in the Act for dealing with complaints of minor breaches<sup>4</sup>; and
- (d) was satisfied that the Department had provided procedural fairness to Cr Rayner.
7. 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 assisting the relevant Minister at the time instead of considering the Complaint itself.<sup>5</sup> As Cr Rayner had not previously committed a minor breach the Panel did not consider sending the Complaints to the Chief Executive Officer of the Department.
8. Based on the information referred to in paragraphs 2 to 7 above the Panel found it had jurisdiction to determine whether Cr Rayner had breached regulations 4, 7 and 8 in connection with the Complaints.

### **Panel's role**

9. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.
10. Any finding, that a councillor has committed a minor breach, must be based on evidence from which it may be concluded that it is more likely than not that the breach occurred than that it did not occur (the required standard of proof).<sup>6</sup>
11. Where direct proof of an alleged fact, proposition or conduct is not available, in order to find the allegation, proposition or conduct has been established, the Panel must be satisfied from the evidence that it is more probable than not that it has occurred. The Panel cannot make a finding that the alleged fact, proposition or conduct occurred if the evidence merely supports two or more conflicting but equally possible inferences.<sup>7</sup>
12. For a finding that a councillor has breached a particular regulation the Panel must be satisfied that every element of the particular regulation has been established to the required standard of proof.

### **Regulation 4**

13. Regulation 4 provides:

#### ***“4. Contravention of certain local laws***

*(1) In this regulation –*

***local law as to conduct*** means a local law relating to conduct of people at council or committee meetings.

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

<sup>5</sup> Sections 5.110(2)(b), 5.111(1) of the Act.

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

<sup>7</sup> *Bradshaw v McEwens Pty Ltd* (1951) 217 ALR 1, paragraph 5.



(2) *The contravention of a local law as to conduct is a minor breach for the purposes of section 5.105(1)(b) of the Act.*

### **Regulation 7(1)(b)**

14. Regulation 7(1)(b) provides:

#### ***“7. Securing personal advantage or disadvantaging others***

(3) *A person who is a council member must not make improper use of the person’s office as a council member –*

.....

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

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

15. The Panel decided that the alleged conduct is not conduct that contravenes section 5.93 of the Act or section 83 of *The Criminal Code*.

### **Elements of regulation 7(1)(b)**

16. In order to find a breach of regulation 7(1)(b), the Panel must be satisfied to the required standard of proof that:

- (a) the person, the subject of the Complaint, engaged in the alleged conduct (first element);
- (b) the person, the subject of the Complaint, was a council member both at the time of the conduct and the time when the Panel makes its determination (second element);
- (c) by engaging in the conduct, the person, the subject of the complaint, made use of his or her office as a council member (in the sense that he or she acted in their capacity as a councillor, rather than in some other capacity (third element);
- (d) that when viewed objectively, such use was an improper use of the person’s office as a council member in that it:
  - (i) involved a breach of the standards of conduct that would be expected of a person in the position of a councillor by reasonable persons with knowledge of the duties, power and authority of the councillor and the circumstances of the case; and
  - (ii) was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty;

(fourth element)



- (e) the person engaged in the conduct in the belief that detriment would be suffered by the local government or any other person (fifth element).

*Fourth element - meaning of “to make improper use of...office”*

17. The Macquarie 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>8</sup> The Shorter Oxford dictionary definition is “*irregular, wrong; unsuitable, inappropriate; unbecoming, unseemly.*”<sup>9</sup>
18. 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>10</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>11</sup>
19. Under the Act Panel members must have regard to the general interests of local government in Western Australia.<sup>12</sup> It is in the interests of local government that councillors are, and are seen to be, professional and respectful in their dealings with fellow councillors, local government employees and members of the public.
20. 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>13</sup> Regulation 3 provides, among other things, that councillors should act with reasonable care, diligence and integrity and treat others with respect and fairness.
21. The meaning of “*improper*” must be considered in the context of relevant legislation, such as the Act and the Regulations, and 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>14</sup> All these provisions form part of the backdrop to the Regulations and give context to a complaint but the alleged conduct must also be judged in the particular circumstances.
22. 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>15</sup>

Fifth element - meaning of “to cause detriment to the local government or any other person”

<sup>8</sup> Macquarie Dictionary, Revised Third Edition.

<sup>9</sup> Shorter Oxford English Dictionary, Sixth Edition.

<sup>10</sup> *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 27, referring to *R v Byrnes* (1995) 183 CLR 501.

<sup>11</sup> *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 9, referring to *Robbins v Harness Racing Board* [1984] VR 641.

<sup>12</sup> Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).

<sup>13</sup> Regulation 3.

<sup>14</sup> *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 10.

<sup>15</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64, referring to *Treby* 2010.



### *Detriment*

23. “*Detriment*” means loss, damage or injury.<sup>16</sup> It includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage. A person can suffer detriment through others thinking less favourably of them.<sup>17</sup>
24. 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>18</sup> However 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 it is more likely than not that the councillor believed that his or her actions would cause detriment and intended to cause detriment.<sup>19</sup>
25. “*To cause detriment*” has been interpreted as meaning “*in order to*” or “*for the purpose of*” causing detriment, or “*with the will to*” cause detriment.<sup>20</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>21</sup>

### **Regulation 8**

26. 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 purposes 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”.*

### Elements of regulation 8

27. The essential issues or elements which need to be satisfied in order for a contravention of regulation 8 to have occurred are that it is more likely than it is not that:

- a. a Councillor directly or indirectly used;

<sup>16</sup> Macquarie Dictionary Revised Third Edition, 2001.

