

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

**Internal Arbitration Process – Gannawarra Shire Council
(IAP 2022-29)**

Applicant: Gannawarra Shire Council

Respondent: Cr Garner Smith

Arbiter: Yehudi Blacher

DECISION AND STATEMENT OF REASONS

Background

1. The applicant in this matter is the Gannawarra Shire Council. Councillor Charlie Gillingham is the appointed representative of the Council.
2. The respondent is Cr Garner Smith.
3. On 21 September 2022 the Council carried the following resolution:
“That the Principal Councillor Conduct Registrar to appoint an arbiter to make findings in relation to certain allegations concerning Councillor Garner Smith’s recent social media posts concerning a video involving a well-known AFL footballer: that the social media posts breach the Standards of Conduct set out in Schedule 1 of the Local Government (Governance and Integrity) Regulations 2020 in that:
 1. they breach clause 1(a) concerning the elimination of discrimination, sexual harassment and victimisation in accordance with the Equal Opportunity Act 2010;

2. they breach clause 1(b) in that they are inconsistent with supporting Council in fulfilling its obligation to achieve and promote gender equality;
 3. they breach clause 1(c) in that they involve the Councillor engaging in obscene behaviour in his dealings with members of the public;
 4. they breach clause 1(d) in that they fail to treat all persons with respect; and
 5. they breach clause 4(1) in that they bring discredit upon the Council.”
4. A Directions Hearing on this matter was held on 30 November 2022. At the Hearing the Arbiter explained the arbitration process to parties. He advised the respondent, Cr Smith, that he would consider any submission made by him relevant to the complaints lodged by the Council. He also advised Cr Gillingham that he would consider any further submission by the applicant that was directly relevant to the complaint. Any submissions would need to reach the Arbiter by close of business on 16 December 2022. Councillor Smith provided his submission by the due date. No further material was provided by the applicant.
 5. A Hearing on this matter took place on 7 March 2023 at the Gannawarra Shire Offices, Kerang.

Councillor Smith’s submission

6. Councillor Smith provided a one-page submission in which he made three salient points.
 - a) He argued that criticism of his language was unreasonable because neither the AFL nor any government authority had taken any action regarding the player concerned.
 - b) Because the AFL had taken no action against the player, none of his comments could be construed as a contravening the provisions of the Standards of Conduct under the *Local Government Act 2020* (the Act) and therefore did not bring the Council into disrepute.

- c) He also argued that his comments were not made in his capacity as a Councillor and therefore did not fall under any relevant Code or section of the Act.

Comments on Cr Smith's submission

7. In relation to points a) and b), Cr Smith seems to misunderstand the nature of the complaint. The complaint related to comments made by Cr Smith not the actions of the player. The fact that the AFL took no action on the matter is irrelevant to whether Cr Smith's comments contravened relevant sections of the *Local Government Act 2020* or the Standards of Conduct. At the Hearing Cr Smith remained emphatic on this matter despite several attempts to explain why his understanding was incorrect.
8. I have been provided with two Facebook postings made by Cr Smith. The first is a response to a comment made by another person as to the reason the player may or may not have touched a woman's breasts. Cr Smith posted "I'd be more worried if he didn't go in for a feel".
9. This comment resulted in another person on the Facebook page posting that Cr Smith is "a councillor at Gannawarra council. Wonder if they think this is ok."
10. Councillor Smith's response is as follows - "To all you triggered, whinging, whining, bleating, bitching, offended losers. Instead of getting a skinny soy latte with a twist of lemon, head to your local independent hardware store, buy a bag of cement and harden the #@&! Up."
11. In response to the Councillor's comments a posting was made as follows - "Garner Smith this comment actually makes me feel sick. What a sl**ze you are. My hope is that you don't ever have daughters."
12. Section 28(2)(e) of the *Local Government Act 2020* states that "In performing the role of a Councillor, a Councillor must ... (e) act in accordance with the standards of conduct."
13. Schedule 1 of the Local Government (Governance and Integrity) Regulations 2020 prescribes the Standards of Conduct for Councillors. Clause 1 of Schedule 1 of the regulations requires Councillors inter-alia

to treat members of the public with dignity, fairness, objectivity courtesy and respect. Clause 1 also refers to the need for a councillor to take positive action to eliminate discrimination sexual harassment and victimisation ... to actively promote gender equality ... and not engage in abusive, obscene, or threatening behaviour in their dealings with members of the public. Clause 4(1) of Schedule 1 requires Councillors to ensure that their behaviour does not bring discredit upon the Council.

14. The Council's media policy states the "Councillors choosing to express a personal opinion through the media will make it clear that this is a personal view and does not represent the position of Council. Councillors will ensure that any such position is devoid of comments which could reasonably be construed as being derogatory, offensive, or insulting to any person."
15. Councillor Smith argues that his comments were made in a private capacity rather than in his role as a Councillor. The relevant sections of the *Local Government Act 2020* and the Regulations all refer to the roles, behaviours and expectations of Councillors "in performing the role of a Councillor." Arguably these references suggest that a distinction can be made between actions and public comments by a Councillor in a private capacity and those made in performing the role of a Councillor. On this basis it could be argued that his initial comment was not made in performing the role of a Councillor. However, this argument is not relevant in this instance because Cr Smith's Facebook page states that he is a Councillor at the Shire of Gannawarra.
16. Moreover, having made the initial comment, Cr Smith was identified in a further posting as a Gannawarra Councillor. Once that occurred any further postings by Cr Smith could reasonably be interpreted as one being made in his role as a Councillor.
17. On this basis I have determined that Cr Smith is guilty of misconduct in that he did not comply with Clauses 1(a), 1(b), 1(c), 1(d) and 4(1) of the standards of conduct in the Local Government (Governance and Integrity) Regulations 2020.

Arbiter's determination

18. I direct Cr Smith to make a public apology to the Shire of Gannawarra community for his postings on this matter. The apology must be issued to the relevant local media within seven days of this decision, and must also be tabled at the next Council meeting on 19 April 2023 (under section 147(4) of the *Local Government Act 2020*) and recorded in the minutes of that meeting.

19. It is also apparent that Cr Smith is not aware of his obligations as a Councillor in relation to public statements made in using social media. Accordingly, I direct that he be required to undergo specific training in the proper use of social media to the satisfaction of the Mayor.

Yehudi Blacher
Arbiter
31 March 2023