

INTERNAL ARBITRATION PROCESS - FRANKSTON CITY COUNCIL

In the matter of an Application by the Frankston City Council concerning
Councillor Steven Hughes

HEARING PURSUANT TO DIVISION 5 OF PART 6 OF THE *LOCAL GOVERNMENT ACT 2020*

Application Number: IAP 2022-21
Applicant: Frankston City Council (represented by the Mayor
Councillor Nathan Conroy)
Respondent: Councillor Steven Hughes
Hearing Date: 7 December 2022
Before: Arbiter Matthew Evans

DETERMINATION

The Arbiter has determined that the Respondent, Councillor Steven Hughes, has breached the prescribed Standards of Conduct included in section 2 of the Frankston City Council Councillor Code of Conduct 2021 in relation to four of the eight allegations, and has made a finding of misconduct in respect of these breaches. These are summarised as follows:

- Allegation 1 - breached Standards of Conduct 2.2 and 2.4(a)
(Standards 2 & 4(1) of the prescribed standards of conduct)
- Allegation 2 - breached Standard of Conduct 2.1
(Standard 1 of the prescribed standards of conduct)
- Allegation 3 - breached Standard of Conduct 2.2
(Standard 2 of the prescribed standards of conduct)
- Allegation 7 - breached Standard of Conduct 2.1
(Standard 1 of the prescribed standards of conduct)

The Arbiter has made no finding of misconduct in relation to four allegations (numbers 4,5,6 and 8). As there had been no breach of the prescribed standards of conduct, the Application in relation to these allegations is dismissed.

STATEMENT OF REASONS FOR DECISION

The Application

1. On 15 June 2022, the Applicant applied under section 143 of the *Local Government Act 2020* (the Act) for an Arbiter to make a finding of misconduct against the Respondent.
2. The Principal Councillor Conduct Registrar (the Registrar) examined the application under section 144 of the Act, and on 30 August 2022, the Registrar appointed the Arbiter under sections 144 and 149 of the Act after forming the opinion that the application was not frivolous, vexatious, misconceived or lacking in substance and that there was sufficient evidence to support a breach of the Frankston City Council Councillor Code of Conduct.

Jurisdiction of the Arbiter in relation to this Application

3. Section 143 of the Act provides that an Arbiter may hear an application that alleges misconduct by a Councillor.
4. The Arbiter was appointed pursuant to section 144 of the Act.
5. Pursuant to section 147 of the Act, an Arbiter may determine whether a Councillor has engaged in misconduct.
6. At the time of the Application, 'misconduct' was defined in section 3 of the Act as "...any breach by a Councillor of the prescribed standards of conduct included in the Councillor Code of Conduct".
7. The prescribed standards of conduct are set out in Schedule 1 of the Local Government (Governance and Integrity) Regulations 2020. A copy of the standards is attached as Attachment 1.
8. These standards are included in section 2 of the Frankston City Council Councillor Code of Conduct. The Code was adopted and signed by all Council members.

The Hearings

9. On 7 September 2022, the Arbiter wrote to the Council's Councillor Conduct Officer and the parties advising that a directions hearing would be held on 14 September 2022. An additional Direction was issued on 11 September 2022 accepting a request from parties that the directions hearing be held remotely.
10. Following the directions hearing, directions were made for the filing and serving of documents on which the parties intended to rely at the hearing, and a hearing date was set down for 4 November 2022.
11. Due to a delay in the filing of the Applicant's documents, additional directions were made on 20 October 2022 providing revised deadlines for the filing and serving of documents by the parties.

12. An additional direction was made on 3 November 2022 agreeing to postpone the 4 November 2022 hearing, following a request from the Applicant's representative. This was followed by a direction that was made on 23 November 2022 setting a new hearing date for 7 December 2022.
13. After hearing submissions from the parties at the hearing, and considering the documents filed by them, the Arbiter reserved his decision.

Evidence Provided

14. The Application contains eight separate allegations. Written submissions and evidence including copies of emails, screenshots of social media posts, copies of media articles, links to the recorded livestream of Council meetings and a 'debrief' (following a Council meeting) and other material was submitted by both the Applicant and Respondent prior to the hearing. In addition, the Mayor Councillor Nathan Conroy lodged a personal Witness Statement.
15. At the hearing on 7 December 2022, both the Applicant and Respondent made verbal submissions regarding the eight allegations of a breach of the Standards of Conduct. During the hearing, a video of the livestream of the Council meeting of 26 April 2022 was also viewed.