<sup>17</sup> *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraphs 31, 32.

<sup>18</sup> *Treby* 2010, paragraph 96, referring to *Chew v The Queen* 1992 CLR 626 (*Chew* 2010).

<sup>19</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>20</sup> *Chew* 2010.

<sup>21</sup> *Treby* 2010.



- b. his or her local government's resources;
- c. for the identified purpose or any other purpose;
- d. without such purpose being authorised under the Act or by the council or the local government's CEO.

### **Substance of the Complaints**

28. Both Complaints share the same background, as follows.

#### Background

29. The April 2018 edition of the Shire's Community Newsletter ("Newsletter") included a column entitled "RU "OK"?" ("Column") written by the Shire's CEO, Mr Stan Scott ("CEO"). The Column was published with the knowledge and support of the Shire President, Cr Rayner. The Column included the following statement ("Statement") by the CEO:

*"I am not OK with the way that good people of Toodyay who do not agree with the unprincipled campaign by the Herald and the TPA (Toodyay Progress Association) are bullied and harassed for having a different point of view".*

30. The Toodyay Progress Association ("TPA") disagreed with the Statement and the Chairman of the TPA (the Second Complainant) raised the matter at the April Council Meeting.

#### April Council Meeting

31. At the Council Meeting on 24 April 2018 ("April Council Meeting") the Second Complainant asked Cr Rayner a series of questions relating to the Column and the Statement made in it. The exchange between the two parties is set out as follows:

*"Question Three*

*I refer to the Council Newsletter published on 11 April 2018 with particular emphasis on the columns headed "CEO Letter to the Editor of the Toodyay Herald" and "RU'OK'?" and I ask, were the statements in those articles approved as official statements made on behalf of Council? If not, why not? And if so, who approved them?*

***Answer - The article was written by the CEO in his own name and published with my full knowledge and support.***

*Question Five*

*As I am the only person authorised to make statements on behalf of the TPA, will the Shire President please provide details of any statements made by me that fit the description of the claimed in the Council newsletter of an "...unprincipled campaign by the Herald and the TPA (Toodyay Progress Association)" that bullies or harasses people who hold different points of view?*

***Answer - I note that you are not claiming that bullying and harassment did not occur, only that you are not personally responsible. That notwithstanding, denying all knowledge of the actions of your office bearers does not obviate the TPA of the***



**responsibility for some of the outrageous verbal attacks made by your office bearers, no matter how much you try to distance yourself from them. If you do not agree with their behaviour may I suggest that you either pull them into line or remove them from their office?**

*Question Six*

*Do you have any details of any statements made by the TPA that fit that description?*

**Answer - Mr Graham this has been a long running battle and I will not get into an argument in the Chamber.**

*Question seven*

*Can you produce evidence of the claims the Council made publicly?*

**Answer - Yes I can. Mr Graham, Mr Appleby published that he was out to get to the CEO in his position as Secretary of the TPA**

32. The Complainants found Cr Rayner's response to Question Seven in particular to be offensive. The wording of it was subsequently amended by way of Council motion (because it did not reflect accurately what Cr Rayner had intended to convey) to read as follows:

*"Yes I can. Mr Appleby, in his position as Secretary of the TPA, has publicly stated that he is out to get the CEO."*

33. Regardless of the amendment to the wording of Question Seven, the Complainants still found the response to be offensive ("Offending Response").

#### May Council Meeting

34. At the Council meeting on 22 May 2018 ("May Council Meeting"), the Second Complainant asked further questions in relation to the Column and the Offending Response:

*"Question Four*

*In seeking to find what evidence Council had for the allegations it made in its official newsletter, at last month's meeting I asked the Shire President to "produce evidence of the claims the Council made publicly" and was informed that Mr. Appleby published that he was out to get to the CEO in his position as Secretary of the TPA" I have gone back through our records and have been unable to find such a statement. Will Council now produce the evidence it has of such a statement being published? If not, why not?*

**Answer - The information has been provided from reliable third party reports that I consider credible. I also note that in defamation law published includes any statement made aurally (sic) to a third party. Nowhere has Mr Appleby denied the claims.**

*Question Five*

*How do the Shire President's comments about Mr Geoffrey Appleby and myself at last month's meeting comply with the Council Code of Conduct S3.5 that says: "We will not make any allegations that are derogatory or improper?"*



***Answer - I do not consider the remarks to be either derogatory or improper if they are true and in the public interest. Given the ongoing campaign by Mr Appleby to denigrate the Shire and the CEO it is proper that his stated agenda should be public.***

Question Six

*I take it that you are not including the TPA in that? It is directly aimed at Mr Appleby?*

