

LOCAL GOVERNMENT STANDARDS PANEL

Established under section 5.122 of the *Local Government Act 1995*

Complaint Number SP 11 of 2013
DLG 20130104

Legislation *Local Government Act 1995 (WA)*

Complainants **Don Stuart Burnett**

Subject of complaint **Councillor Michael Wayne McKay**

Local Government City of Kalgoorlie Boulder

Regulation Regulations 7(1)(a), 9(1) and 10(1)(a) of the *Local Government (Rules of Conduct) Regulations 2007*

Panel Members Mr B Jolly (Presiding Member)
Councillor P Kelly (Member)
Mr P Doherty (Deputy Member)

Heard 3 October 2013
(Determined on the documents)

Outcome Two breaches established

FINDINGS AND REASONS FOR FINDING

DEFAMATION CAUTION

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1. Summary of the Panel's Decision

1.1 The Panel found that Cr McKay:

- (a) committed a breach of regulations 7(1)(a) and 9(1)(a) of the *Regulations* by engaging in the conduct and undertaking the Task (as defined below); and
- (b) did not commit a breach of regulation 10(1) of the *Local Government (Rules of Conduct) Regulations 2007*.

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 On 28 June 2013 Don Stuart Burnett, the Chief Executive Officer (**CEO**) of the City of Kalgoorlie Boulder (**Complainant**) lodged a complaint against Councillor Michael Wayne McKay, regarding alleged conduct by Councillor McKay on 14 June 2013 (**Complaint**).
- 3.2 The Complainant alleges that on 14 June 2013 Cr McKay removed a quantity of blankets from a facility known as the Men's Shed which had been donated to the Mayor of the City's Blanket Appeal (**Appeal**) without the approval of the CEO or the Council and in so doing breached Regulations 7(1)(a), 9(1) and 10(1)(a) of the *Regulations*.
- 3.3 The *Regulations* are rules of conduct for the purposes of section 5.104(1) of the *Act*. A breach of the *Regulations* is a 'minor breach' as defined in section 5.105(1)(a) of the *Act*.
- 3.4 The CEO is the 'complaints officer' for the Shire under section 5.120 of the *Act*.
- 3.5 By letter dated 28 June 2013, the CEO sent the Complaint to the Local Government Standards Panel (**Panel**) in accordance with the requirements of section 5.107 of the *Act*.
- 3.6 Pursuant to section 5.110(2) of the *Act*, the Panel is required to make a finding as to whether the breaches alleged in the Complaint occurred or to send the Complaint to the Chief Executive Officer of the Department of Local Government (**Department**) under section 5.111 of the *Act*.
- 3.7 The Panel had been informed by the Department, and so finds that Councillor McKay:
 - (a) was at the relevant time (i.e. during June 2013) and remains currently, elected as a member of the Council (**Council**) of the City of Kalgoorlie Boulder (**City**);

- (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) of the *Act*;
 - (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 of the *Act*; and
 - (iii) he is not disqualified from continuing his membership of the Council under section 2.25 of the *Act*.

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

4. Legislative background

4.1 The *Regulations* include the following regulations:

- ‘7(1)(a) A person who is a council member must not make improper use of the person’s office as a council member ...
 - (a) to gain directly or indirectly an advantage for the person or any other person;
- 9(1) A person who is a council member must not undertake a task that contributes to the administration of the local government unless authorised by the council or by the CEO to undertake that task.
- 10(1) A person who is a council member must not—
 - (a) direct or attempt to direct a person who is a local government employee to do or not to do anything in the person's capacity as a local government employee;
 ...
- (2) Subregulation (1) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.’

5. The Panel's Role

5.1 The Panel observes that:

- (a) clause 8(6) of Schedule 5.1 of the *Act* requires the Panel's members to have regard to the general interests of local government in 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 of the *Act*, 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 relates to blankets donated pursuant to the Appeal.

6.2 As to the Appeal, the CEO has advised the Panel (by letter dated 24 June 2013) that:

- (a) the Appeal is an annual event that commenced during the 1990s;
- (b) the Appeal was established informally and has no formal terms of reference;
- (c) on 4 May 2013, when the Mayor launched the Appeal for 2013 he read from a speech¹ and advised:

¹ The Panel was provided with a copy of the Mayor's speech.

'The Mayor's Blanket Appeal is a local charity, supported by local people, to provide assistance to those in our community who need it the most, and I urge you all to support this worthwhile cause. I will personally be approaching local businesses throughout Kalgoorlie-Boulder to come on board to help support this very worthwhile project.

I would like to encourage everyone who can afford it to make that extra bit of effort and donate to the Mayor's Blanket Appeal by placing your blankets in the boxes at the Eastern Goldfields Community Centre, at 13 Roberts Street Kalgoorlie and at the City's Administration Building, 577 Hannan Street Kalgoorlie from now until June 30.

It is important to me, both personally and on behalf of the elected members of the City of Kalgoorlie-Boulder, to know that we are doing all we can to ensure that no one is left out in the cold this winter. Please remember - together we can make a difference, so please make a donation to make some one's winter warmer.' [emphasis added]

- (d) when the Appeal was launched, no particular charity had been nominated as distributors of the donated blankets but 'the Councillors, including Cr McKay were briefed regularly on the Appeal's progress and later advised that the Red Cross would be distributing the blankets to the needy';
- (e) prior to 14 June 2013, the Council determined that the beneficiary of the Appeal would be the Australian Red Cross (**Red Cross**);
- (f) the Eastern Goldfields Community Centre includes the CY O'Connor Men's Shed (**Men's Shed**); and
- (g) as at 13 and 14 June 2013 the Men's Shed housed a number of blankets that had been donated to the Appeal.

