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**WYONG SHIRE COUNCIL**

**CONDUCT COMMITTEE**  
HELD IN COMMITTEE ROOMS,  
WYONG CIVIC CENTRE, HELY STREET, WYONG  
ON WEDNESDAY 6 JUNE 2007  
COMMENCING AT 9.00 AM

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**COMMITTEE:** Deputy Mayor – Councillor Kath Forster (Chairperson)  
General Manager – Kerry Yates  
John Cole (Independent)

**ITEMS FOR CONSIDERATION:**

Investigation into Possible Breaches of the Code of Conduct:

- 2.1 Wingo Fong Credit Application
- 2.2 Protected Disclosure, behaviour of Cr Eaton at Ordinary Meeting of 14 March 2007
- 2.3 Protected Disclosure, declarations of Cr Graham

## **MATTER NO. 2.1 – WINGO FONG CREDIT APPLICATION**

### **Introduction**

A complaint has been lodged by the Mayor, Cr Bob Graham alleging that Cr Eaton accused him, at the Council meeting held on 14 December 2005, of “perverting the vote in the chamber” by orchestrating Wingo Fong to make a credit application with Cr Eaton’s business (Eaton’s Mitre 10). This required Cr Eaton to declare an interest in the report that was before the Council for its determination, thereby not allowing Cr Eaton to be able to vote on the matter.

### **Evidence**

The copy of the transcript from the meeting of 1 December 2005 was attached to the papers and considered by the Committee. The actions of Cr Eaton at the December meeting, when becoming aware of the Wingo Fong credit application, was appropriate with him declaring an interest and withdrawing. At the following meeting however Cr Eaton, in business arising, raised the question of the Mayor’s involvement in bringing this credit application to the attention of the Council on the floor of the Council during the previous Council meeting.

Councillor Eaton expressed to the Committee his dismay at his company’s private credit application form which had been lodged very close to the meeting, being raised at the meeting so that he had to declare the interest in circumstances where he was unaware of the matter despite having inquired from his staff as to the potential for any such problem.

Cr Graham on the other hand denied at the meeting that he had spoken to anybody from Wingo Fong.

There was no evidence as to where the document in question came from, how it came into the possession of the Mayor nor why it was not brought to Cr Eaton’s attention earlier.

Notwithstanding the above, the comments of Cr Eaton to the effect of accusing the Mayor of “*perverting the vote in the chamber*” by orchestrating Wingo Fong to make the credit application to Cr Eaton’s business was a very serious matter and one of concern to the Committee.

The Committee asked Cr Eaton a number of questions and formed the view, that other than the circumstantial evidence of Cr Graham making the disclosure in the chamber, there was no evidence to support the accusation by Cr Eaton.

The Committee did however understand Cr Eaton's concern in relation to firstly, a private document being obtained and secondly it being disclosed in the chamber during the meeting when the vote had to be taken. Cr Eaton indicated that in such circumstances where he was "ambushed" it did not give him time to properly investigate the allegation. The Committee agrees. The Committee accepts his evidence that in fact he did investigate it later and proved that there was no business of any extent which would cause a normal Councillor or member of the public to be concerned in relation to a pecuniary or for that matter a non-pecuniary conflict of interest.

The Committee inquired as to why in the above circumstances Cr Eaton then responded with his concerns, to the following meeting, again in chamber with the accusations that could not be proved rather than deal with the complaint and his concern under the Code of Conduct. Clause 10.9 of the Code says that:

*"Councillors should report suspected breaches of the Code of Conduct to the General Manager, preferably in writing, in the first instance and refrain from making allegations at Council meetings. Where appropriate, the General Manager will report the matter to the Conduct Committee."*

Discussion did arise at the hearing as to whether both Councillors, in the circumstances, could be accused of breaching that clause.

Councillor Eaton's comment in relation to this clause of the Code was that he investigated the comment in between the two Council meetings to determine there was \$40.00 worth of "stuff" purchased the week earlier. It appeared to him that there was no intention by Wingo Fong to set up a business relationship such as would cause a pecuniary interest or even a non-pecuniary interest conflict problem. Cr Eaton expressed his view that at the meeting, other councillors were also forced out through indirect associations with him wherein they all assumed that this was a legitimate conflict question, though one of which they were not aware. He was concerned as to the whole issue being initially raised in open Council and potentially causing damage to his and other Councillors' reputations and that of the Council. In all the circumstances he believed it was then a matter that should be put back before an open meeting for public debate as he was concerned in relation to the issues involved.