***Answer - Yes it is".***

### **Complaint Number SP2018-110**

35. The First Complainant is the Secretary of the TPA and was a volunteer columnist with the Toodyay Herald newspaper at the time the Column was published.
36. The First Complainant submits that the allegations in the Column accusing the TPA and the Herald Newspaper of bullying and harassment were serious. When asked about the Column at the April Council Meeting, Cr Rayner, in his position as Shire President, specifically targeted the First Complainant and accused him of stating that he was "*out to get the CEO*". He caused untrue and unsubstantiated allegations about the First Complainant to be publicly aired and published in the Shire's Council minutes following the meeting. Cr Rayner's Offending Response has caused the First Complainant considerable offence and embarrassment.
37. On 2 May 2018 the First Complainant emailed Cr Rayner denying he had ever said he was "*out to get the CEO*" and requested evidence that he had in fact said that. However, despite being given ample opportunity to produce such evidence, Cr Rayner has not done so. Instead, in an email sent by Cr Rayner to the First Complainant on 10 May 2018, Cr Rayner stated only that he had received the information from reliable sources that he chose not to name.
38. The First Complainant denies stating he was "*out to get the CEO*". However, even if he did make that statement, it was also wrong for Cr Rayner to suggest he made it on behalf of the TPA because:
  - a. what he publishes in his private capacity should not be attributed to other entities (such as the TPA); and
  - b. only the TPA Chairman is authorised to make statements on behalf of the TPA.
39. The First Complainant wrote to Deputy Shire President, Councillor Therese Chitty ("Deputy Shire President") on 2 June 2018 to make a formal complaint that Cr Rayner's conduct breached the Shire's *Code of Conduct*, specifically section 3.5:

*"Avoid Derogatory Statements*

*We will not make any allegations that are derogatory or improper. We will always act in the best interests of the Shire and refrain from any type of communication, in our public or professional duties, which may cause any reasonable person unwarranted offence or embarrassment. When we are uncertain about the probable impact of our communications we should seek legal advice".*



40. Cr Chitty replied that she found Cr Rayner's comments to be neither improper nor derogatory and could not sustain that a breach of the *Code of Conduct* had occurred.
41. The entire situation has detrimentally affected the First Complainant; the Editor of the Toodyay Herald newspaper has asked that he no longer write the regular opinion pieces for the paper and his reputation has been damaged amongst the wider community causing him to withdraw from involvement in community groups.
42. As Shire President, Cr Rayner incurs a special and lawful responsibility as the person who speaks on behalf of the Shire Council, and he has a role to play in correcting the public record. Unspecified comments from unidentified third parties do not constitute any basis for official council statements.

### **Complaint Number SP2018-111**

43. The Second Complainant is the founding Chairman of the TPA and states that the accusations of bullying and harassment in the Column were the first the TPA had heard of such things. The matter has caused the TPA and its office holders' considerable embarrassment and the allegations are strongly rejected. Cr Rayner so far has been unable or unwilling to produce any evidence to substantiate the official claims of bullying and harassment made in the Council Newsletter.
44. The Shire President, as the person authorised to speak on behalf of the local government, confirmed at the April Council Meeting that the Column was written and published with his approval and it was therefore an official Council statement. The Second Complainant alleges Cr Rayner acted improperly when he approved the Column and also authorised the misuse of government resources (the Council Newsletter) by doing so.
45. With regard to the Offending Response and Cr Rayner's accusation that the First Complainant said he was "*out to get the CEO*" in his capacity as TPA Secretary, the Second Complainant states there is a difference between someone expressing a view in private and an organisation making official public statements. In this case, if indeed the First Complainant made the statement (which is denied), he could not have been speaking on behalf of the TPA because:
  - i. as Secretary the First Complainant is not authorised to make such statements without the approval of the Management Committee and no such approval was either sought or granted; and
  - ii. as Chairman of the TPA, the Second Complainant makes all public statements on behalf of the TPA.
46. Cr Rayner has not produced any evidence to support his allegation that the First Complainant stated he was "*out to get the CEO*". However, even if the allegations were correct (which they are not), office holders are still prohibited from making such statements by the Shire's own policies, more particularly:
  - a. Standing Order 7.15(3)



*“A member is not to use offensive or objectionable expressions in reference to any Member, employee or other person”*

b. Section 3.5 of the Shire’s Code of Conduct

***“Avoid Derogatory Statements***

*We will not make any allegations that are derogatory or improper. We will always act in the best interests of the Shire and refrain from any type of communication, in our public or professional duties, which may cause any reasonable person unwarranted offence or embarrassment. When we are uncertain about the probable impact of our communications we should seek access to legal advice.”*

47. The matter was subsequently dealt with by the Deputy Shire President who determined that there had been a breach of section 3.5 of the *Code of Conduct* by Cr Rayner. However, the official allegations still stand uncorrected on the public record.

Summary of Allegations

48. The Complainants make the following allegations in relation to Cr Rayner’s conduct:

**Complaint Number SP2018-110**

*i. First Allegation – breach of regulation 7(1)(b)*

Cr Rayner is alleged to have breached regulation 7(1)(b) when he made the Offending Response during the April Council Meeting.

*ii. Second Allegation – breach of regulation 7(1)(b)*

It is claimed Cr Rayner also breached regulation 7(1)(b) when he approved the Statement in the Column written by the Shire’s CEO and allowed its publication in the Community Newsletter.

**Complaint Number SP2018-111**

*iii. Third Allegation – breach of regulation 4*

It is alleged that Cr Rayner breached regulation 4 when he made the Offending Response during the April Council Meeting.