6.3 In the Complaint, the Complainant alleges as follows:

It is alleged that on the morning of 14 June 2013, Mr Mick McKay called around at the City's Men Shed Workshop where donated blankets from the Mayor's Blanket Appeal 2013 were being stored. There were approximately 170-180 Blankets (quilts).

Mr McKay was not known to the Shed supervisor and he introduced himself as Councilor (sic) Mick McKay and that he was taking some blankets to distribute to the needy. The Supervisor advised him that he could not release any blankets without proper authority, Cr McKay then stated that he would call the Mayor. He was unable to speak to the Mayor on his mobile phone.

Cr McKay called me on my mobile and spoke with me regarding this matter and I cannot be sure as to whether this was when (sic) was unable to speak with the Mayor or not, but we did discuss the matter.

I advised Mr McKay that he was not permitted to take any blankets and that he should leave it for the Red Cross to distribute.

It is alleged that Mr McKay then advised the Shed Supervisor Mr William (Tex) Moore that he would be taking 5-6 blankets. Mr Moore assuming that Cr McKay had the necessary authority stated to him "Take what you need".

It is alleged that Cr McKay filled up his ute including the passenger seat with approximately 40 blankets and drove off.

It should be noted that Cr McKay owns a Boarding House in the City and to date has not disclosed what he has done with the blankets.

...

I believe that Cr McKay may have breached the Regulations because;

1. He has used his title as Councilor to influence the decision of a local government employee. (Reg 10 (1)(a)).
2. He has gained and (sic) indirect advantage for persons's of his choice rather than those that may have been selected by the Red Cross (Reg 7(1)(a)).
3. He has involved himself in the administration of the local government without due authority (Reg 9(1)).'

- 6.4 By letter dated 26 August 2013 the Complainant advised the Panel that:
- (a) he first became aware of the blankets being removed from the Men's Shed on 19 June 2013; and
 - (b) Cr McKay was 'clearly advised by me that he could not take the blankets as the Red Cross were collecting them and distributing them'.

- 6.5 It is alleged that by acting in the above manner, Cr McKay breached Regulations 7(1)(a), 9(1) and 10(1)(a) of the *Regulations*.

7. The Response

- 7.1 The Department sent a copy of the Complaint, together with a Complaint Summary prepared by the Department, to Councillor McKay by letter dated 1 August 2013 and invited him to responds to the same.
- 7.2 Councillor McKay responded to the allegations by an undated letter to the Panel which was received by the Department (**Complaints Summary**) on 18 August 2013 (**Response**).

7.4 In the Response, Councillor McKay said:

- (a) at the ordinary Council meeting held on 10 June 2013 Cr Botica asked the CEO 'why the blankets collected for the Appeal had not been distributed to those in need'²;
- (b) the CEO replied that it 'was not a City issue but an issue for the Red Cross';
- (c) following the meeting Cr McKay spoke with Cr Botica and Cr Reidy and 'it was agreed that I should collect some of the blankets and take to the Boulder Camp to ensure at least some of the blankets would be put to use';
- (d) he attended the Mens' Shed on 13 June 2013 and:
 - (i) he 'was amazed at how many blankets were there ... so [he] rang the Mayor to request the City works crew deliver the blankets to the needy as it was now mid-winter';
 - (ii) when the Mayor was not available, he telephoned the CEO who said that 'the blankets did not belong to the City and were not the City's responsibility and were merely being stored at the Men's Shed awaiting collection';
 - (iii) he did not 'recall the CEO saying that [he] was not permitted to take any of the blankets as his advice was that they were not the property of the City';
 - (iv) he spoke to Tex Moore (**Mr Moore**) the Men's Shed Supervisor, 'who agreed to let him [him] take some blankets to the Boulder Camp';
 - (v) he took approximately 25 blankets from the Men's Shed; and
 - (vi) he dropped off the blankets at the Boulder Camp 'which [was] used by itinerant Aboriginal people' and as there were 'a couple of cars there' [he] left the blankets in the container' at the camp;
- (e) '[t]he people who benefitted from [his actions of delivering blankets to the Boulder Camp were the disadvantaged Aboriginal people who frequent the camp';
- (f) he found 'it difficult to believe this would be a breach of this regulation. Surely our CEO is not of the view that the intentions of this regulation is to stop local government councillors from helping the needy?';
- (g) '[t]he CEO, in front of Council at a public Council meeting, advised that the blankets were not the property of the City and that the distribution of the blankets was the role of the Red Cross, not the City';

² The Minutes of this meeting do not record this topic as having been discussed. The Minutes are available from:

<http://www.kalbould.wa.gov.au/Your-Council,-Your-City/Council/minutes-and-agendas.aspx?month=6>

- (h) '[i]s distributing blankets from the Mayor's blanket appeal to those most in need "administration of the local government"?';
- (i) 'I did not direct or attempt to direct a person who is a local government employee. No local government employee was asked to undertake any task. The Men's Shed Supervisor agreed to provide access to the blankets stored at the Men's Shed, that's all'; and
- (j) '[i]t is difficult to comprehend why our CEO would waste your time over such a trivial matter. My motivation was out of frustration that half way through winter these blankets were still in storage and our CEO had no interest in ensuring they were distributed to those in need.'

7.5 By email send by Cr McKay to the Panel on 3 September 2013 he advised:

'... in response to the CEO's statement that he directed me not to take any blankets this is not correct as I had called him to have the council works crew pick them up as there was such an abundance of them and I thought it would be far better for council to pick up the lot. His reply was to say he was leaving it up to the Red Cross which he had told Cr. Botica a couple of days earlier at the OCM. With that I went back inside the shed and said to Tex "they're not interested, so I'll grab some and take them out to the Boulder Camp (the home of local fringe dwellers and outback communities who come into town). With that I loaded up my vehicle with as many as I could squeeze in and took them out there. I was not concerned with counting how many there was. I don't think I would like to stress Tex the manager of the men's shed any more than he has been already over this, but it was not discussed between us about authorisation by anybody or about blanket numbers. At no time did I feel I was doing anything wrong by answering a request from a very concerned fellow councillor to take some blankets out to warm the poor unfortunates of our society. Quite possibly without Cr. Botica's persistent urging's to the CEO the blankets may well be still in the Men's Shed, because as noted the Red Cross did not want them and they finished up being collected by the Salvation Army.'