Findings of the Arbiter and Reasons

Allegation 1

16. The Applicant alleged that Councillor Hughes had breached Standards of Conduct in the Code by not removing from his public Facebook page any of the posts referred to in the Arbiter's Determination and Reasons dated 27 July 2021. This is a reference to the decision of the Arbiter Hon. Shane Marshall AM.
17. The Applicant argued that Councillor Hughes was requested to remove the posts by the then Mayor Councillor Kris Bolam on 4 October 2021 and on 22 October 2022, and copies of these requests were provided as part of the Applicant's evidence. Councillor Hughes did not comply with that request.
18. Council contended that continued publication of the relevant posts (especially after a request for their removal had been made) constituted a breach of paragraphs 2.1, 2.2 and/or 2.4 of the Councillor Code of Conduct.
19. Specifically, the Applicant alleged that Councillor Hughes' continued to breach:
 - (a) paragraph 2.1 of the Code in that Councillor Hughes' continued publication of the posts treats the office of Mayor and Councillor Bolam (as the Mayor at the time that the posts were originally published) with a lack of courtesy and respect;
 - (b) paragraph 2.2 of the Code in that Councillor Hughes' continue publication of the posts means that he is not performing the role of Councillor responsibly; and/or
 - (c) paragraph 2.4 of the Code in that Councillor Hughes' continued publication of the posts brings discredit upon Council and/or involves Councillor Hughes deliberately misleading the public.

20. The Applicant alleged that the continued publication of social media content that has been found to breach a Standard of Conduct is itself a breach of the Standards of Conduct. The Applicant explained that were it to be otherwise, a Councillor who had been found to breach a Standard of Conduct could continue to:
- (a) show a lack of courtesy and respect to others;
 - (b) not perform the role of Councillor responsibly; and/or
 - (c) bring discredit upon Council or deliberately mislead the public.
21. The Applicant submitted that if a member of the public were to read the posts subsequent to the Arbitrator's decision (27 July 2021), they may have been unaware of that decision or the findings that Councillor Hughes had breached the Standards of Conduct. That member of the public would, in any event, have been confronted with content that (according to the Arbitrator's decision) exhibited a lack of dignity, courtesy or respect for the office of Mayor (or, Councillor Bolam, as the immediate past Mayor) or which brought discredit upon Council.
22. In his Witness Statement, Councillor Conroy provided a screenshot of the relevant parts of Councillor Hughes' public Facebook page as it appeared on 20 October 2022. This contains two posts:
- (i) The first was posted 1 March 2021 and opens with "A taste of North Korean justice comes to Frankston with a move that would make Kim Jon-Un nod in approval"; and,
 - (ii) The second was posted 18 February 2021 and opens with 'The odds have shortened on a rate rise next year as council votes to reject a rate reduction'.

Both parties acknowledged a third post that was also originally contentious, but there was a common understanding that the Respondent had removed this at the time of the previous Arbitration due to a 'technical error'.

23. At the hearing, Councillor Hughes explained that every time he discussed a council decision he disagreed with, he feels he may be in breach of the Code of Conduct and open to further sanctioning. He explained that he equates this to the silencing of free speech that he experienced when visiting North Korea. The 'North Korea' post focuses on Councillor Hughes' position on the Frankston Code of Conduct's Communication Policy, which had remained in place, but was recently removed from the Code via a resolution of Council. With the removal of the Code of Conduct's Communication Policy, I questioned whether Councillor Hughes would now agree to remove the 'North Korea' post. Councillor Hughes confirmed that he would. No clear explanation was provided by Councillor Hughes as to why the post had not already been removed.
24. In relation to the Facebook post on rates (18 February 2021), Councillor Hughes made submissions on this in relation to Allegation 1 and Allegation 3. In relation to Allegation 1, he submitted in his oral evidence that the post was his only recourse when Council promotes resolutions about the level of rates that he had voted against, and Council's communications neglected to inform that he voted against the resolution.
25. Whilst I note Councillor Hughes' explanation for producing, posting and retaining these two items on Facebook, I do not accept that he could not have originally written them in such a way as to make his point without breaching the Code. After considering submissions from the parties and their evidence I am satisfied that Councillor Hughes social media posts continue to breach the Standard of Conduct as follows:

- Standard of Conduct 2.2 of the Code in that Councillor Hughes' continued publication of the posts means that he is not performing the role of Councillor responsibly; and
- Standard of Conduct 2.4(a) of the Code in that Councillor Hughes' continued publication of the posts brings discredit upon Council.