*iv. Fourth Allegation – breach of regulation 7(1)(b)*

Cr Rayner is alleged to have breached regulation 7(1)(b) when he made the Offending Response during the April Council Meeting.

*v. Fifth Allegation – breach of regulation 7(1)(b)*

It is claimed Cr Rayner also breached regulation 7(1)(b) when he approved the Statement in the Column written by the Shire’s CEO and allowed its publication in the Community Newsletter.



vi. *Sixth Allegation – breach of regulation 8*

The Complainant submits that Cr Rayner, by approving the Column for publication, authorised the use of local government resources (the Newsletter) to produce and publish unauthorised and non-conforming statements.

**Councillor Rayner’s Response**

49. Cr Rayner denies the allegations in the Complaints.

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50. Council is to provide a safe working environment for all people employed by the Shire. The CEO believed he was not in a safe working environment and many of his staff were under the same impression. The CEO discussed his health and well-being with Cr Rayner, and the effect of the unpleasant environment and the “*barrage of Public Questions*” from the TPA at council meetings.

51. The First Complainant is the Secretary of the TPA and up until the time the Column was published, all correspondence was sent by the First Complainant by email with no reference to the Chairman of the TPA (the Second Complainant) authorising the communication. However, following the publication of the Column, the details of the Second Complainant appeared on all correspondence involving the TPA, authorising the communication.

52. Cr Rayner, as Shire President, has not gained any personal advantage but has suffered disadvantage in many ways, whereas the First Complainant and the TPA have gained significantly by denigrating Council, Councillors and Administration.

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53. Cr Rayner considered the Statement to be factual and accurate and its publication of the Column to be in the public interest. Speaking on behalf of the local government and authorising the CEO to do so are within his authority as Shire President.

54. The person responsible for the alleged bullying and harassment was the First Complainant, the Secretary of the TPA. The First Complainant told several people in conversation that “*now the ex-President was out the CEO should be next*”.

55. The Second Complainant disagreed with the Statement made in the Column, and asked questions during Public Question Time at the April Council Meeting regarding its truthfulness. The Second Complainant stated that as he was the only person who could speak on behalf of the TPA, it could not be held accountable for the actions of other office bearers acting in a private capacity. However, after the publication of the Column it became apparent that the TPA wished to separate itself from the behaviour of the First Complainant.

56. With regard to the allegation that Cr Rayner breached the Shire’s Local Laws, as Shire President, it is his decision as to whether or not a breach of the Standing Orders has occurred and as the statements were true and in the public interest, he did not consider the Statement to be in contravention of these.



57. Finally, there is no evidence of what personal advantage he sought to gain or what person he sought to disadvantage. The TPA is not a person and the Second Complainant has not indicated any personal disadvantage. The Second Complainant, through the process of Public Question Time regularly denigrates the Shire Council and Administration. When participating in public political debate, it is very likely that the targets of campaigns will contest views and state opposing views and call those parties to account.

### **Panel's consideration**

#### **Complaint Number 2018-110**

##### First Allegation – breach of regulation 7(1)(b)

58. Cr Rayner is alleged to have breached regulation 7(1)(b) when he made the Offending Response during the April Council Meeting.

##### *First, second and third elements satisfied*

59. The Panel finds that Cr Rayner engaged in the conduct which is the subject of the First Allegation and that he was a councillor and was acting as a councillor at all relevant times.

60. The first, second and third elements of regulation 7(1)(b) are established.

##### *Whether Cr Rayner acted improperly (fourth element)*

61. The Panel is not satisfied that the fourth element has been established in relation to the First Allegation and finds that Cr Rayner did not act improperly. The Panel has had regard to all the evidence, including the Shire's *Code of Conduct* and the breach of section 3.5 that was found by the Deputy Shire President to have occurred in respect of Cr Rayner's conduct.

62. However, the Panel makes this finding because it is not satisfied to the required standard of proof that a reasonable person would consider that Cr Rayner did not meet the standards of conduct expected of a councillor when he made the Offending Response at the Council Meeting. The surrounding circumstances provide important context to the exchange between the parties, and the Panel has considered Cr Rayner's response against that background:

- a. Cr Rayner was being asked a series of questions relating to the Column and the Statement. The Second Complainant repeatedly asked Cr Rayner specifically to produce evidence of the claims of bullying and harassment made by the CEO. Cr Rayner answered the question directly and addressed the issue to the best of his knowledge.
- b. Cr Rayner had already stated during the exchange that he did not wish to get into an argument with the Second Complainant. However the Second Complainant continued to ask Cr Rayner further questions on the matter:

##### *Summary of Question Six*



*Do you have any details of any statements made by the TPA that fit that description?*

***Answer - Mr Graham this has been a long running battle and I will not get into an argument in the Chamber.***

*Question seven*

*Can you produce evidence of the claims the Council made publicly?*

***Answer - Yes I can. Mr Graham, Mr Appleby published that he was out to get to the CEO in his position as Secretary of the TPA***

It is reasonable that Cr Rayner would have felt obliged to respond as the exchange was during public question time and he was responsible for speaking on behalf of Council.