7.6 The Panel has also been provided with copies of the following emails:

- (a) email sent by the CEO to Cr McKay on 20 June 2013 at 1.46pm:
 'I have been advised that you collected some blankets from the Men's shed. Could you please confirm what the situation is?'

- (b) email sent by Cr McKay to the CEO on 20 June 2013 at 2:06pm:
- ‘Correct Don, I rang you and Ron to have council do something done about distributing them as per Deborah's request. You did not seem too concerned telling me you were leaving it up to the Red Cross. Given the blankets were doing nobody any favours in storage at the men's shed and nearly half way through winter I took a heap out to the Boulder Camp. The situation is that they began to keep people warm from the day I rang you. Mick.’
- (c) email sent by Mr Moore to the CEO on 20 June 2013 at 2.28pm:
- ‘A person, "now known to me", as Mick McKay; turned up at the shed and introduced himself, and said he was a Councillor, and asked for some blankets so he could distribute them to some needy families.
- I informed Cr McKay that the blankets in the shed was (sic) for the [Appeal], Cr McKay said he would ring the Mayor. I went back into the shed, assuming he was making a phone call.
- Mr McKay came in and said he would take some blankets for distribution. Shortly after, he said he would take more because, as he had a number of people in Boulder that could use the blankets. Assuming he had cleared taking the blankets, I said take as many as you may need.
- I assumed he had made a phone call and sorted out a course of action. Mr McKay then proceeded to fill up a van with a number of blankets which I estimated to be about fourty (sic)..
- A short time later the Salvation Army turned up a (sic) removed the rest of the blankets, I assume to their depot. I did not question them, because I again believed they were an authorised distributor (sic) for the appeal.’
- (d) email sent by Kenan Bender, the City's Environmental Health Officer - Indigenous Communities Coordinator, to the CEO on 20 June 2013 at 2.34pm:
- ‘I believe that only six people have occasionally been at Boulder Camp this week and they haven't been staying overnight. I haven't actually seen anyone when I've been there and doubt there would be anyone to hand blankets off to. If they were handed out, I haven't seen or heard anything about them.’

(e) email sent by the CEO to Cr McKay on 20 June 2013 at 5:08pm:

'Your actions were totally inappropriate given that you rang me asking to distribute blankets and I advised that this was the Red Cross's project and that you shouldn't interfere. You gave an impression to a staff member that the Mayor had cleared you taking blankets and I believe you took about 40. A couple of things you need to be aware of;

- I specifically said you couldn't take any blankets as they were the property of the Red Cross and they were organising the distribution.
- You advised the staff member at the Men's Shed that you were a Councillor and gave the impression that the Mayor said you could take some and this was not the case. It is pointed out you cannot use your position as Councillor to influence or direct staff.
- The Salvation Army of behalf of the Red Cross turned up and collected the rest just after you left.
- Advice from my Indigenous Health Officer is that there is at best 6 people at Boulder camp and probably no-one staying overnight. Where did you distribute the blankets?
- You need to be aware of what the perception of this is, in that you run a boarding house and you collected blankets.

I have copied all of the Councillor's (sic) in as you had in your response to me. Mick, you may think you were doing the right thing and I understand your concerns in this matter, however this is the sort of thing you need to stay out of. You cannot get involved at this level.'

7.7 In the Response, Cr McKay said, amongst other things:

'Please find below my responses to the questions contained in the Form A forwarded to me in relation to the abovementioned complaint.

The allegations are not accepted as per the following:

Allegation 2

While I acknowledge that I called into the Men's Shed Workshop this occurred on the afternoon of Thursday 13 June 2013 NOT the morning of 14 June 2013 as claimed in the CEO's statement. My phone records show that the telephone call from me to the Mayor occurred at 2:15pm on the 13th.

The rest of this allegation is correct.'

7.8 The Panel is satisfied that it is more likely than it is not that the 'Form A' to which Cr McKay refers, is the Complaint Summary, allegation 2 of which reads as follows:

‘Allegation 2

On 14 June 2013 you, Councillor Michael Wayne McKay, called around at the City's Men Shed Workshop ('the Shed') where donated blankets from the Appeal were being stored. You were not known to the Shed's Supervisor, Mr William ('Tex') Moore. You introduced yourself to him as Councillor Mick McKay. You told Mr Moore you were taking some blankets to distribute to the needy. Mr Moore advised you that he could not release any blankets without proper authority. You told Mr Moore you would call the Mayor.'

- 7.9 It follows that, save for the date of his attendance at the Men's Shed, Cr McKay accepts the accuracy of the matters set out in that paragraph.

8. The Documents

- 8.1 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 documents after considering:

- (a) the Complaint, and the attachments to the same;
- (b) a letter dated 24 July 2013 from the CEO to the Department;
- (c) the Response;
- (d) the Minutes of the Ordinary Meeting of the Council held on 10 June 2013;
- (e) the Mayor's Speech (as referred to in paragraph 6.2(c) above; and
- (f) the emails referred to above.