Allegation 2

26. The Applicant alleged Councillor Hughes has breached paragraph 2.1, 2.2 and/or 2.4 of the Councillor Code of Conduct. It was alleged that at a Councillor Briefing on 21 March 2022 Councillor Hughes made serious allegations about members of Council staff associated with the handling of a petition from residents in Ozone Avenue, Frankston. Councillor Hughes alleged that a member of Council staff advised the residents objecting to an application for a crossover that they should delay submitting a petition to Council, and that Council staff did this so they could make a decision (using delegated authority) on the crossover before the existence of the petition became known to Councillors.
27. To support the allegation, the Applicant provided evidence including an email from Council's CEO to Councillor Hughes sent on 3 May 2022 containing a review into the circumstances surrounding the petition. Contrary to Councillor Hughes' understanding of the potential for Councillors to 'call the matter in' and use discretion to decide the application, the review noted that little discretion was available. As part of a 'Chronology' of key events, the review noted that on 6 May 2021, an email was sent by C Hughes to various officers, including advice that 'They (residents) have started to form a petition from their neighbours, but I asked them to hold off until we can find out what is going on'. The CEO concluded that in relation to how the crossover application was handled by Council there was no further action required in relation to the matter.
28. I have reviewed a recording of the Council Briefing of the 21 March 2022, during which Councillor Hughes is alleged to have asserted that staff associated with the handling of the petition had acted improperly, seemingly with nefarious intentions. Councillor Hughes' allegation was unqualified, and no definitive evidence was presented to support his claims.
29. In response to the allegation, Councillor Hughes highlighted that the CEO's review was limited insofar as it did not seek the views of residents. However, I have reviewed statements provided by Councillor Hughes, which outlines the residents' grievances in some detail. In his evidence Councillor Hughes asserts that officers were in some way seeking to deceive residents, even referring to this as '*trickery*'.
30. In his defence, Councillor Hughes also emphasised that his questioning of how Council officers dealt with the matter was in a closed Council briefing session, which he referred to as 'in-private' rather than a meeting open to the public, and that he did not name the staff member whom it is claimed encouraged residents to delay lodgement of a petition. However, in addition to the Mayor and Councillors, Council's executive leadership team and several managers were in attendance including officers that managed the team that Councillor Hughes alleged had misled residents.
31. Section 2.1 'Treatment of Others' of the Councillor Code of Conduct is clear that members of Council staff are entitled to be treated with dignity, fairness, objectivity, courtesy, and respect.

32. After considering submissions from the parties and evidence, I am satisfied that Councillor Hughes breached Standard of Conduct 2.1 as he did not treat Council staff with dignity, fairness, objectivity, courtesy, and respect. Councillor Hughes derided Council staff in front of the elected Council and senior officers of the Council, after he formed a position on this matter without providing substantive evidence.

Allegation 3

33. On the 31 March 2022, Councillor Hughes posted on his public Facebook Page information purporting to set out the level of Frankston City Council's rates compared with the level of rates in other municipal districts. A screenshot of the post was provided in the Application. The Application contends that in doing so, he did not explain that each council's level of rates is affected by the mix and distribution of the rates burden, with some councils having a heavier reliance on rates referable to residential properties than others.

34. The Applicant therefore alleges that Councillor Hughes' failure to present a complete account of the comparative rates data breached:

- (i) Paragraph 2.2 of the Code, in that Councillor Hughes failed to perform the role of Councillor responsibly; and/or
- (ii) Paragraph 2.4 of the Code, in that Councillor Hughes deliberately misled the public.

In addition, it was alleged that the breaches were due to his failure to attend Councillor briefings dedicated to Council's financial affairs, held on 21 July 2021 and 9 February 2022, thereby breaching paragraph 2.2 of the Code by failing to perform the role of Councillor responsibly (and more particularly, by failing to diligently use Council processes to become informed about matters which are subject to Council decisions).

35. The Applicant's outline of argument referred to an earlier decision (dated 27 July 2021) of the Arbiter Hon. Shane Marshall AM. This was in relation to a social media post by Councillor Hughes that also referred to the relative level of rates across municipalities. The Applicant argued that "As the Arbiter's Decision and Reasons indicated (at para 21), it is important that anything said about rates presents the full story. Otherwise, there is the risk that members of the public are misled and that Council is brought into disrepute".

36. The Applicant submitted that the 31 March 2022 social media post by Councillor Hughes did not contain relevant qualifications about the information presented. It failed to distinguish between the mix and distribution of residential and commercial rateable properties within municipalities, and that such qualifying information is important in order to compare rates within different municipalities. This failure to present the 'full story' (as Mr Marshall referred to it in para 21) meant that Councillor Hughes breached paragraph 2.2 and/or 2.4 of the Councillor Code of Conduct.

37. In addition, the Applicant submitted that had Councillor Hughes attended Councillor Briefings dedicated to Council's financial position, and rating strategies more particularly, he would have better understood the 'full story' and appropriately qualified his post. Such briefings took place on 21 July 2021 and 9 February 2022. It was submitted that a failure to attend those Councillor briefings meant that Councillor Hughes failed to diligently use council processes to become informed about matters which were the subject of Council decisions. Attached to the witness

statement of the Mayor Councillor Conroy was a record of Councillor attendance at Councillor Briefings between 1 November 2020 and 6 June 2022. I agree this illustrates a decline in attendance at Councillor Briefings by Councillor Hughes particularly from around 1 July 2021.