- c. The Panel finds that when Cr Rayner responded, he did so in a restrained and reasonable manner, taking into consideration he did not wish to name or involve any third parties. His response was limited in length, it was straightforward and he did not seek to go further than was necessary in providing an answer to the question. Nor was the language Cr Rayner used overtly wrongful or offensive.

63. Based on the evidence before it, the Panel is not satisfied that Cr Rayner acted improperly when making the Offending Response.

*Whether Cr Rayner intended to cause detriment to the local government or any other person (fifth element)*

64. The Panel has found that Cr Rayner did not act improperly and therefore it is not necessary to consider the fifth element. However, to be clear, the Panel is also not satisfied to the required standard of proof that Cr Rayner intended to cause detriment when he made the Offending Response:

- a. Cr Rayner was responding to a robust and vigorous series of questions about the Column and the exchange took place against a background of strained relations between Council and the TPA (the body represented by the Second Complainant). This would have placed Cr Rayner in a difficult situation.
- b. Cr Rayner did not have any prior warning of what the question was, and his reply was made during the back and forth exchange between the parties.
- c. Cr Rayner had already stated he did not wish to engage in an argument when he was asked Question Seven and the Panel finds he was simply answering the question to the best of his ability.

65. Based on the evidence before it, the Panel does not find that it is more likely than not that Cr Rayner intended to cause detriment to the First Complainant, the TPA or any other party.



## Findings

66. Accordingly for the above reasons, the Panel finds that Cr Rayner did not breach regulation 7(1)(b) in relation to the First Allegation.

### Second Allegation – breach of regulation 7(1)(b)

67. The First Complainant alleges that Cr Rayner breached 7(1)(b) by his conduct when he approved the Column that was written by the Shire's CEO and allowed its publication in the Community Newsletter.

#### *First, second and third elements satisfied*

68. The Panel finds that Cr Rayner engaged in the conduct which is the subject of the Complaint and that he was a councillor and was acting as a councillor at all relevant times.

69. The first, second and third elements of regulation 7(1)(b) are established.

#### *Whether Cr Rayner acted improperly (fourth element)*

70. The Panel is not satisfied that the fourth element has been established in relation to the Second Allegation and finds that Cr Rayner did not act improperly. The Panel has had regard to all the evidence, including the Shire's *Code of Conduct* and the breach of section 3.5 that was found by the Deputy Shire President to have occurred in respect of Cr Rayner's conduct.

71. The Panel makes this finding because it is not satisfied to the required standard of proof that a reasonable person would consider that Cr Rayner did not meet the standards of conduct expected of a councillor when he supported the publication of the Column:

- a. Cr Rayner confirmed that the Column was published with his "*full knowledge and support*" including the following Statement:

*"I am not OK with the way that good people of Toodyay who do not agree with the unprincipled campaign by the Herald and the TPA (Toodyay Progress Association) are bullied and harassed for having a different point of view".*

- b. However, the Column was written and published by the CEO in his own name in response to being asked if he was "ok". The subject matter of the article was personal to the CEO who was clearly upset at the situation and expressed that openly in the publication:

*"But really I am not OK! I am not OK with the impact this campaign is having on my staff and family whose hard work, loyalty and integrity I value....*

*I am not OK with the damage that is being done to my reputation in the Local Government Industry.....*

*I would like to thank those people who have approached me to lend their support".*



- c. Evidently, the CEO felt he and others in the Shire were under attack and Cr Rayner agreed. It was clearly a serious matter and the Panel finds that in those circumstances, it was proper for Cr Rayner to show his support, not only for the CEO, but also for others in the Shire too, by endorsing the Column. This is especially so as Cr Rayner had witnessed what was happening first hand and the detrimental impact on Shire staff.
- d. Cr Rayner did not make any direct comment in the Column; he simply supported a senior member of Shire staff, holding an important role in local government, in putting forward his position to the community and thanking them for their support.

72. The Panel finds that Cr Rayner did not act improperly by supporting the publication of the Column in the Community Newsletter.

*Whether Cr Rayner intended to cause detriment to the local government or any other person (fifth element)*

73. The Panel is not satisfied to the required standard of proof that Cr Rayner acted improperly therefore it is not necessary to consider the fifth element. However, to be clear, the Panel is also not satisfied that Cr Rayner intended to cause detriment to the TPA or any other party when he supported the publication of the Column:

- a. Clearly the CEO was very upset with the situation and the Panel finds it plausible that Cr Rayner wanted to give his support to the CEO and others who had been affected by the situation, with a view to ending the issue.
- b. This was clearly a topic that affected several groups of people in the Shire who felt a similar way to the CEO, and it is a reasonable claim that Cr Rayner's intention in supporting the publication of the Column was to allow their position to be shared amongst the community.

74. Based on the evidence before it, the Panel does not find that it is more likely than not that Cr Rayner intended to cause detriment to the TPA or any other party.

## Findings

75. Accordingly, for the above reasons, the Panel finds that Cr Rayner did not breach regulation 7(1) (b) in relation to the Second Allegation.

## SP 2018-111

### Third Allegation – breach of regulation 4

76. Under the Act a local government can make “*local laws*”, including laws that are necessary or convenient to enable the local government to perform its functions.<sup>22</sup>

77. Under the Act and regulation 4, a council member who contravenes a “*local law as to conduct*” commits a minor breach.<sup>23</sup> A “*local law as to conduct*” includes a

<sup>22</sup> Section 3.51 of the Act.