9. Findings of fact

- 9.1 In the light of the matters set out above the Panel finds that it is more likely than it is not that:

- (a) the matters set out in paragraph 6.2 (above) have been established;
- (b) in response to the Appeal, a number of blankets were donated and held by the City, at the Men's Shed, pending their collection by the Salvation Army on behalf of the Red Cross;
- (c) on either 13 or 14 June 2013 Cr McKay attended the Men's Shed and told Mr Moore (the supervisor) that he had come to collect some blankets for needy families;
- (d) Mr Moore told him that the blankets were for the Mayor's Appeal;
- (e) Cr McKay said he would speak with the Mayor;
- (f) Cr McKay then telephoned the Mayor but was unable to speak with him so he telephoned the CEO (**Conversation**);
- (g) Cr McKay then told Mr Moore he was going to take some blankets; and

- (h) Cr McKay then removed a quantity of blankets³.

The Conversation

9.2 There is a dispute as to the substance of the Conversation with:

- (a) the CEO stating that he told 'Cr McKay that he was not permitted to take any blankets and that he should leave it for the Red Cross to distribute'⁴;
- (b) Cr McKay stating that he was advised by the CEO that:
 - 'the blankets did not belong to the City and were not the City's responsibility and were merely being stored at the Men's Shed awaiting collection by the Red Cross'⁵;
 - '... he was leaving it up to the Red Cross.'⁶

9.3 Elsewhere, Cr McKay has said:

- (a) 'You [the CEO] did not seem too concerned telling me you were leaving it up to the Red Cross'⁷;
- (b) 'I don't think I would like to stress Tex the manager of the men's shed any more than he has been already over this, but it was not discussed between us about authorization by anybody or about blanket numbers'⁸; and
- (c) he did not recall the CEO 'saying that [he] was not permitted to take any of the blankets as his advice was that they were not the property of the City'⁹.

9.4 In the light of the evidence as set out above, including Cr McKay's admission as set out in paragraphs 7.6 and 7.7 (above) the Panel finds that it is more likely than it is not that:

- (a) Mr Moore told Cr McKay, when he attended the Men's Shed on either 13 or 14 June 2013, that he could not take any blankets without the Mayor's approval; and
- (b) Mr Moore believed that Cr McKay had received authorisation from the Mayor to take some blankets and, but for that belief, would not have allowed him to take any blankets.

9.5 The Panel has not made a determination as to whether it is more likely than it is not that the CEO told Cr McKay, as the CEO alleges, before he took the blankets from the Men's Shed, that Cr McKay was not permitted to take any blankets. This is because the Panel considers that the outcome of the Complaint does not depend on whether such a statement was made.

³ Cr McKay accepts that it was approximately 25 blankets: Mr Moore estimated the number taken was about 40, but nothing turns on the number taken.

⁴ Complaint, page 2.

⁵ Response, under the heading 'Allegation 3'.

⁶ Email of 13 September 2013.

⁷ Email of 20 June 2013 sent at 2.06pm.

⁸ Email of 13 September 2013.

⁹ Response, under the heading 'Allegation 3';

10. Elements of the offence and determination

Regulation 7(1)(a) of the Regulations

10.1 Regulation 7(1)(a) of the *Regulations* provides that '[a] person who is a council member must not make improper use of the person's office as a council member ... (a) to gain directly or indirectly an advantage for the person or any other person'.

10.2 Where:

- (a) there is no indication from the evidence that the conduct complained about is conduct that contravened section 5.93 of the Act or The Criminal Code section 83; or
- (b) the Panel is satisfied that the conduct complained about is not conduct that contravened section 5.93 of the Act or The Criminal Code, section 83;

the essential elements of a breach of regulation 7(1)(a) of the *Regulations* are, that it is more likely than not that:

- (c) a person who is currently a council member engaged in conduct;
- (d) the person's conduct was a use of his or her office of council member;
- (e) viewed objectively, that use was an improper use of the person's office of council member; and
- (f) the person engaged in the conduct with the belief that the intended result would be (i.e. his or her intent, purpose and aim was) to gain directly or indirectly an advantage for the member or any other person¹⁰.

Council Member

10.3 The Panel has already found that Cr McKay was a Councillor of the City during June 2013.

Use of Office

10.4 In the Shorter Oxford Dictionary (6th ed), the meaning of the noun 'use' in the context of the matter considered by the Panel is the 'Act of using, fact of being used; The action of using something; the fact or state of being used; application or conversion to some purpose.'. In the same dictionary, amongst the meanings of the verb 'use' is 'employ'. There must exist some indication that the council member employed or somehow availed himself or herself of his or her position as council member.

10.5 The Panel is satisfied that Cr McKay's conduct, as set out in its findings of fact in paragraph 9 (above) (**Conduct**) constituted a use of his office as a councillor of the City because:

- (a) he became aware of the existence of the blankets through being a Councillor of the City;
- (b) when he attended the Men's Shed on 13 or 14 June 2013, he introduced himself to Mr Moore as a Councillor of the City; and

¹⁰ See *Yates and Local Government Standards Panel* [2012] WASAT 59 per Deputy-President Judge Sharp said, at paragraphs [71] – [72].

- (c) Mr Moore would not have released the blankets to Cr McKay unless he was a Councillor.