Regarding the specific question of why did he not proceed by way of written complaint he also noted, as he did at the outset of the hearing, that the matter arose some time ago and his recollection of events was somewhat blurred. He also believed that as the matter had been raised in open Council the dispersions "*were in fact cast upon him and other Councillors as it would be seen they would be getting benefit*". He wanted therefore to set the record straight in the Council Chamber rather than to proceed through the normal complaint process.

The account was closed. The boss of Wingo Fong never returned Cr Eaton's phone calls.

Councillor Welham referred to the Code of Meeting Practice clauses 42 and 43 and in particular in relation to clause 42(1)(i). This was recorded in the Council Minutes of the Meeting.

Councillor Eaton raised the question as to the interrelationship between the Code of Conduct and the Code of Meeting Practice. He submitted that even if there was a breach of the Code of Meeting Practice this did not amount to a breach of the Code of Conduct.

The Committee referred to clauses 8.6 of the Code of Conduct which notes you must act in accordance with Council's Code of Meeting Practice and the Local Government (Meetings) Regulation 1999 during Council and Committee meetings and clause 8.7 – which requires Councillors to respect the chair, other Council officials and any members of the public present during the Council or committee meetings or other formal proceedings to the Council.

### **Findings**

The Committee recognises the submission of Cr Eaton in relation to clause 10.12 of the Code of Conduct which requires that the General Manager, an independent person or the Conduct Committee will follow the rules of procedural fairness and specifies that inquiries should be conducted without "*undue delay*". The Committee noted the General Manager's advice that the Council has previously expressed concerns about the cost of Code of Conduct Committee Meetings and he and the Council had agreed that the Committee would not be convened to consider a single issue. Although the particular circumstances of this see some 14 plus months between the event and the hearing of the matter, the Committee believed that the matter was an important one that should be dealt with. The Committee however, took into account Cr Eaton's submission and his comments and the problem of detailed recollection of some of the events, particularly in relation to his motivations regarding the failure to lodge a formal written complaint with the General Manager and not refrain as required under clause 10.9 from making allegations in a Council meeting, in concluding its ultimate decision on the matter and the recommendation of the Committee.

The Committee was very concerned with the content of the accusation by Cr Eaton. It cut to the very core of Council's decision making and could be seen as effectively undermining the whole purpose of the Code of Conduct. The Councillor was not acting in a way which enhances public confidence in the integrity of the Council. Cr Eaton however believed that vigorous public debate in relation to such an issue was at the core of enhancing public confidence. Notwithstanding the Committee was of the view the appropriate way to have dealt with this matter was under the Code of Conduct, with a formal complaint to the General Manager rather than a serious accusation which could not be proved being put forward on the floor of the Council Chambers. Further the comment was not withdrawn despite a request by the chairman.

Clause 4 in the key principles of the Code of Conduct have been called into question in this matter. Clause 4.2 deals with leadership and imposes upon Councillors a duty "*to maintain and strengthen the public's trust and confidence in the integrity of Council*". Clause 4.8 also requires that "*you must treat others with respect at all times*". This is repeated in clause 5.3.

The Committee believes the conduct was an act of disorder in it being improper to make such an accusation without proof (Code of Meeting Practice clause 42 and Code of Conduct clause 5.1) as well as not respecting the Mayor in the circumstances (Code of Conduct clause 5.3) and in refusing to withdraw the comments when asked to by the Chair (Code of Meeting Practice clause 42 (a)) as re-enforced under clause 8.6 and 8.7 of the Code of Conduct).

The Committee has determined that there has been a serious breach of the Code of Conduct and associated Code of Meeting Practice. However, the Committee believes that the above matters should be taken into consideration, in particular the time from when the event occurred, the legitimate concern that Cr Eaton had regarding the raising of the matters late; on the Council floor and on the basis of private documents the availability of which is questionable.

#### **COMMITTEE RECOMMENDATION**

- 1** *That Council endorse the Committee's decision that the conduct did amount to a breach of the Code of Conduct and this breach was serious.*
  
- 2** *That Councillor Eaton be counselled in regard to his behaviour and reminded of the appropriate means of lodging a complaint.*

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**MATTER NO. 2.2 - PROTECTED DISCLOSURE, BEHAVIOUR OF CR EATON AT ORDINARY MEETING OF 14 MARCH 2007**

**Introduction**

The General Manager has received a complaint lodged under the provisions of the Protected Disclosures Act regarding Cr Doug Eaton's conduct at the Ordinary meeting of 14 March 2007. The allegation is that a breach of the Code of Conduct occurred by Cr Eaton referring, on a number of occasions to "*Hitler Mayor Graham*", "*Mayor Graham Hitler*" or terms to that effect as well as giving the Nazi salute while directing comments to the Mayor Cr Bob Graham. There is also a complaint in regard to Cr Eaton using the term "*pissed off*".