<sup>23</sup> Section 5.105(1)(b), regulation 4 of the Regulations.



local law about the conduct of councillors at meetings.<sup>24</sup> The Second Complainant refers to both the Shire's *Code of Conduct* and its *Standing Orders Local law 2008* ("Standing Orders"). However, only the Standing Orders are considered a local law as to conduct and therefore fall within the scope of regulation 4.

78. Part 7 of the *Standing Orders* relates to the "Conduct of Members" and Order 7.15(3) ("SO 7.15(3)") states:

*"A Member is not to use offensive or objectionable expressions in reference to any Member, employee or other person"*.

The Panel finds that a contravention of SO 7.15(3) would be a minor breach under the Act and regulation 4(2).

79. In order to find that Cr Rayner committed a breach under regulation 4 the Panel must be satisfied that it is more likely than not that he:

- used offensive expressions; or
- used objectionable expressions;

at a Council Meeting or Committee.

80. The Panel finds that Cr Rayner:

- a. was clearly a member of the Council at the time of the alleged conduct; and
- b. referred to and used expressions in relation to the First Complainant during the April Council Meeting when he made the Offending Response.

81. The question therefore is whether the expressions used by Cr Rayner in relation to the First Complainant were "offensive" or "objectionable" or both.

Were the words of the type referred to in SO 7.15(3)?

82. The Macquarie dictionary defines:

*"offensive" as "causing offence or displeasure; irritating; highly annoying; repugnant to the moral sense, good taste, or the like".*

*"objectionable" as "able or liable to be objected to; unpleasant; offensive".*

83. The Panel is satisfied to the required standard of proof that the expression Cr Rayner used in relation to the First Complainant during the April Council Meeting, was objectionable:

- a. Cr Rayner clearly referred to the First Complainant in his capacity as Secretary of the TPA when he stated:

*"Yes I can. Mr Appleby, in his position as Secretary of the TPA, has publicly stated that he is out to get the CEO."*

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<sup>24</sup> Regulation 4(1) of the Regulations.



- b. Both the First and Second Complainants oppose the accuracy of that statement. Firstly, they object on the basis that it was said at all by the First Complainant. Secondly, even if the statement was made, they say that the First Complainant was not authorised to speak on behalf of the TPA.
- c. While the Panel notes Cr Rayner's submissions that it was unclear at times as to when the First Complainant was speaking on behalf of the TPA or personally, there is insufficient evidence before the Panel to make a finding on that issue. However, there is evidence that:
- i. only the First Complainant (as Chairman of the TPA) was authorised to make statements on behalf of the TPA; and
  - ii. that the Offending Response was intended to be aimed directly at the First Complainant, and not the TPA and the Panel refers to the following exchange at the May Council Meeting:

*"Question Five*

*How do the Shire President's comments about Mr Geoffrey Appleby and myself at last month's meeting comply with the Council Code of Conduct S3.5 that says: "We will not make any allegations that are derogatory or improper?"*

***Answer - I do not consider the remarks to be either derogatory or improper if they are true and in the public interest. Given the ongoing campaign by Mr Appleby to denigrate the Shire and the CEO it is proper that his stated agenda should be public.***

*Question Six*

*I take it that you are not including the TPA in that? It is directly aimed at Mr Appleby?*

***Answer - Yes it is".***

- d. The Panel finds that Cr Rayner's Offending Response linked the TPA to the alleged conduct of the First Complainant (that he had stated he was "out to get the CEO") without a clear basis for doing so.

84. Based on the evidence, the Panel finds it can be concluded that the Offending Response was objectionable on the basis that it attributed the First Complainant's alleged comments (that were serious in nature), to not only the First Complainant but also by association to the TPA. The Panel does not find that the expression used by Cr Rayner was offensive.

### **Panel's Finding**

85. The Panel finds that Cr Rayner did breach SO 7.15(3) of the Standing Orders and therefore did commit a minor breach under regulation 4.

### **Fourth Allegation – regulation 7(1)(b)**



86. The Second Complainant alleges that Cr Rayner breached 7(1)(b) by his conduct when he made the Offending Response during the April Council Meeting.

87. The Panel repeats paragraphs 59 to 65 above.

### **Findings**

88. Accordingly, for the above reasons, the Panel finds that Cr Rayner did not breach regulation 7(1)(b) in relation to the Fourth Allegation.

#### Fifth Allegation – breach of regulation 7(1)(b)

89. The Complainant alleges that Cr Rayner breached 7(1)(b) by his conduct when he approved the Column that was written by the Shire's CEO and allowed its publication in the Community Newsletter.

90. The Panel repeats paragraphs 68 to 74 above.

### **Findings**

91. Accordingly, for the above reasons, the Panel finds that Cr Rayner did not breach regulation 7(1)(b) in relation to the Fifth Allegation.