Improper Use

10.6 In *Yates and Local Government Standards Panel* [2012] WASAT 59 Deputy President Judge Sharp said, at [64]:

In *Treby and Local Government Standards Panel* [2010] WASAT 81 (*Treby*), Judge Pritchard, as she was then, examined in detail the meaning of the word ‘improper’ used in reg 7(1)(b) of the Regulations. Her Honour’s observations and findings continue to reflect the view of the Tribunal on this issue and we respectfully summarise them, so far as they are relevant to these reasons, as follows:

1. The word ‘improper’ is used in reg 7(1)(b) as an adjective to describe the use of a councillor’s office. The term ‘improper’ is not defined in the LG Act or the Rules of Conduct Regulations.
2. According to the Shorter Oxford English Dictionary (6th ed, 2007), the meaning of ‘improper’ includes ‘unsuitable’ and ‘inappropriate’. Her Honour said that the meaning of the word ‘improper’ could not be considered in isolation, but rather should take its flavour from the surrounding context, which includes an assessment of what is involved in role of a councillor, according to the LG Act and the Rules of Conduct Regulations and other instruments made under the LG Act.
3. ...
4. In view of these authorities, her Honour drew the following conclusions in relation to the meaning and application of the term ‘improper use of the person’s office’ within the context of reg 7(1)(b) of the Rules of Conduct Regulations.
 - (a) Impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of a councillor by reasonable persons with knowledge of the duties, powers and authority of that person’s position as a councillor and the circumstances of the case.
 - (b) Impropriety does not depend on a councillor’s consciousness of impropriety. It is to be judged objectively and does not involve an element of intent.

- (c) Impropriety may arise in a number of ways. It may consist of an abuse of power, that is, if a councillor uses his or her position in a way that is inconsistent with the discharge of the duties arising from that office. Alternatively, impropriety will arise from the doing of an act which a councillor knows or ought to know that he or she has no authority to do.
- (d) In the case of impropriety arising from an abuse of power, a councillor's alleged knowledge or means of knowledge of the circumstances in which the power is exercised and his or her purpose or intention in exercising the power will be important factors in determining whether the power has been abused.
- (e) A councillor's use of his or her office can be improper even though it is for the purpose or with the intention of benefiting Council.

- 5. The standards of conduct that would be expected of a member of a local government can be discerned from the fiduciary obligations which council members owe to their councils and from a range of statutory and non-statutory instruments, including the LG Act itself, and any code of conduct, local laws as to conduct and regulations which the LG Act contemplates may be made to regulate the conduct of members of local government. Such instruments might include the Rules of Conduct Regulations (which at reg 3 contains general principles to guide the behaviour of council members).
- 6. A failure to comply with any of these provisions would constitute a breach of the standards of conduct that would be expected of a person in the position of a councillor by reasonable persons with knowledge of the duties, powers and authority of that person's position as a councillor and the circumstances of the case, and that would therefore suggest an improper use of that office.'

10.7 This reasoning applies with equal force to regulation 7(1)(a).

10.8 For the following reasons, the Panel finds the Conduct was an improper use of Cr McKay's office as a Councillor of the City:

- (a) Cr McKay was aware that the blankets in the Men's Shed had been donated to the Appeal and that the nature of the Appeal (being the Mayor's Appeal) was such that donors would expect that the Mayor or the Council would determine to whom the donated blankets in the Men's Shed would be given;
- (b) Cr McKay was aware that the City had already made arrangements for the blankets in the Men's Shed to be collected by the Salvation Army on behalf of the Red Cross;

- (c) the balance of the blankets in the Men's Shed were in fact collected by the Salvation Army on behalf of the Red Cross on the same day that Cr McKay removed the blankets taken by him (**Taken Blankets**); and
 - (d) by so acting, Cr McKay deprived the Red Cross of the Taken Blankets, ignored the determination of the Mayor or the Council as to whom the donated blankets would be given and effectively made his own assessment of to whom the Taken Blankets would be given, without the knowledge (which the Red Cross would likely possess) of whether there were persons who were in greater need of the Taken Blankets.
- 10.9 The Panel also observes that the Conduct has the potential to undermine the success of future Appeals, because donors may be reluctant to donate blankets, in circumstances where they are not confident that the Mayor or the Council will ultimately determine to whom the donated blankets are given.
- 10.10 In the Panel's opinion, the Conduct, in the context of the matters set out in the two previous paragraphs:
- (a) was unsuitable or inappropriate;
 - (b) was conduct which Cr McKay knew or ought to have known he had no authority to do; and
 - (c) involved a breach of the standards of conduct that would be expected of a person in the position of a councillor by reasonable persons with knowledge of the duties, powers and authority of that person's position as a councillor and the circumstances of the case.

Belief that the intended result would be to to gain directly or indirectly an advantage for the person or any other person

- 10.11 The word "to" in the phrase "to cause detriment" has been interpreted as meaning "in order to", "for the purposes of" or "with the intent, purpose and aim": see *Chew v R* [1992] HCA 18; (1992) 173 CLR 626 at [2] – [3]; *Ryan and Local Government Standards Panel* [2009] WASAT 154 at [31] – [32].
- 10.12 Cr McKay has said that 'the people who benefitted from [his actions of delivering blankets to the Boulder Camp] were the disadvantaged Aboriginal people who frequent the camp' and the Panel is satisfied that it is more likely than not that that this was the intended result of the Conduct.
- 10.13 The Panel therefore finds that by engaging in the Conduct, Cr McKay breached regulation 7(1)(a) of the *Regulations*.

Regulation 9(1) of the Regulations

- 10.14 Regulation 9(1) of the *Regulations* provides that 'a person who is a council member must not undertake a task that contributes to the administration of the local government unless authorised by the council or by the CEO to undertake that task.'
- 10.15 Regulation 9(2) provides that '[s]ubregulation (1) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.'

10.16 In *Yates and Local Government Standards Panel* [2012] WASAT 59 (**Yates**), Deputy-President Judge Sharp said:

‘48. Neither the LG Act nor the Rules of Conduct Regulations specifically define what tasks contribute to the administration of the local government, but s 2.7(1) of the LG Act provides that the role of the Council is to ‘govern the local government’s affairs’. It then provides for the appointment of a Chief Executive Officer for the local government to perform certain functions.

49. Section 5.41 of LG Act sets out the Chief Executive Officer’s functions as follows:

5.41. Functions of CEO

The CEO’s functions are to —

...