38. From the Respondent's opening remarks at the hearing, it was clear that he prioritises the issue of Council's financial accountability in his role as a Councillor. I agree with the observation in his written statement that 'the amount charged in rates in Frankston is a vexed issue'. He maintains that the social media post of the 31 March 2022 is accurate and provides complete information that is not misleading. He also references his efforts to improve the post of the 31 March 2022 based upon feedback from the earlier decision (dated 27 July 2021) of the Arbiter Hon. Shane Marshall AM.
39. After considering submissions from the parties and evidence I find that there is agreement between the parties that Councillor Hughes has the right to say that rates are too high. In his oral evidence, Councillor Conroy acknowledged this point. But where the parties diverge is in relation to ensuring that Councillor Hughes does not simplify a complex decision of council to fit a narrative, or that he does not provide misleading or incomplete information. It is not consistent with the Code to continue to give the impression that Council rates in Frankston are unreasonable without giving the full story. For example, Councillor Hughes selectively refers to the impact on rates of Council pursuing various capital projects. But other important factors such as differences in the mix and proportion of categories of residential property or commercial/industrial properties, and the fact that these will each pay a higher or lower rate in the dollar in each municipality must be included in any reasonable comparison between municipalities or their localities. Other factors may include, for example, historic investment levels in infrastructure and maintenance across municipalities, which can also significantly impact decisions on rates and distort comparisons like those provided in Councillor Hughes' post.
40. It is noted that Council's website provides a significant amount of information and responses to frequently asked questions about how rates are calculated. This information is fair, balanced and helpful.
41. I am comfortably satisfied that Councillor Hughes' social media post breached Standard of Conduct 2.2 of the Councillor Code of Conduct and that Councillor Hughes failed to perform the role of Councillor responsibly. However, I am not satisfied it was Councillor Hughes intention to deliberately mislead so have not found a breach of the Standard of Conduct 2.4(b).
42. It is not at all helpful that Councillor Hughes fails to attend Councillor Briefings dedicated to Council's financial affairs, such as those held on 21 July 2021 and 9 February 2022. Whilst it was alleged that these breaches can be attributed to Councillor Hughes non-attendance, on-balance I find that Councillor Hughes non-attendance does not breach Standard of Conduct 2.2 of the Code.

Allegation 4

43. Upon being elected, all Frankston Councillors have taken oath or affirmation of office as prescribed in Regulation 5 of the Local Government (Governance and Integrity) Regulations 2020. This requires each Councillor to swear or affirm that they will undertake the duties of the office of Councillor in the best interests of the municipal community.

44. Against this backdrop, the Applicant alleged that Councillor Hughes made very direct allegations against several Councillors at the 'debrief' meeting (not open to the public) following the end of the Council meeting on 26 April 2022. It was alleged that Councillor Hughes effectively claimed that each of the named Councillors were guided by political affiliations at the expense of the broader interests of the community. The quality of the recording of the debrief is not great and there was some contention over whether some Councillors were referred to as 'former' members of political parties.
45. According to the Applicant, each named Councillor was really being said to have elevated political priorities above interests of the broader community. The Applicant alleged that in making these claims at the 'debrief' Councillor Hughes breached paragraph 2.1, 2.2 and/or 2.4 of the Councillor Code of Conduct.
46. The Applicant noted the comments were made only to Councillors and those members of Council staff who continued to be present in the meeting's aftermath. Therefore, it cannot be said that any element of robust public debate existed as a defence.
47. A recording of the 26 April 2022 Council meeting debrief was viewed.
48. In response, Councillor Hughes explained that a significant amount of Councillor time had been spent focussing on a controversy due to a federal election candidate appearing in a council photo, and this controversy had dominated Councillor discussions prior to the Council meeting on the 26 April 2022, and in the 'pre meeting' on the night of the Council meeting. Councillor Conroy did not dispute that Council had spent considerable time focussing on that issue. This appears to have contributed to some frustration for Councillor Hughes who was focusing on a matter that required a Council decision, being the level of funding for a Toy Library.
49. After considering submissions from the parties, I accept the evidence of Councillor Hughes and find there to be no breach of the Standards of Conduct. I accept that Councillor Hughes reference to political affiliations did not amount to Councillors disregarding their oath or affirmation. Rather, Councillor Hughes was expressing some frustration at the result of Council's resolution on the Toy Library issue, and it was his view that Council should have been more focussed on that issue rather than other issues outlined above.

Allegation 5

50. Allegation 5 alleged that Councillor Hughes made an accusation on social media that Councillors' political associations were given priority over their concern for the community.
51. Specifically, evidence presented focused on a social media exchange on or about the 27 April 2021, whereby Councillor Hughes questioned the motivation of 'other Councillors'. Councillor Hughes' comment was part of a lengthy exchange, which included Councillor Hughes drawing a distinction between he and Councillor Liam Hughes with other Councillors. He claimed that 'Unlike...other Councillors, we are not political party operatives'. This goes to the reputation or character of Councillors. The Applicant alleges that this constituted a breach of paragraph 2.1, 2.2 and/or 2.4 of the Councillor Code of Conduct.