#### Sixth Allegation – breach of regulation 8(b)

92. The Complainant alleges that Cr Rayner breached regulation 8(b) when he approved the Column for publication. Only limited information is provided regarding the status of the Newsletter, however past editions appear on the Shire's website and the Panel finds it is more likely than not that it is a Shire resource

93. In order to find that there has been a contravention of a particular regulation, it is necessary to find that all the requisite elements have been satisfied. In this case, the Panel is not satisfied to the required standard that Cr Rayner breached regulation 8 when he supported the publication of the Column in the Shire's Newsletter:

- a. The Panel is not satisfied that Cr Rayner directly or indirectly *used* the Newsletter for any purpose. The definition of "use" is "*take, hold, or deploy (something) as a means of accomplishing or achieving something*". Although Cr Rayner supported the CEO in publishing the Column, he was not involved in the writing of it in any way. It is also not particularised by the Complainant what Cr Rayner would have meant to achieve with its publication and therefore it is unclear for what purpose he "*used*" it.
- b. Regulation 8(b) also provides that a person who is a council member must not use the resources of a local government for any other purpose unless it is authorised by the Council *or the CEO*. In this case, the Column was written by the CEO and authorised by him.

94. Therefore, the Panel finds the essential elements of regulation 8(b) have not been satisfied.



## Findings

95. Accordingly, for the above reasons, the Panel finds that Cr Rayner did not breach regulation 8(b) in relation to the Sixth Allegation.

A handwritten signature in black ink, appearing to read 'SRizk'.

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Sarah Rizk (Presiding Deputy Member)

A handwritten signature in black ink, appearing to read 'ERowe'.

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Elanor Rowe (Deputy Member)

A handwritten signature in black ink, appearing to read 'RAubrey'.

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Rebecca Aubrey (Deputy Member)



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## Local Government Standards Panel

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Complaint Number	SP 2018-111
Legislation	<i>Local Government Act 1995 (WA)</i>
<b>Complainant</b>	<b>Councillor Brian Rayner</b>
<b>Respondent</b>	<b>Mr Larry Graham</b>
Local Government	<b>Shire of Toodyay</b>
Regulation	Regulation 4 of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i>
Panel Members for Penalty Consideration	Mr Michael Connolly (Presiding Member) Cr Paul Kelly (Member) Mrs Emma Power (Member)
Heard	26 April 2019 Determined on the documents
Penalty Considered	9 July 2019
Outcome	Public Apology

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### PENALTY DECISION AND REASONS FOR DECISION

Delivered 24 July 2019

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#### DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005 (WA)*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents



## Introduction

1. At its meeting on 26 April 2019, the Panel found that Councillor Brian Rayner, a Councillor for the Shire of Toodyay (“**the Shire**”), committed one minor breach of Regulation 4 of the *Local Government (Rules of Conduct) Regulations 2007* (WA) (“**the Regulations**”) when he made certain statements at the Ordinary Council meeting of 24 April 2018 (“**the Minor Breach**”).

## Jurisdiction

2. The Panel convened on 9 July 2019 to consider how it should deal with the Minor Breach.
3. The Panel accepted the advice of the Department of Local Government, Sport and Cultural Industries (“**the Department**”) that on this date there was no available information to indicate that Cr Rayner had ceased to be, or was disqualified from being, a councillor.

## Possible Sanctions

4. Section 5.110(6) of the *Local Government Act 1995* (WA) (“**the Act**”) provides that the Panel is to deal with a minor breach by:
  - (a) *dismissing the complaint;*
  - (b) *ordering that —*
    - (i) *the person against whom the complaint was made be publicly censured as specified in the order;*
    - (ii) *the person against whom the complaint was made apologise publicly as specified in the order; or*
    - (iii) *the person against whom the complaint was made undertake training as specified in the order;*
  - or*
  - (c) *ordering 2 or more of the sanctions described in paragraph (b).*

## Councillor Rayner’s Submissions

5. If the Panel finds that a councillor has committed a minor breach, it must give the councillor an opportunity to make submissions to the Panel about how it should deal with the breach under section 5.110(6).<sup>1</sup>
6. By a letter dated 31 May 2019, Cr Rayner was:
  - a. notified of the Panel’s finding of the Minor Breaches;
  - b. provided with a copy of the Panel’s Finding and Reasons for Finding; and
  - c. offered an opportunity to make submissions as to how the Minor Breach should be dealt with under section 5.110(6) of the *Act*.
7. By email dated 4 June 2019, the Department received a response from Cr Rayner acknowledging that:

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<sup>1</sup> *Local Government Act 1995* (WA), s 5.110(5).



- a. he accepts that he may have contravened Regulation 4, that I used offensive expression; or used objectionable expressions to a member of the public or an organisation; and
- b. that he will abide by the findings of the Panel.

### **Panel's Consideration**

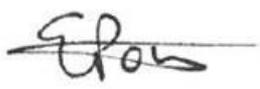
8. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach. The Panel may dismiss a complaint under section 5.110(6)(a), not to reverse the Panel's finding of a breach but to indicate that in all the circumstances the councillor should not be penalised and the breach should not be recorded against the councillor's name.
9. The Panel notes that Cr Rayner accepts that he has breached the Regulations by his conduct.
10. In these circumstances, the Panel considers that the appropriate penalty is that Cr Rayner make a public apology.
11. Making a public apology is a significant sanction, being a personal admission by the individual of wrongdoing. It is a suitable and appropriate penalty when a councillor's conduct:
  - a. adversely affects particular individuals<sup>2</sup>; or
  - b. does not meet the standards other councillors seek to uphold.