- (c) cause council decisions to be implemented; and
- (d) manage the day to day operations of the local government; and
- (e) liaise with the mayor or president on the local government’s affairs and the performance of the local government’s functions; and

...

53. ... What the intervener is contending is that the applicant involved himself in implementing a decision of Council without the consent of Council or the Town’s CEO.

54. It is without doubt the role of the Council to consider the need for and desirability of the carrying out of the Works and to decide whether the Works should be carried out. On the other hand, the process for giving effect to that decision is clearly an administrative function of the Town’s CEO.

...

56. The word ‘contribution’ when given its ordinary and general meaning, means ‘play a part in the achievement of a result’; Shorter Oxford English Dictionary, (6th ed, 2007).’

10.17 In the light of *Yates*, the essential elements of a breach of regulation 9(1) of the *Regulations* are that it is more likely than not that:

- (a) a person who is currently a council member;
- (b) undertook a task (i.e. performed work that is or arises from a function of his or her local government’s CEO pursuant to section 5.41 of the Act);
- (c) the task contributed to the administration of the local government (i.e. the work played a part in the achievement of a result in regard to the local government’s CEO’s function concerned);

- (d) the task or work was not performed by the person as a council member as part of the deliberations at a council or committee meeting; and
- (e) prior to the task work being commenced, the council or the CEO did not authorise the person to perform it.

Council Member

- 10.18 The Panel has already found that Cr McKay was a Councillor of the City during June 2013.

Undertook a Task

- 10.19 The Panel finds that by engaging in the Conduct, Cr McKay ‘undertook a task’ being the collection of the Taken Blankets from the Men’s Shed and the distribution thereof to the Boulder Camp (**Task**).

Contributes to the task of local government

- 10.20 The general function of a local government is to provide for the good government of persons in its district and a liberal approach is to be taken to the construction of the scope of the general function of a local government: *Act*, ss 3.1 and 3.3.
- 10.21 In performing its executive functions, a local government may provide services and facilities: *Act*, s 3.18.
- 10.22 The Panel is satisfied that the Appeal is a function of local government.
- 10.23 Pursuant to s 5.41 of the *Act* the CEO’s functions include managing the day to day operations of the local government.
- 10.24 The Panel finds that, by engaging in the Conduct, and undertaking the Task, Cr McKay involved himself in the management of the Appeal (which involved him in the management of the day to day operations of the City), and thereby undertook a task that contributed to the administration of the local government.

Deliberations or authorisations

- 10.25 The Panel finds that on the evidence before it:
- (a) the Task was not performed by Cr McKay as a council member as part of the deliberations at a council or committee meeting; and
 - (b) prior to the task work being commenced, neither the council nor the CEO authorised Cr McKay to perform it.
- 10.26 The Panel therefore finds that by undertaking the conduct and engaging in the Task Cr McKay breached regulation 9(1)(a) of the *Regulations*.

Regulation 10(1) of the Regulations

- 10.27 Regulation 10 of the *Regulations* provides as follows:

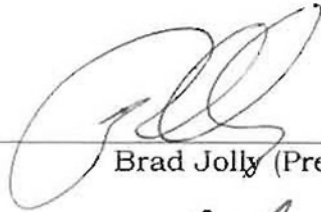
‘10(1) A person who is a council member must not—

- (a) direct or attempt to direct a person who is a local government employee to do or not to do anything in the person's capacity as a local government employee;

...

(2) Subregulation (1) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.'

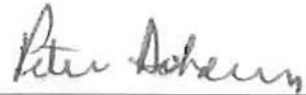
- 10.28 The allegation in the Complaint is that Cr McKay 'used his title as Councillor to influence the decision of a local government employee'.
- 10.29 Regulation 10 is not engaged unless a Councillor directs or attempts to direct a local government employee to do or not to do anything.
- 10.30 While the Panel is satisfied that Cr McKay made use of his office as councillor of the City to remove the Taken Blankets from the Men's Shed, the Panel is not satisfied, on the evidence before it, that he gave (or attempted to give) a direction to Mr Moore.
- 10.31 Accordingly the Panel finds that Cr McKay did not commit a breach of regulation 10(1) of the *Regulations*.



Brad Jolly (Presiding Member)



Paul Kelly (Member)



Peter Doherty (Deputy Member)

LOCAL GOVERNMENT STANDARDS PANEL

Established under section 5.122 of the *Local Government Act 1995*

Complaint Number

SP 11 of 2013

DLG 20130104

Legislation

Local Government Act 1995 (WA)

Complainants

Don Stuart Burnett

Subject of complaint

Councillor Michael Wayne McKay

Local Government

City of Kalgoorlie Boulder

Regulation

Regulations 7(1)(a), 9(1) and
10(1)(a) of the *Local Government
(Rules of Conduct) Regulations
2007*

Panel Members

Mr B Jolly (Presiding Member)

Councillor P Kelly (Member)

Mr P Doherty (Deputy Member)

Heard

5 December 2013

(Determined on the documents)

DECISION AND REASONS FOR DECISION

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.

11. Definitions

11.1 In these Reasons, unless otherwise indicated:

- (a) a reference to a section is a reference to the corresponding section in the *Local Government Act 1995* (WA), and a reference to a regulation is a reference to the corresponding regulation in the *Local Government (Rules of Conduct) Regulations 2007* (**Regulations**); and
- (b) words appearing in **bold** in the Panel's Finding and Reasons for Finding in these matters (**Breach Findings**) bear the same meaning in these Reasons.

12. Summary of Breach Findings

12.1 The Panel has made two findings of minor breach in relation to the Complaints – namely that it is more likely than it is not that Cr McKay, by engaging in the Conduct and undertaking the Task committed:

- (a) a breach of regulations 7(1)(a) of the *Regulations* (**Regulation 7(1)(a) Breach**); and
- (b) a breach of regulations 9(1)(a) of the *Regulations* (**Regulation 9(1)(a) Breach**).