**Evidence**

There seems to be no dispute as to the factual occurrence of the events complained of.

In relation to the use of the term "pissed off" however, Councillor Eaton referred to it being simply part of colloquial language and he didn't see it as something which would result in a breach of the Code of Conduct being found against him.

Cr Eaton looked to the Code of Meeting Practice and referred specifically to clause 42, which suggested that he should have been dealt with under the Code of Meeting Practice which specifies how this would be done under clause 43. In his view, the reference to the "Hitler" comments and actions was not an appropriate matter to be brought before the Code of Conduct as it had its own "code" where it should be dealt with under the Code of Meeting Practice and this wasn't followed.

Cr Eaton also put forward a submission as part of his evidence that s.731 of the Local Government Act exculpates actions taken in good faith. He suggested in this particular matter he was executing his functions under the Act and no improper motives were established against him in that he would be considered not to be acting in good faith. Consequently he was entitled to the exemption from any proceedings under the Act.

As part of the evidence Cr Eaton also acknowledged that he went too far in the circumstances and that if he caused embarrassment to the Mayor he was prepared to apologise. When asked whether this would be in public or private he did not have a view.

## Findings

In dealing with the factual matters first, the Committee did not believe that the Code of Meeting Practice was the only way which such conduct can be dealt with. It accepted that an act of disorder was specifically dealt with and provided for, under the Code of Meeting Practice however the Code of Conduct, also in clause 8.6 and 8.7, put clear responsibilities on to Councillors as to their obligations during meetings. Further the Code of Meeting Practice under the heading of clause 43 states "*How Disorder at a meeting may be dealt with*". Consequently it is discretionary not mandatory. In the circumstances of this case, the Committee formed the clear view that those obligations had been breached. The Committee did not believe s731 of the Local Government Act to be relevant in this matter.

Importantly, clause 3 of the Code of Conduct setting out its purpose, seeks to have Councillors acting in a way that enhances public confidence in the integrity of the Council. Actions such as those by Cr Eaton could not be seen as enhancing public confidence but rather undermining the respect of the public for the Council.

Equally important under the Code's key principles clause 4.2, this matter is stressed ie. Council should seek to maintain and strengthen the public's trust and confidence in the integrity of the Council and, under Clause 4.8, Councillors must treat others with respect at all times. Again these clauses were breached.

Under clause 5, general conduct obligations are set out. Clause 5.1 specifically states that Councillors must avoid conduct that could constitute an act of disorder or misbehaviour. Specified here under bullet point 5 is conduct that causes, comprises or involves verbal abuse. Clause 5.3 also specifies the need to treat others with respect at all times. Clause 5 has again been clearly breached.

Clause 8.6 picks up the breaches of the Code of Meeting Practice and here the Committee believes clause 42 was breached. The conduct was detrimental to the pursuit of Council's charter 42(1)(b) (see section 8 of the Local Government Act); was improper (cl 42(1)(c)); was effectively verbal abuse (cl 42(1)(d)); was an act of disorder (cl 42(1)(f)); was insulting (cl 42(1)(i)); and was inconsistent with maintaining order (cl 42(1)(j)).

In addition clause 8.7 stresses that the Councillors must respect the Chair during Council and Committee meetings or other formal proceedings for Council. Again this was clearly breached.

In the circumstances where the breaches are numerous and clear, there seems to be no excuse or justifiable cause as to why they occurred, were repetitive and apparently understood by Cr Eaton. The Committee recommends by reference to recommendations available under clause 10.15 of the Code of Conduct that the Councillor should be censured for his misbehaviour on this occasion.

Finally, the Committee considered the matter of reference to "pissed off". This would seem to be a question of proper decorum of the Councillors in their conduct at Council meeting versus the introduction of colloquial language into Council debate. The Committee could understand that such language may occasionally arise when a Councillor is frustrated in regard to the proceedings. Notwithstanding, such outbursts should not occur if the Councillors are to act in a way which enhances public confidence in the Council. Though the Committee is of the view that Councillors should refrain from such conduct, it did not determine that the use of this term once in the debate would, by itself, constitute a breach of the Code of Conduct. Consequently, the Committee recommends no action in relation to this particular matter.

