

## LOCAL GOVERNMENT STANDARDS PANEL

Established under section 5.122 of the *Local Government Act 1995* (WA)

Complaint Number	SP 12 of 2014 DLG 20140091
Legislation	<i>Local Government Act 1995</i> (WA)
<b>Complainant</b>	<b>Mr Jonathan Throssell</b>
<b>Subject of complaint</b>	<b>Councillor Tony Cuccaro</b>
Local Government	Shire of Mundaring
Regulation	Regulations 11(2) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Dr C Berry (Deputy Presiding Member) Cr P Kelly (Member) Mr P Doherty (Deputy Member)
Heard	19 September 2014 (Determined on the documents)
Result	Breach established

---

### FINDINGS AND REASONS FOR FINDING

---

#### DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005*, 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.

## 1. Summary of the Panel's Decision

- 1.1 The Panel found that Cr Cuccaro committed a breach of regulation 11 of the *Local Government (Rules of Conduct) Regulations 2007* by failing to disclose an impartiality interest at an Ordinary Council Meeting of the Shire held on 8 July 2014.

## 2. Introduction

- 2.1 In these Reasons unless otherwise indicated:

- (a) a reference to a regulation is a reference to the corresponding regulation of the *Local Government (Rules of Conduct) Regulations 2007 (Regulations)*, and a reference to a section is a reference to the corresponding section of the *Local Government Act 1995 (Act)*; and
- (b) the term “viewed objectively” means “as viewed by a reasonable person” (the reference to a reasonable person being a reference to a hypothetical person with an ordinary degree of reason, prudence, care, self-control, foresight and intelligence, who knows the relevant facts).

## 3. Jurisdiction

- 3.1 By written complaint dated 15 July 2014 Mr Jonathan Throssell (**Complainant**) lodged a complaint of a minor breach with the Department of Local Government (**Department**) regarding alleged conduct by Cr Tony Cuccaro of the Shire of Mundaring (**Shire**) on 8 July 2014 (**Complaint**).
- 3.2 On or about 15 July 2014 the Complainant (being the Shire's Complaints Officer and its Chief Executive Officer) sent the Complaint to the Local Government Standards Panel (**Panel**) in accordance with the requirements of section 5.107.
- 3.3 The Complainant alleges that at an Ordinary Council Meeting of the Shire held on 8 July 2014 (**July 2014 OCM**) Cr Cuccaro failed to disclose a partiality interest in relation to matters concerning Item 11.1 – Consideration of Projects listed as Strategic Priorities (**Item 11.1**) and in so doing committed a breach of regulation 11(2).
- 3.4 Regulations 6 through to 12 (both inclusive) are rules of conduct for the purposes of section 5.104(1) of the *Act*.
- 3.5 A breach of any of those regulations is a “minor breach” as defined in section 5.105(1)(a).
- 3.6 Pursuant to section 5.110(2), the Panel is required to make a finding as to whether the breach alleged in the Complaint occurred or to send the Complaint to the Chief Executive Officer of the Department of Local Government and Communities (**Department**) under section 5.111.
- 3.7 The Panel had been informed by the Department, and so finds that Cr Cuccaro:
- (a) was at the relevant times (i.e. 8 July 2014) and remains currently, an elected member of the Council of the Shire (**Council**); and

- (b) satisfies the requirements of being an elected member of the Council as:
  - (i) he is qualified to be an elector of the district under section 2.19(1)(b);
  - (ii) there is no evidence to indicate that he is disqualified for Council membership under sections 2.21, 2.22, 2.23 or 2.24; and
  - (iii) he is not disqualified from continuing his membership of the Council under section 2.25.

3.8 The Panel also finds that:

- (a) the Complaint is made in writing in the form approved by the Minister pursuant to section 5.107(2);
- (b) the Complaint was sent to the Complaints Officer of the Shire within two years after the breaches alleged in the Complaints occurred, as required by section 5.107(4);
- (c) the Complaint is not one that ought to be sent to the Chief Executive Officer of the Department under section 5.111; and
- (d) it has jurisdiction to determine whether the breach alleged in the Complaint occurred.