(**Minor Breaches**)

13. Summary of Decision

13.1 The Panel considered how the Minor Breaches are to be dealt with under section 5.110(6) of the *Local Government Act 1995* and concluded, for the following reasons, that:

- (a) the complaint in relation to the Regulation 7(1)(a) Breach should be dismissed pursuant to subsection (a) of that section; and
- (b) Cr McKay be publicly censured as specified in the attached Minute of Order, in relation to the Regulation 9(1)(a) Breach, pursuant to subsection (b)(i) of that section.

14. Procedural fairness

14.1 By a letter dated 23 October 2013, Cr McKay was notified of the finding of Minor Breaches and given a copy of the Breach Findings. He was also provided with an opportunity to make a written submission on how the Panel should deal with the breaches under section 5.110(6) of the Act.

14.2 Cr McKay responded with a letter dated 15 November 2013 (**Letter**) to the effect that the Panel should deal with the breaches under section 5.110(6) of the Act by dismissing the Complaint pursuant to paragraph (a) of that section. He added that if the Panel was not so minded, he was willing to undertake appropriate training.

14.3 In the Letter, Cr McKay also said:

“In regards to the finding that I breached regulation 7(1)(a):

My reading of the findings of the Panel is that my actions in taking blankets to the Boulder Camp for the benefit of the disadvantaged Aboriginal people who frequent the camp was in breach of reg 7(1)(a) because, in summary (refer paragraph 10.8 of the Panel's findings); I deprived the Red Cross of the Taken

Blankets; I ignored the determination of the Mayor or the Council as to whom the donated blankets would be given to; I effectively made my own assessment as to who they should be given to; and I did not have knowledge as to whether there were persons in greater need.

While technically these statements may be correct they do not reflect the fact that my actions were born from the frustration of the blankets being held in storage during the winter months, rather than being available to those in need. I did what I did to help those in need.

I would argue that the intent of the words "or any other person" included in regulation 7(l)(a) was not to prohibit Councillors from helping disadvantaged persons and those in genuine need. Accordingly I request that the Panel accept that my actions were in good faith and dismiss the finding in regards to this minor breach.

In regards to the finding that I breached regulation 9(l)(a):

The Panel's finding is that the collection of the blankets from the Men's Shed and the distribution thereof to the Boulder Camp (refer paragraph 10.19 of the Panel's findings) constitutes the administration of the local government.

My understanding, at the time, was that the responsibility for the distribution of the blankets was assigned to the Red Cross, and accordingly my actions were of a concerned citizen rather than acting as a Councillor.

As my actions were in good faith and it is not entirely clear as to where the administrative boundary between the City and the Red Cross lies in this matter I request that the Panel's finding in regards to this minor breach be dismissed."

15. Panel's views

15.1 Section 5.110(6) of the Act specifies the sanctions that may be imposed by the Panel for the Minor Breaches. The Panel may:

- (a) dismiss the complaint;
- (b) order that —
 - (i) the person against whom the complaint was made be publicly censured as specified in the order;
 - (ii) the person against whom the complaint was made apologise publicly as specified in the order; or
 - (iii) the person against whom the complaint was made undertake training as specified in the order;
- or
- (c) order 2 or more of the sanctions described in paragraph (b).

- 15.2 In considering an appropriate sanction or sanctions for the Minor Breaches the Panel notes that Cr McKay has not previously been found to have breached the *Regulations*.

Principles

- 15.3 A public censure of the kind ordered by the Panel is a significant sanction. It involves a high degree of public admonition of the conduct of the council member concerned.¹¹ While a public censure has that character or effect it is aimed at reformation of the offending council member and prevention of further offending acts.
- 15.4 A breach of regulation 9(1) of the *Regulations* is a serious matter and will usually deserve the sanction of a public censure – not only as a reprimand aimed at reformation of the offending council member and prevention of further offending acts, but also as a measure in support of those council members who do not interfere with the everyday, hands-on running of their local government.
- 15.5 A public apology of the kind ordered by the Panel is also a significant sanction, as it involves a high degree of public admonition of the conduct of the council member concerned.
- 15.6 The circumstances that will in almost all occasions deserve the sanction of a public apology to another person include those where a council member's offending conduct is or conveys a slight or a personal attack on the other person, particularly where the other person is an employee of the council member's local government.
- 15.7 The circumstances in which it may be appropriate for the Panel to order that the council member concerned undertake training include where the type of training is reasonably available for the member to undertake, and the member communicates to the Panel:
- (a) his or her acknowledgement that he or she has committed the minor breach found by the Panel to more likely than not have occurred, and his or her willingness to undertake training; or
 - (b) his or her acknowledgement that he or she has committed the minor breach found by the Panel to more likely than not have occurred, but that such breach occurred through his or her lack of knowledge or education on the issue or issues concerned; or
 - (c) the member communicates to the Panel his or her remorse or contrition for his or her offending conduct in committing the minor breach found by the Panel to more likely than not have occurred, and the Panel's view is that training may be of use to the member so as to not repeat his or her offending conduct.
- 15.8 In the Panel's opinion, Cr McKay, has not communicated to the Panel any remorse or contrition for committing the Minor Breaches. Accordingly the Panel finds that training is not an appropriate sanction for either of the Minor Breaches.

¹¹ *Mazza and Local Government Standards Panel* [2009] WASAT 165 per Judge J Pritchard (Deputy President) as her Honour then was, at [107].

- 15.9 Further, as neither of the Minor Breaches involved a slight or personal attack on another person, the Panel finds that a public apology is not an appropriate sanction for either of the Minor Breaches.
- 15.10 The remaining options are a dismissal of the Complaint or a public censure.