#### **COMMITTEE RECOMMENDATION**

- 1** *That Council endorse the Committee's decision that the conduct did amount to a breach of the Code of Conduct and this breach was serious.*
  
- 2** *That Councillor Eaton be formally censured on the grounds that he has seriously breached both the Code of Conduct and the Code of Meeting Practice by referring on a number of occasions to "Hitler Mayor Graham", "Mayor Graham Hitler" or terms to that effect as well as giving the Nazi salute while directing comments to the Mayor, Councillor Bob Graham.*
  
- 3** *That Councillor Eaton be directed to publicly apologise for his actions.*



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**MATTER NO. 2.3 PROTECTED DISCLOSURE, DECLARATIONS OF CR GRAHAM**

**Introduction**

A complaint has been lodged under the provision of the *Protected Disclosures Act* alleging a breach of the Code of Conduct by the Mayor, Cr Bob Graham, in that he previously declared a conflict of interest (insignificant) in regard to matters in which Johnson Partners were involved on the basis that Johnson Partners had provided electoral funds to him at the last election and at the meeting of 9 May, he did not make any declaration.

Further the complainant alleges that Cr Graham has not provided a full list of parties with which he has a business relationship as required by the ICAC recommendations.

**Evidence – Part 1**

Councillor Graham pointed out that the report considered by himself and the Council at the time was in relation to a Land & Environment Court matter. The heading of the report to Council however did not refer to Johnson Partners or Peter Johnson. Cr Graham indicated that he was well aware that he had received campaign donation from Johnson Partners and in fact pointed out that in the ordinary meeting of Council of 23 November 2005 in relation to effectively the same issue (proposed 37 lot strata subdivision at Hamlyn Terrace) he declared a non-pecuniary insignificant conflict of interest in the matter by reason that one of the applicant's consultants had made a donation to his election campaign. Cr Graham noted that the donation in fact had been correctly recorded in the Electoral Returns.

Councillor Graham stated that, as the matter was the subject of legal advice and the advice was strong and clear, he did not go into the context in as much detail as he normally would have. The Committee reviewed the report before Council at the time and the name of Johnson was in fact mentioned through the middle of the report. Cr Graham suggested this was not at the critical sections where his focus was in the particular circumstances. The matter was also in "confidential" and in those circumstances Cr Graham indicated he always gave the papers back.

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Councillor Graham agreed that he should have declared the matter and had he been aware, he would have declared an interest and dealt with it in the same way as on a previous occasion; ie he would have declared in similar terms.

### Findings

Clause 6.15 of the Code of Conduct identifies:

*“Councillors should note that matters before Council involving **campaign donors may give rise to a non-pecuniary conflict of interest.**”* (our emphasis).

Clause 12.6.7 expands on this and deals with the potential conflicts of interests arising for Councillors when a campaign donor *“has a matter before the Council for determination”*. The clause continues as to how that should be dealt with, and outlines the ways to deal with it, all of which involved declaring an interest.

Though the clause refers to the party having the matter before the Council for determination the Committee believes that where the consultant is extensively involved in the matter for determination and is a campaign donor the clause would apply. Accordingly, the Committee found a conflict of interest clearly arose in this situation and was not declared. A breach of the Code of Conduct was consequently found by the Committee.

Notwithstanding this above finding, the Committee believed that though the conflict should have been declared it accepted the submission that it was a legitimate mistake by Cr Graham. It finds support for this conclusion in the previous declaration in relation to the matter which indicates how the question would have been resolved had Cr Graham been aware of the involvement of Johnson Partners. The heading of the report not referring to them but rather a Court case along with the clear recommendation of the lawyers outlined in the report could be accepted by the Committee as supporting Cr Graham's comment that it was not a “normal” matter for Council's in depth exercise of discretion and detailed consideration. In some ways he was relying on the lawyers' analysis and resultant bottom line advice rather than his personal evaluation.

In those circumstances the Committee has taken the view that no further action should be taken.

### **Evidence – Part 2**

Part 2 of the complaint alleges that Cr Graham did not provide a full list of parties with which he has a business relationship as required by the ICAC recommendation. Though Council has adopted the recommendations of the ICAC it is not a matter which is set out in the Council's Code of Conduct. The Mayor has indicated that he doesn't have any business relationship "as required by the ICAC recommendations". He agrees that he knows a lot of consultants though would not see his knowing lots of people within the local area in all forms of business as a matter which would qualify for identification on the list of business relationships. There was no details or evidence of what particular relationships are being referred to in any event.

### **Findings**

The Committee could not find any evidence in relation to a breach of Code of Conduct in relation to this question and consequently recommends no action.

### **COMMITTEE RECOMMENDATION**

- 1** *That Council endorse the Committee's decision that the conduct did amount to a breach of the Code of Conduct and that the Committee accepts that it was a legitimate mistake on the part of Councillor Graham.*
  
- 2** *That no further action be taken in regard to this matter.*