#### 4. **Legislative background**

4.1 The Regulations include the following regulations:

“11(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.
- (3) Subregulation (2) does not apply to an interest referred to in section 5.60 of the Act.
- (4) Subregulation (2) does not apply if —
  - (a) a person who is a council member fails to disclose an interest because the person did not know he or she had an interest in the matter; or

- (b) a person who is a council member fails to disclose an interest because the person did not know the matter in which he or she had an interest would be discussed at the meeting and the person disclosed the interest as soon as possible after the discussion began.
- (5) If, under subregulation (2)(a), a person who is a council member discloses an interest in a written notice given to the CEO before a meeting then —
- (a) before the meeting the CEO is to cause the notice to be given to the person who is to preside at the meeting; and
  - (b) at the meeting the person presiding is to bring the notice and its contents to the attention of the persons present immediately before a matter to which the disclosure relates is discussed.
- (6) If —
- (a) under subregulation (2)(b) or (4)(b) a person’s interest in a matter is disclosed at a meeting; or
  - (b) under subregulation (5)(b) notice of a person’s interest in a matter is brought to the attention of the persons present at a meeting,
- the nature of the interest is to be recorded in the minutes of the meeting.”

## **5. The Panel’s Role**

### **5.1 The Panel observes that:**

- (a) clause 8(6) of Schedule 5.1 of the *Act* requires that each member of the Panel is to have regard to the general interests of local government in the State of Western Australia;
- (b) a finding of a minor breach is a serious matter as it may affect an individual both personally and professionally;
- (c) by section 5.106, in order for the Panel to make a finding that a minor breach has been committed by a council member, the finding is to be “based on evidence from which it may be concluded that it is more likely that the breach occurred than that it did not occur”;
- (d) when making this determination:
  - (i) 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 to the reasonable satisfaction of the [determining body]”, such as the Panel: *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J in at 362; and

- (ii) where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture. But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise: *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5.

## 6. The Complaint

6.1 The Complaint alleges that:

- (a) at the July 2014 OCM, the Council considered Item 11.1 which concerned the Library and Community Centre at Boya Oval (**Boya Oval Facilities**);
- (b) when a substantially similar matter was considered by the Council at an Ordinary Council Meeting held on 25 February 2014 (**February 2014 OCM**), Cr Cuccaro disclosed an interest affecting his impartiality in relation to Item No 11.1<sup>1</sup> – Library and Community Centre at Boya Oval, namely that he was a member of a “user group” of the Boya Oval Facilities (**Association**); and
- (c) at the July 2014 OCM Cr Cuccaro still had the Association in relation to Item 11.1, which affected his impartiality, but failed to disclose that Association contrary to regulation 11(2).

## 7. The Response

7.1 The Department sent a copy of the Complaint and a “Complaint Summary” prepared by the Department (**Complaint Summary**) to Councillor Cuccaro by letter dated 15 August 2014 and invited him to respond to the same.

7.2 The Complaint Summary recited that:

“It is alleged that you, Councillor Tony Cuccaro, had an interest that adversely affected your impartiality when a matter was presented to the Ordinary Council Meeting of 8 July 2014 of the Shire of Mundaring, concerning the Library and Community Centre at Boya Oval, and that your interest in the matter is that you are a member of a user group of the oval, and that this interest affecting your impartiality in the matter was not disclosed, contrary to *Regulation 11 ...*”

7.3 In his response to the Department dated 20 August 2014 (**Response**), Cr Cuccaro said:

“Firstly I must apologies (sic) for inadvertently failing to disclose my ‘Interest Affecting Impartiality’ on Item number 11.1 ‘Consideration of Projects listed as Strategic Priorities’ at the Ordinary Council meeting of 8 July 2014.

---

<sup>1</sup> Being Item 11.1 as defined in paragraph 3.3 (above).

Yes, at the Ordinary Council meeting of 25 February 2014 I expressed my 'Interest Affecting Impartiality' on item number 11.1 'Library & Community Centre at Boya Oval' and I was a member of a user group at that location.

At the 8 July 2014 Ordinary Council meeting of 8 July 2014 when considering the projects at Boya Oval, I totally forgot about disclosing any interest in that item. The item was very controversial and emotional and leading to the Council meeting I totally forgot about this matter. I am disappointed that either the CEO or the Presiding Person should or could have made me aware of the situation on the night.

Now that the matter has been brought to my attention, I will endeavour to fulfil my obligation under Regulation 11 of the Local Government (Rules of Conduct) Regulation 2007 at any future meetings.

Once again please accepted (sic) my apologies."

7.4 Additionally:

(a) the minutes of the February 2014 OCM note:

**"9.2 Disclosure of Interest Affecting Impartiality**

...

Cr Cuccaro disclosed an interest affecting impartiality in Item 11.1 [Library and Community Centre at Boya Oval] as he is a member of one of the organisations"

(b) in response to an inquiry from the Department, Cr Cuccaro advised the Department that the "user group" referred to in his Response was the Helena Valley Cricket Club (**Cricket Club**), of which he is a life member; and

(c) in his "Form A Elected Member's response to the matters set out in the Complaint Summary" (**Form A**) Cr Cuccaro stated that he accepts the matters in the Complaint Summary and accepts that he contravened regulation 11 of the *Regulations*.