Regulation 7(1)(a) Breach

- 15.11 As the Panel observed in the Breach Findings:
- (a) Cr McKay had advised the Panel that “the people who benefitted from [his actions of delivering blankets to the Boulder Camp] were the disadvantaged Aboriginal people who frequent the camp”; and
 - (b) the Panel was satisfied that it is more likely than not that this was the intended result of the Conduct.
- 15.12 In view of these findings, the Panel finds that:
- (a) a public censure is not warranted;
 - (b) the Complaint, insofar as it concerns the Regulation 7(1)(a) Breach, ought be dismissed.

Regulation 9(1)(a) Breach

- 15.13 In the Panel’s View, different considerations apply to the Regulation 9(1)(a) Breach where the Panel found [Breach Findings, paragraphs 9.1 and 9.4] that it was more likely than it was not that:
- (a) the matters set out in paragraph 6.2 of the Breach Findings had been established including that prior to 14 June 2013, the Council determined that the beneficiary of the Appeal would be the Red Cross;
 - (b) in response to the Appeal, a number of blankets were donated and held by the City, at the Men’s Shed, pending their collection by the Salvation Army on behalf of the Red Cross;
 - (c) on either 13 or 14 June 2013 Cr McKay attended the Men’s Shed and told Mr Moore (the supervisor) that he had come to collect some blankets for needy families;
 - (d) Mr Moore told him that the blankets were for the Mayor’s Appeal and that he could not take any blankets without the Mayor’s approval; and
 - (e) Cr McKay said he would speak with the Mayor;
 - (f) Cr McKay then telephoned the Mayor but was unable to speak with him so he telephoned the CEO;
 - (g) Cr McKay then told Mr Moore he was going to take some blankets;
 - (h) Mr Moore believed that Cr McKay had received authorisation from the Mayor to take some blankets and, but for that belief, would not have allowed him to take any blankets; and
 - (i) Cr McKay then removed a quantity of blankets.

15.14 In the Panel's opinion Cr McKay effectively made his own assessment of to whom the Taken Blankets would be given, without the knowledge (which the Red Cross would likely possess) of whether there were persons who were in greater need of the Taken Blankets.

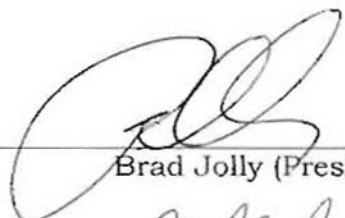
15.15 In the Panel's opinion, this conduct is such that:

- (a) it is not appropriate to deal with the Regulation 9(1)(a) Breach by dismissal of the Complaint in relation to that breach; and
- (b) public censure is warranted:
 - (i) to reflect that this conduct ought not to have occurred;
 - (ii) to deter further offending acts; and
 - (ii) as a measure in support of those council members who do not interfere with the everyday, hands-on running of their local government.

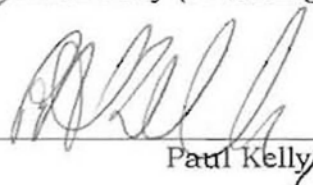
16. Panel decision

16.1 Having regard to the Breach Findings, the matters mentioned in paragraphs 5 and 6 above, and the general interests of local government in Western Australia, the Panel's decision on how the Minor Breaches are to be dealt with under section 5.110(6) of the Act, is that:

- (a) the Complaint in relation to the Regulation 7(1)(a) Breach be dismissed pursuant to subsection (a) of that section; and
- (b) in relation to the Regulation 9(1)(a) Breach pursuant to subsection (b)(i) of that section, Cr McKay should be publicly censured as set out in the attached Minute of Order.



Brad Jolly (Presiding Member)



Paul Kelly (Member)



Peter Doherty (Deputy Member)

NOTICE TO THE PARTIES TO THE COMPLAINT

RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (**Panel**) hereby gives notice that:

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

Note:

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

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

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

LOCAL GOVERNMENT STANDARDS PANEL

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

Complaint Number SP 11 of 2013
DLG 20130104

Legislation *Local Government Act 1995* (WA)

Complainants **Don Stuart Burnett**

Subject of complaint **Councillor Michael Wayne McKay**

Local Government City of Kalgoorlie Boulder

Regulation Regulations 7(1)(a), 9(1) and
10(1)(a) of the *Local Government*
(Rules of Conduct) Regulations
2007

Panel Members Mr B Jolly (Presiding Member)
Councillor P Kelly (Member)
Mr P Doherty (Deputy Member)

Heard 5 December 2013
(Determined on the documents)

MINUTE OF ORDER

THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Michael Wayne McKay, Councillor of the City of Kalgoorlie Boulder, be publicly censured as specified in paragraph 2 below.
2. Within the period of 29 days to 43 days from the day following the date of service of this Order on him, the Chief Executive Officer of the City of Kalgoorlie Boulder arrange the following Notice of Public Censure to be published, in no less than 10 point print:
 - (a) as a one-column or a two-column display advertisement in the first 15 pages of "The West Australian" newspaper; and

- (b) as a one-column or a two-column display advertisement in the first 15 pages of the “Kalgoorlie Miner” newspaper

NOTICE OF PUBLIC CENSURE

The Local Government Standards Panel (the Panel) has made a finding to the effect that during June 2013 Councillor Michael Wayne McKay breached regulation 9(1)(a) of the *Local Government (Rules of Conduct) Regulations 2007* by undertaking a task that contributes to the administration of the City which had not been authorised by the City or the CEO of the City, the task being his involvement with the distribution of blankets donated to the Mayor of the City's Blanket Appeal.

The Panel censures Councillor McKay for this breach of regulation 9(1)(a).

LOCAL GOVERNMENT

STANDARDS PANEL