52. At the hearing, the Respondent conceded that the wording of his comment underneath the social media post was 'very poor', and that as soon as this concern was brought to his attention he deleted the comment. The Respondent also described the exchange of comments as robust debate. I accept that this debate on social media was robust.
53. Whilst the social media comment is on the borderline of breaching substandard 2.4 (a), I find there to be no breach of the Standards of Conduct found in paragraph 2.1, 2.2 and 2.4 of the Councillor Code of Conduct. Notwithstanding, Councillor Hughes' social media comments were unhelpful, and this finding should not be misconstrued as a 'green light' for casting of aspersions about the impact of political affiliations, even in the context of robust debate.

Allegation 6

54. The Applicant alleged breaches of paragraph 2.1, 2.2 and/or 2.4 of the Councillor Code of Conduct in relation to allegation 6. At a meeting of Council on 21 February 2022, a matter regarding funding for the Frankston Toy Library was considered by Council.
55. The Application alleged that Councillor Hughes misrepresented Councillor Bolam's position when posting on his public Facebook page on or about 28 April 2022. The Application explained that Councillor Bolam's comments at the meeting on 21 February 2022 were confined to the amount of funds given to the Frankston Toy Library by Council, and that he said nothing about the overall financial position of the Frankston Toy Library. To support the allegation the Applicant provided an extract of Councillor Hughes' social media post.
56. In his post of 28 April 2022, Councillor Hughes states: *'He (Cr Bolam) made claims that the library was 'doing alright', with his statement being included in a local newspaper, potentially misleading residents to believe that the toy library was not in financial hardship'*.
57. The Application claimed that at a minimum this failed to treat Councillor Bolam fairly, and at worst it reflected a failure to act responsibly, by checking what had, in fact, been said, or it could even have been an act of deliberately misleading the public.
58. I have reviewed the publicly available livestream of the 21 February 2022 Council meeting to determine if Councillor Hughes' social media post fairly described Councillor Bolam's comments. When summing up his arguments in support of item 12.10 'Community Grants Program' on the Council Agenda, Councillor Bolam seeks to put the issue of the toy library's funding into a broader context. He comments on several aspects of the toy library including the "enormous amount of space", "zero rent" and proposed "\$15,000 contribution", quickly followed by the comment "So I think they're doing pretty well". He continued by comparing this toy library to other nearby toy libraries and stated that the toy library is "still doing very well in comparison to those other toy libraries".
59. A fair-minded objective observer of the meeting would conclude that Councillor Bolam's description did not amount to a toy library that was confronting financial hardship. Councillor Bolam's comments were not confined to the amount of funds allocated through the Community Grants Program but were broader, with reference to other merits of the toy library (space, zero rent) in addition to the funding, and he then makes a sweeping comparison between the Frankston Toy Library and other toy libraries.

60. In summary, whilst Councillor Hughes' social media post suggested that Councillor Bolam had used the words 'doing alright' when describing the position of the 'toy library', and this was not what he said, I do not find that Councillor Hughes description constitutes unfair treatment, a failure to act responsibly or was intentionally misleading. After considering submissions from the parties and evidence, I find that there has been no breach of the standards of conduct.

Allegation 7

61. Section 18 of the Act specifies the role of the Mayor. This includes a requirement to 'promote behaviour among Councillors that meets the standards of conduct set out in the Councillor Code of Conduct', and to 'assist Councillors to understand their role'.

62. Also, for context, each Council including Frankston has Governance rules, made in accordance with section 60 of the Act. I have reviewed Frankston's Governance rules, and these do not differ in any consequential way from those at other Councils. These rules apply to meetings of Councils, requiring decisions which are balanced, ethical, impartial and on the merits, free from favouritism or self-interest and without regard to irrelevant or unauthorised considerations.

63. On 27 April 2022, the Mayor Councillor Nathan Conroy drafted and sent a memo titled 'Council Meeting reflections from Tuesday 26 April 2022'. This contained: the Mayor's observations (after a period of reflection), a summary of issues of concern about Councillor conduct, a commitment to strictly apply several Frankston City Council governance rules, a reminder that the chambers is a workplace subject to Council's obligations under the OHS Act, and finally a reminder of the conduct and standards that the Mayor expects in future meetings. After reviewing video of the conduct during the meeting and debrief, it is clear that this was the only responsible course of action for the Mayor. The memo was 'on-point' and consistent with the type of leadership envisaged by section 18 of the Act.

64. As a consequence, Councillor Hughes sent an email to the Mayor in response to the Memorandum, which was copied to all Councillors. A copy of the email was submitted as evidence by the Applicant. It included several personal and provocative statements including that the Mayor 'adhere(s) to the 'if you can't beat them, silence them' philosophy' and that the Mayor was destroying democracy to protect a friend. It refers to the Mayor's 'new rules' when the memo was simply a recommitment by Councillor Conroy to enforce the existing Governance rules. Any fair-minded objective observer of the 26 April 2022 meeting would have identified a need for the Governance rules to be applied as described in Councillor Conroy's Memorandum.