**8. Item 11.1**

8.1 Having reviewed the Minutes of the February 2014 OCM, the Minutes of the July 2014 OCM and the Report of the senior officer (being the Complainant) in relation to Item 11.1 (**Report**) the Panel finds that:

(a) Item 11.1 required the Council to consider the provision of funding for several major capital projects (**Projects**) identified in the Shire's Community Strategic Plan. The report listed those projects as including:

"...the redevelopment of Boya Oval to accommodate a community hub including a library in replacement of the existing Katherine Susannah Pritchard Library in Greenmount; upgrades to the change rooms at Boya Oval and an associated new clubroom; upgrades to the Brown Park Community Centre; construction of a social room at the Elsie Austin Oval; and a proposed Mundaring Indoor Recreation Centre."

(b) the Report states:

**“Western Suburbs Community Hub (Boya Oval) and Brown Park Community Centre**

Following a series of council decisions since 2009 (ie decisions C4.11.09, SC3.12.11, C17.04.13, C7.01.14 and C13.02.14), it is proposed to construct a Community Hub facility at the Boya Oval, comprising a Library (to replace the library located in Greenmount) and community centre (to replace the Greenmount and Boya Halls). ...

For many years there have been discussions about replacing the ageing Katharine Susannah Pritchard Library, as it is undersized and does not meet contemporary expectations of a community library. ...

In addition to the library, Greenmount Hall (statistically the most used hall in the Shire and located next to the library) was identified as being in urgent need of replacement due to its age and requirement for substantial capital works.

A set of concept plans and costings was developed by Braude and Associates Architects for three potential sites for the western suburbs library. These were: to remain in its current location at the corner of Great Eastern Highway and Scott Street, Greenmount, relocate to Brown Park in Swan View or to Boya Oval in Boya.

On receipt of the report from the Investment Property Committee, Council decided to continue to provide a two branch library service in the Shire and to locate the library at Boya Oval, along with replacement of other ageing infrastructure at that location. ...

***Due to the selected site being at Boya Oval, consideration was given to an opportunity to upgrade the existing change rooms at Boya Oval, plus the addition of a new club room.*** The Boya oval site was chosen by Council with the original concept plan having the new facility on the western side. This would have meant leaving the change rooms on the eastern side of the oval, a poor design and functional outcome. It was therefore recommended the change rooms be incorporated into the design.

Subsequent detailed concepts proved the eastern side was in fact the best site and the change rooms were best left in their current location, separate to the main building containing the library and community spaces.

***The relocation of the change rooms is therefore no longer required.*** The existing change rooms are close enough to be integrated with the upgrade of library and community spaces as evidenced by the concept drawings.

...

The new designs were costed at \$10.72 million, approximately \$2.5 million above the budget estimate of \$8.2 million. This was also presented as a two stage project to meet current budget funding by constructing all facilities ***less the new clubroom and retaining the existing change rooms until further funding could be put in place.***

...

As was detailed in the financial implications section of this report, Council does not have sufficient financial capacity to fund all of the projects listed in this report. Council's strategic priorities include the Western Suburbs Community Hub (comprising the library and community centre), Brown Park Community Centre upgrades (including the Swan View Toy Library relocation) and the Mundaring Recreation Centre (where this report demonstrates the inclusion of an indoor facility is consistent with the strategic priorities). ***The Boya Oval change rooms and club room, while desirable, were not specifically listed as a strategic priority. Accordingly it is recommended Council not proceed with the option of the Boya Oval change rooms and club room at this time.***

..." [emphasis added]

- (c) the Report recorded the officer's recommendation that, amongst other things, "with the exception of the proposed upgrades to the change rooms and a new clubroom at Boya Oval, Council proceed with all of the [Projects]" ("**Recommendation**");
- (d) a motion in terms of the Recommendation was put to the Council ("**Motion**") at the July 2014 OCM following which Cr Cuccaro moved an amendment to the Motion which included the following:
  - "Approve the development of costing and drawings for an extension to the existing Boya Oval change rooms to include better facilities until such time new change rooms have been funded, to go to council within two months"but Cr Cuccaro withdrew the motion before it was considered by the Council "[u]pon obtaining advice from the Chief Executive Officer as to the financial implications of the proposed amendment"; and
- (e) the Motion was thereafter passed by the Council at the July 2014 OCM by a majority of 10 to 1, with Cr Cuccaro voting against it.



