

Decision-maker's Title: **LOCAL GOVERNMENT STANDARDS PANEL**
Jurisdiction: Complaints of minor breach by local government council members
Act: *Local Government Act 1995*
File No/s: SP 15 of 2010 (DLG 20100101)
Heard: Determined on the documents
Considered: 21 October 2010
Coram: Mr B. Jolly (Presiding Member)
 Councillor C. Adams (Member)
 Mr J. Lyon (Member)

Complaint SP 15 of 2010**Complainant: (Cr) Stephanie PROUD****Council member complained about:****Councillor Elizabeth RE****Local Government:****City of Stirling****Regulation alleged breached:****Regulation 7(1)(b)****FINDING AND REASONS FOR FINDING****DEFAMATION CAUTION**

The general law of defamation, as modified by the *Defamation Act 2005*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents.

SUMMARY OF FINDING

The Panel found that on or about 5 February 2010 Councillor Re made improper use of her office, and committed a breach of regulation 7(1)(b), by publishing and circulating her electronic newsletter with an article in it headed 'Martino service station – Ampol – Scarborough Beach Road Innaloo' with the intent to cause detriment to each of Councillor Giovanni Italiano JP and Councillor Stephanie Proud.

BACKGROUND AND PROCEDURAL MATTERS

The material in **Attachment A** is incorporated here as if set out in full.

AVAILABLE INFORMATION

The information before the Panel in relation to this matter (the available information) is the information and documents described in the table under the heading 'Available information' in **Attachment A**. These documents are referred to below, in italics within square brackets, by the relevant Doc ID in the table for the relevant document – e.g. [*Doc B2*] refers to the document that is Doc ID B2 in the table. Pages in a document described in the table are similarly referred to below by the relevant page/s number followed by the relevant Doc ID – e.g. [*pp3-4Doc B2*] refers to pages 3 - 4 of Doc ID B2.

FINDING AND REASONS FOR FINDING

Allegation of minor breach made in the complaint

1. Councillor Proud's allegation of minor breach made in the complaint, as confirmed by her in her letter of 29 July 2010 [Doc D], is:

That in February 2010 Councillor Re contravened regulation 7(1)(b) in that she made improper use of her office of Council member to cause detriment to Councillor Giovanni Italiano JP and to Councillor Stephanie Proud by publishing in her February 2010 edition of her electronic newsletter known as WAG Update, an article headed 'Martino service station – Ampol – Scarborough Beach Road Innaloo'. (the subject allegation)

Factual background

2. On the available information the Panel is satisfied there is evidence from which it may be concluded, and from which the Panel has concluded, that it is more likely than not that the relevant background and material facts of this matter are as set out in **Attachment B**.

Councillor Proud's claims

3. Councillor Proud's claims in this matter appear to be as set out in **Attachment C**.

Councillor Re's response to the subject allegation

4. The Panel notes that Councillor Re's response to the subject allegation is her letter of 17 September 2010 [Doc F1], the relevant text of which is set out in **Attachment D**.

PANEL'S DEALING WITH THE SUBJECT ALLEGATION

5. The subject allegation is as mentioned in paragraph 1 above. Regulation 7(1) is a rule of conduct under section 5.104(1) and, in accordance with section 5.105(1)(a), a contravention of regulation 7(1) is a minor breach. Regulation 7(1) is contravened by a breach of regulation 7(1)(a) or 7(1)(b).

Views for the purposes of dealing with the subject allegation

6. **Attachment E** sets out views, including the Panel's general views, and material in relation to regulation 7(1). The Panel adopts those views and that material for the purposes of its dealing with the subject allegation.

Issues arising and issues in dispute, in dealing with the subject allegation

7. On the available information and in the light of the views and material set out in **Attachment E** it is the Panel's view that the issues which arise and the issues that Councillor Re disputes, in dealing with the subject allegation are as set out or otherwise indicated in **Attachment F**.

8. On the available information, it is the Panel's view that:

(1) Councillor Re admits:

- (a) that she was a person who was a Council member at the October 2009 OCM and in February 2010;
- (b) that on 5 February 2010 she circulated to a number of persons her email with the subject/heading "WAG 3 Update 4 February" (the newsletter); and
- (c) the newsletter contained the article that Councillor Proud complains about (the article)

(2) The issues that Councillor Re disputes in relation to the subject allegation are:

- (a) was such circulation a use of Councillor Re's office as a Council member?; and
- (b) if issue (a) is answered in the affirmative, viewed objectively, was such circulation an improper use of Councillor Re's office as a Council member?; and
- (c) if issue (b) is answered in the affirmative, when Councillor Re circulated the newsletter, did she believe that the intended result would be to cause detriment to both or either of Councillor Italiano and/or Councillor Proud?