65. The Applicant alleged that in the circumstances there had been a breach of paragraph 2.1, 2.2 and/or 2.4. In support, the Applicant submitted that it is important that the office of Mayor be respected by all Councillors, and that this should be so irrespective of whether, during a particular meeting, the Mayor makes rulings that are adverse to the interests of any one particular Councillor. It submitted that Councillor Hughes' response was inflammatory (when referring to a destruction of democracy) and patently unfair in alleging a lack of impartiality and, indeed, hypocrisy. What was said went beyond robust public debate and involved allegations about character.

66. In his witness statement, Councillor Conroy described how he felt incredibly disappointed when he read the email from Councillor Hughes, which he described as factually wrong and failed to treat him fairly or with courtesy and respect.
67. In his evidence, Councillor Hughes colloquially 'doubled-down' calling the Memorandum a 'terrible attack on free speech, democratic principles or transparency and drastically limits the ability of a Councillor to represent the residents they were elected by". He then proceeded to list several 'legal issues' with the memo, focusing on the Mayor's recommitment to enforce what are the existing Governance rules.
68. After considering submissions from the parties and evidence I find the allegation proven. Councillor Hughes' polarising response to the Mayor's memorandum, directed to the entire Council group, failed to treat the Mayor with fairness, objectivity, courtesy and respect (Standard of Conduct 2.1).

Allegation 8

69. On 28 April 2022, Councillor Hughes posted elements of the Mayor's Memorandum to all Councillors (sent on 27 April 2022) onto his public Facebook page. By making aspects of the Mayoral Memorandum available the Applicant alleged that there was a breach by Councillor Hughes of Standards of Conduct 2.1, 2.2 and/or 2.4 of the Councillor Code of Conduct.
70. To support the allegation the Applicant submitted that good governance depends, at least in part, on certain communications between and among Councillors (and between and among Councillors and senior members of Council staff) remaining private or confidential. Without labelling every document or every discussion 'private', 'confidential' or 'private and confidential', it will be apparent that the subject-matter of many documents and discussions are intended to remain accessible only to a very limited audience. This was the case with the Mayor's Memorandum to Councillors dated 27 April 2022.
71. In his witness statement Councillor Conroy explained that had he known that the Memorandum or its contents would be publicly available, the Memorandum might not have been sent. Instead, he suggested that a Councillor-only discussion may have been held. Alternatively, what was said in the Memorandum might have been heavily modified.
72. In addition, the Application alleged that Councillor Hughes' 28 April 2022 post which referred to aspects of the Memorandum suggested that the Memorandum was directed solely at the behaviour of himself and Councillor Liam Hughes. It was alleged that the imputation that the Memorandum was directed solely at two Councillors failed to accord the Mayor fairness and objectivity. It was therefore submitted that there was a breach of a paragraph 2.1 of the Councillor Code of Conduct by Councillor Hughes. It was also alleged that paragraphs 2.2 and/or 2.4 of the Councillor Code of Conduct were breached, in that the imputations were the product of a failure to perform the role of Councillor responsibly and/or involved Council and the public being deliberately misled.
73. In response Councillor Hughes submitted that the Applicant's claim that the information provided in the email by the Mayor was of a private nature and shouldn't have been shared, is legally incorrect and lacks transparency. The Respondent submitted that emails, meeting minutes and

council discussions are all available to the public under Freedom of Information laws, and that only items that are clearly stated as confidential are not available for discussion.

74. I accept the Applicant's submission that good governance depends, at least in part, on certain communications between and among Councillors (and between and among Councillors and senior members of Council staff) remaining private or confidential. However, I interpret Councillor Hughes decision on 28 April 2022 to post extracts of the memorandum with a commentary on his interpretation as 'robust public debate', which should not be unreasonably restricted by the Standards of Conduct. I therefore make no finding in relation to this allegation.
75. After considering submissions from the parties, as well as observing the conduct of several Councillors at the 26 April 2022 meeting, I am comfortable that a fair reading of the Memorandum suggests that it was not the intention of the Mayor to direct this solely at two Councillors. Whilst the Respondent's claim failed to accord the Mayor fairness and objectivity, I give Councillor Hughes the benefit of the doubt as he seems to sincerely believe that parts of the Memorandum are directed solely towards him and Councillor Liam Hughes. On balance, I therefore find there to be no breach.