## 9. The Documents

- 9.1 Save for the information provided to the Panel by the Department (as set out under the heading “Jurisdiction” above) the Panel determined the Complaint on the papers after considering the Complaint, the Response, the Form A, the minutes of the July 2014 OCM<sup>2</sup> and of the February 2014 OCM<sup>3</sup> and Cr Cuccaro’s advice as set out in paragraph 7.4(b) above.

## 10. Elements of the offence and determination

- 10.1 For present purposes, the essential elements or issues of a breach of regulation 11(2) are that it is more likely than not that:
- (a) a person who is a current council member;
  - (b) had an interest in a matter to be discussed at a Council meeting;
  - (c) the matter was discussed at a Council meeting at which the person attended; and
  - (d) the person did not disclose the nature of his or her interest in either of the ways required by regulation 11(2)(a) or 11(2)(b).
- 10.2 The Panel has considered the available evidence and applied the *Briginshaw*<sup>4</sup> principles and is satisfied that it is more likely than it is not that:
- (a) as at 8 July 2014 Cr Cuccaro was a member of the Council, and remains currently a member of the Council;
  - (b) Cr Cuccaro attended the July 2014 OCM;
  - (c) Item 11.1 was discussed at the July 2014 OCM;
  - (d) neither prior to, not during, either July 2014 OCM did Cr Cuccaro disclose an interest pursuant to regulation 11(2); and
  - (e) each of the elements set out in subparagraph 10.1 (a), (c) and (d) have been established.

### Interest

- 10.3 The remaining issue is whether Cr Cuccaro’s Association (being his life membership of the Cricket Club) was an “interest” that he ought to have disclosed at or before the July 2014 OCM pursuant to regulation 11(2).
- 10.4 Regulation 11(2) requires the disclosure of an “interest”.
- 10.5 Regulation 11(1) defines an “interest” as meaning “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”.

---

<sup>2</sup> Available from:

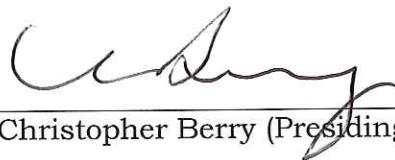
<http://www.mundaring.wa.gov.au/AboutCouncil/MinutesAndAgendas/Lists/Minutes%20and%20Agendas/Attachments/496/Unconfirmed%20Council%20Minutes%208%20July%202014.pdf>

<sup>3</sup> Available from:

<http://www.mundaring.wa.gov.au/AboutCouncil/MinutesAndAgendas/Lists/Minutes%20and%20Agendas/Attachments/459/Confirmed%20Minutes%20Council%2025%20February%202014.pdf>

<sup>4</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J in at 362.

- 10.6 In *Bradley and Local Government Standards Panel* [2012] WASAT 44 (**Bradley**) at paragraph [42] Member McNab found that an allegation that a council member has committed a breach of regulation 11(2) “is an allegation of undeclared conflict or bias (apparent or real) clouding the exercise of public duty”.
- 10.7 Determining whether a conflict of interest exists, requires an analysis as to the relationship, as reasonably perceived, between the interest and the decision to be made: *McGovern and Another v Ku-Ring-Gai Council and Another* [2008] 72 NSWLR 404 (*McGovern*) at [26].
- 10.8 Determining whether bias exists involves a consideration of the extent to which the decision maker brought a closed mind to the decision to be made: *McGovern* at [26].
- 10.9 The Panel finds that when viewed objectively in the context of the facts found by the Panel that:
- (a) the Resolution had the effect of deferring the provision of upgrades to the change rooms and a new clubroom at the Boya Oval Facilities Facility, being a facility used by the Cricket Club;
  - (b) by virtue of Cr Cuccaro’s membership of the Council (on the one hand) and his life membership of the Cricket Club (on the other) he had a personal or private interest that could, or could reasonably be perceived to, adversely affect his impartiality when determining the matter; and
  - (c) that his Association was therefore an interest that he was obliged to have disclosed pursuant to regulation 11(2).
- 10.10 **For the above reasons, the Panel finds that Cr Cuccaro has committed a breach of regulation 11(2).**



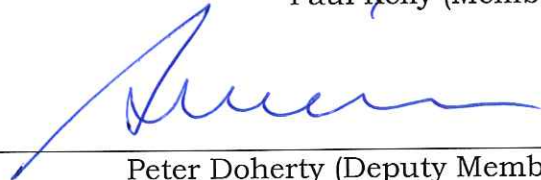
---

Christopher Berry (Presiding Member)



---

Paul Kelly (Member)



---

Peter Doherty (Deputy Member)