### **Panel's decision**

12. The Panel orders pursuant to section 5.110(6)(b)(ii) of the Act that, in relation to the minor breach of regulation 4 of the Regulations, Cr Rayner make a public apology in terms of the attached Order.

  
\_\_\_\_\_  
Mick Connolly (Presiding Member)

  
\_\_\_\_\_  
Paul Kelly (Member)

  
\_\_\_\_\_  
Emma Power (Member)

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<sup>2</sup> *Treby and Local Government Standards Panel* [2010] WASAT 81 [127] (Pritchard J).



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## ORDER

Delivered 24 July 2019

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### DEFAMATION CAUTION

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### THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor Brian Rayner, a Councillor for the Shire of Toodyay publicly apologise to the Toodyay Progress Association, as specified in paragraph 2 and 3 below.
2. On the ordinary council meeting first occurring after the expiration of 28 days from the date of service of this Order on him, Councillor Rayner shall:
  - a. attend the relevant ordinary council meeting;
  - b. ask the presiding person for his or her permission to address the meeting to make a public apology to the public;
  - c. make the apology immediately after Public Question Time or during the Announcements part of the meeting, or at any other time when the meeting is open to the public, as the presiding person thinks fit; and
  - d. address the Council and public as follows, without saying any introductory words before the address, and without making any comments or statement after the address:

- i. 

"I advise this meeting that:

  - ii. A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened the Local Government (Rules of Conduct) Regulations 2007 (WA) at the Ordinary Council Meeting of the Shire of Toodyay held the 24 April 2018 when I attributed a comment made by Mr Geoffrey McDonald-Appleby to the Toodyay Progress Association.
  - iii. The Panel found that I breached the Shire's Standing Orders Local Law 2008 Regulation 4 of the said Conduct Rules in that such attribution was objectionable.
  - i. I accept that I should not have attributed the relevant comments to the Toodyay Progress Association.
  - ii. I now apologise to the Toodyay Progress Association."



3. If Cr Rayner fails or is unable to comply with the requirements of paragraph 2 above, then within the next 28 days following the ordinary council meeting referred to in paragraph 2, he shall cause the following notice of public apology to be published in no less than 10 point print, as a one-column or two-column display advertisement in the first 10 pages of the "Toodyay Herald" newspaper and the "Avon Valley and Wheatbelt Advocate" newspaper:

**PUBLIC APOLOGY BY COUNCILLOR BRIAN RAYNER**

A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened the Local Government (Rules of Conduct) Regulations 2007 (WA) at the Ordinary Council Meeting of the Shire of Toodyay held the 24 April 2018 when I attributed a comment made by Mr Geoffrey McDonald-Appleby to the Toodyay Progress Association.

The Panel found that I breached the Shire's Standing Orders Local Law 2008 Regulation 4 of the said Conduct Rules in that such attribution was objectionable.

I accept that I should not have attributed the relevant comments to the Toodyay Progress Association.

I now apologise to the Toodyay Progress Association.



## NOTICE TO THE PARTIES TO THE COMPLAINT

### RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (the Panel) advises:

- (1) Under section 5.125 of the *Local Government Act 1995* the person making a **complaint** and the person complained about each have the right to apply to the **State Administrative Tribunal (the SAT)** for a review of the Panel's decision in this matter. In this context, the term "decision" means a decision to dismiss the complaint or to make an order.
- (2) By rule 9(a) of the *State Administrative Tribunal Rules 2004*, subject to those rules an application to the SAT under its review jurisdiction **must be made within 28 days** of the day on which the Panel (as the decision-maker) gives a notice [see the Note below] under the *State Administrative Tribunal Act 2004 (SAT Act)*, section 20(1).
- (3) **The Panel's Breach Findings and these Findings and Reasons for Finding – Sanctions**, constitute the Panel's notice (i.e. the decision-maker's notice) given under the *SAT Act*, section 20(1).

**Note:**

- (1) This document may be given to a person in any of the ways provided for by sections 75 and 76 of the *Interpretation Act 1984*. [see s. 9.50 of the *Local Government Act 1995*]
- (2) Subsections 75(1) and (2) of the *Interpretation Act 1984* read:
  - "(1) Where a written law authorises or requires a document to be served by post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, **service shall be deemed** to be effected by properly addressing and posting (by pre-paid post) the document as a letter to the last known address of the person to be served, and, **unless the contrary is proved, to have been effected at the time when the letter would have been delivered in the ordinary course of post.** [Bold emphases added]
  - (2) Where a written law authorises or requires a document to be served by registered post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, then, if the document is eligible and acceptable for transmission as certified mail, the service of the document may be effected either by registered post or by certified mail."
- (3) Section 76 of the *Interpretation Act 1984* reads:

"Where a written law authorises or requires a document to be served, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, without directing it to be served in a particular manner, service of that document may be effected on the person to be served —

  - (a) by delivering the document to him personally; or
  - (b) by post in accordance with section 75(1); or
  - (c) by leaving it for him at his usual or last known place of abode, or if he is a principal of a business, at his usual or last known place of business; or
  - (d) in the case of a corporation or of an association of persons (whether incorporated or not), by delivering or leaving the document or posting it as a letter, addressed in each case to the corporation or association, at its principal place of business or principal office in the State."