Conclusion

76. For the reasons set out above, I find that the Respondent Councillor Hughes has failed to comply with the prescribed standards of conduct in section 2 of the Frankston Code of Conduct.
77. Pursuant to section 147(1) of the Act I make a finding of misconduct in respect of the breach of clauses 2.1, 2.2 and 2.4(a) of Code of Conduct in the application for the reasons set out earlier.
78. These breaches are summarised as follows:
- Allegation 1 - breached Standards of Conduct 2.2 and 2.4(a)
(Standards 2 & 4(1) of the prescribed standards of conduct)
 - Allegation 2 - breached Standard of Conduct 2.1
(Standard 1 of the prescribed standards of conduct)
 - Allegation 3 - breached Standard of Conduct 2.2
(Standard 2 of the prescribed standards of conduct)
 - Allegation 7 - breached Standard of Conduct 2.1
(Standard 1 of the prescribed standards of conduct)

79. I make no finding of misconduct in response to four allegations (numbers 4,5,6 and 8). As there had been no breach of the prescribed Standards of Conduct, the Application in relation to these allegations is dismissed.

Sanction options

80. Under section 147(2) of the Act, after a finding of misconduct, the Arbiter may do any one or more of the following—
- (a) direct the Councillor to make an apology in a form or manner specified by the Arbiter;
 - (b) suspend the Councillor from the office of Councillor for a period specified by the Arbiter not exceeding one month;

- (c) direct that the Councillor be removed from any position where the Councillor represents the Council for the period determined by the Arbiter;
- (d) direct that the Councillor is removed from being the chair of a delegated committee for the period determined by the Arbiter;
- (e) direct a Councillor to attend or undergo training or counselling specified by the Arbiter.

The Applicant's submission on sanction

81. At the Hearing, the Applicant was invited to make a submission on appropriate sanctions if a finding of 'Misconduct' was made in relation to any of the eight allegations.
82. In response, the Applicant requested that the Arbiter consider imposing a requirement for a verbal apology if the Arbiter found there to be a breach of the Code in relation to the treatment of others.
83. In addition, a request to consider a suspension of Councillor Hughes from the office of Councillor for a period of up to 30 days was made.
84. Finally, it was suggested that should a finding of 'Misconduct' be made, Councillor Hughes should be required to undergo training (including in 'emotional intelligence') to ensure he understands his role as a Councillor "but also as a colleague more than anything else".

The Respondent's submission on sanction

85. The Respondent was also invited to make a submission on appropriate sanctions if a finding of 'Misconduct' was made in relation to any of the eight allegations.
86. In response, he observed that during the Council's 'Dispute Resolution Procedure' that commenced prior to this internal arbitration process, he was willing to apologise 'in relation to a couple of points'.
87. Councillor Hughes found the Applicant's suggestion that an appropriate sanction could include emotional intelligence training to be 'offensive'.

Conclusion on sanctions

88. In relation to Allegation 2 whereby Councillor Hughes has been found to have breached Standard of Conduct 2.1, I note that he has not provided an apology to Council staff. I find the only appropriate remedy in this instance is for Councillor Hughes to provide a written apology, addressed to 'Council staff associated with the processing of the Ozone Avenue application, C/- the Frankston City Council CEO'. At a minimum:
- The apology will reference Councillor Hughes' breach of standard of conduct 2.1 of the Councillor Code of Conduct; and,
 - It will contain an apology for not treating Council staff with dignity, fairness, objectivity, courtesy, and respect; and,
 - It will contain an apology for deriding the Council staff member/s in front of the elected Council and senior officers of the Council, and for forming a position and raising serious allegations without providing substantive evidence; and,
 - Be unqualified and unconditional.

89. Consideration has been given to applying other potential sanctions available. This has included directing that Councillor Hughes be removed from any position where he represents Council, or from being the chair of a delegated committee. In addition to this sanction not being raised by the Applicant, I also do not see any nexus between these sanctions and Councillor Hughes' breaches of the standards of conduct. It is also not appropriate to direct a Councillor to attend or undergo training or counselling when such training has not been specified and identified.
90. A period of suspension from the office of Councillor for a period not exceeding 1 month is an available sanction. Given the multiple breaches as outlined in these findings, a period of suspension for 1 month would allow Councillor Hughes ample opportunity to reflect on the consequences of breaching standards of conduct that he agreed to abide by when he signed the Councillor Code of Conduct.
91. These sanctions are proportionate to Councillor Hughes' misconduct.

Order

92. My order to finalise this matter as a consequence of my decision is:

- (1) Pursuant to section 147(2)(b) of the Local Government Act 2020, the Respondent Councillor Steven Hughes, a Councillor of the Frankston City Council, is hereby suspended from the office of Councillor for a period of one calendar month commencing on the day after the meeting of Council at which this decision is tabled under section 147(4) of the Act.
- (2) Pursuant to section 147(2)(a) of the Local Government Act 2020, the Respondent Councillor Steven Hughes is to provide a written apology, addressed to 'Council staff associated with the processing of the Ozone Avenue application, C/- the Frankston City Council CEO'. At a minimum:
 - It will reference Councillor Hughes' breach of standard of conduct 2.1 of the Frankston City Council Councillor Code of Conduct; and,
 - It will contain an apology for not treating Council staff with dignity, fairness, objectivity, courtesy, and respect; and,
 - It will contain an apology for deriding the Council staff member/s in front of the elected Council and senior officers of the Council, and for forming a position and raising serious allegations without providing substantive evidence; and,
 - Be unqualified and unconditional.

The written apology is to be provided by Councillor Hughes to the CEO within two weeks from the date of the meeting of Council at which this decision is tabled. At his discretion, Council's CEO may then supply the letter to those staff member/s associated with the processing of the Ozone Avenue application which was the focus of allegation 2.

Other matters

93. The Frankston City Council Councillor Code of Conduct provides an opportunity for an internal Council mediation process in relation to disputes between Councillors before it reaches a stage of requiring an Internal Arbitration process.

94. At the Directions Hearing held on 14 September 2022, the parties advised that an internal Council mediation process in relation to allegations contained within Application IAP 2022-21 was ongoing. The willingness of the parties to pursue such a process was commended.
95. In a Direction issued by the Arbiter on 4 October 2022, the parties were advised that should they come to a satisfactory resolution on any of the allegations that are contained within Application IAP 2022-21 before the Hearing, the Applicant may withdraw any of the allegations from the current live application for Internal Arbitration.
96. On 16 September 2022 the Respondent sent an email to Council's Councillor Conduct Officer and this email was forwarded to the Arbiter. In summary, the email outlined the status of the internal Council mediation process in relation to allegations contained within Application IAP 2022-21. It alleged that by lodging an application for an Internal Arbitration process the Applicant had breached Council's Code of Conduct. It stated that according to section 4.1 of the Code, Councillors must make genuine attempts at resolving the issues at a local level before commencing the formal dispute resolution process. It alleged that Councillors have disregarded the Code of Conduct and its requirements of due process. Finally, it requested that the current application be dismissed to protect the Respondent's rights to procedural fairness under the Code.
97. The contents of the email from the Respondent outlined above were carefully considered by the Arbiter. The Arbiter was not able to consider the allegations relating to Council's 'Dispute Resolution Procedure (Interpersonal disputes)', as outlined in Section 4 of the Frankston City Council Councillor Code of Conduct.
98. Councils may include complimentary processes, such as a mediation process, in their Councillor Code of Conduct. However, these complimentary processes cannot limit or restrict a Council's or Councillor's entitlement to make an application for an internal arbitration process under section 143 of the Local Government Act 2020. In view of this, the parties were advised that Application IAP 2022-21 was to proceed to hearing.

Matthew Evans
Arbiter

Date: 23 January 2023

Local Government (Governance and Integrity) Regulations 2020

Schedule 1—Standards of conduct

1 Treatment of others

A Councillor must, in performing the role of a Councillor, treat other Councillors, members of Council staff, the municipal community and members of the public with dignity, fairness, objectivity, courtesy and respect, including by ensuring that the Councillor—

- (a) takes positive action to eliminate discrimination, sexual harassment and victimisation in accordance with the **Equal Opportunity Act 2010**; and
- (b) supports the Council in fulfilling its obligation to achieve and promote gender equality; and
- (c) does not engage in abusive, obscene or threatening behaviour in their dealings with members of the public, Council staff and Councillors; and
- (d) in considering the diversity of interests and needs of the municipal community, treats all persons with respect and has due regard for their opinions, beliefs, rights and responsibilities.

2 Performing the role of Councillor

A Councillor must, in performing the role of a Councillor, do everything reasonably necessary to ensure that the Councillor performs the role of a Councillor effectively and responsibly, including by ensuring that the Councillor—

- (a) undertakes any training or professional development activities the Council decides it is necessary for all Councillors to undertake in order to effectively perform the role of a Councillor; and
- (b) diligently uses Council processes to become informed about matters which are subject to Council decisions; and
- (c) is fit to conscientiously perform the role of a Councillor when acting in that capacity or purporting to act in that capacity; and
- (d) represents the interests of the municipal community in performing the role of a Councillor by considering and being responsive to the diversity of interests and needs of the municipal community.

3 Compliance with good governance measures

A Councillor, in performing the role of a Councillor, to ensure the good governance of the Council, must diligently and properly comply with the following—

- (a) any policy, practice or protocol developed and implemented by the Chief Executive Officer in accordance with section 46 of the Act for managing interactions between members of Council staff and Councillors;
- (b) the Council expenses policy adopted and maintained by the Council under section 41 of the Act;
- (c) the Governance Rules developed, adopted and kept in force by the Council under section 60 of the Act;
- (d) any directions of the Minister issued under section 175 of the Act.

4 Councillor must not discredit or mislead Council or public

- (1) In performing the role of a Councillor, a Councillor must ensure that their behaviour does not bring discredit upon the Council.
- (2) In performing the role of a Councillor, a Councillor must not deliberately mislead the Council or the public about any matter related to the performance of their public duties.

5 Standards do not limit robust political debate

Nothing in these standards is intended to limit, restrict or detract from robust public debate in a democracy.