Was Councillor Re's circulation of the newsletter a use of her office as a Council member?

Councillor Re's position

9. The Panel notes that in her letter of 17 September 2010 [Doc F1], Councillor Re's says that:

WAG [i.e. the name of her newsletter] was issued on a regular basis (from 1994) prior to me becoming a Councillor (2005) and I continue to issue WAG in my personal capacity from my personal email account and I have never purported to be issuing that newsletter in my capacity as a Councillor.

The publication of WAG is not a use of my office as a Council member.

Panel view

10. On the available information, it is the Panel's view that Councillor Re's publishing and circulation of the newsletter with the article in it was a use of her office as a Council member, on the basis that in the article, where she refers to and makes comments in relation to a matter that she participated in as a Council member she specifically states that she was "officially" informing the recipients of the newsletter of the Council's decision about the matter.

Was Councillor Re's circulation of the newsletter an improper use of her office as a Council member?

The expected and required standards of conduct of Councillor Re

11. On the available information and in the light of the views, including the Panel's general views, and material in relation to regulation 7(1) set out in **Attachment E**, it is the Panel's view that in February 2010 the expected and required standards of conduct of Councillor Re as a Council member were those flowing from the fiduciary obligations owed by her as a Council member to Council (or the City) as varied or complemented by the Act (which includes all regulations, including the Regulations, made under it), the common law, the City's code of conduct, and Council's decisions and policies.

The City's Code of Conduct

11. **Attachment G** sets out some passages and provisions of the City of Stirling Code of Conduct (as adopted by Council on 13 October 2009, and amended on 15 December 2009) (the City's Code of Conduct). In the Panel's view, the expected and required standards of conduct of Councillor Re as a City Council member in February 2010 included the due observance of those passages and provisions.

Councillor Proud's objections

12. The Panel notes that in her claims in this matter:

- (1) Councillor Proud objects to the following statements in the article, on the basis that they are incorrect or misleading:
 - (a) *"It is with deep regret that I officially inform you that the **majority of Councillors** at the City of Stirling voted for the redevelopment of the Martino service station site.... [emphasis supplied by Councillor Proud]*
 - (b) *"It was especially disappointing to see the other local ward Councillor Proud (9446 6929) and Councillor Italiano (9244 8355) vote for the redevelopment. **If either councillor (just one) had voted against the redevelopment, the results would have been different.** If you contact them you may be able to find answers that I can't and also contact Mayor Boothman (92073033) who used his two votes to push the Martino family out of the 53 year old local family business [emphasis supplied by Councillor Proud]*
- (2) Councillor Proud objects to the article, on the basis that the inference/s that ordinary persons would make from the whole of it would be incorrect and would lower Councillor Italiano and herself in the estimation of right-thinking people generally.

Councillor Re's position

13. The Panel notes that in her letter of 17 September 2010 [Doc F1), Councillor Re's says that:

Even if the newsletter was issued in my capacity as a Council member then I refute that I was making improper use of my office.

After the decision of Council was made I received numerous enquiries about the decision.

I could not and would not try to explain the reasoning that Cr Proud and Cr Italiano or any other Councillor who voted for the redevelopment had for making the decision that they did make.

As Cr Proud is the local ward member and Cr Italiano is a Councillor then I consider it entirely proper that they be able to justify or defend their decisions.

Panel views

14. On the available information it is the Panel's view that:

- (1) The statement in the article – *"It is with deep regret that I officially inform you that the majority of Councillors at the City of Stirling voted for the redevelopment of the Martino service station site ..."* – was more likely than not to have been incorrect when made, on the basis that there was no majority of Councillors at the October 2009 OCM who voted for the redevelopment of the Martino service station site. Rather, the correct position appears that the vote on the redevelopment application was split evenly 6/6 and the person presiding cast his second vote (pursuant to section 5.21(3)) in favour of it.
- (2) The statement in the article – *"The redevelopment could have included a service centre if Councillors had voted that it stayed on the site and the area cosmetically attended to!"* – was more likely than not to have been incorrect when made, on the basis that that the City's Manager Approvals, through the Officer Report considered at the October 2009 OCM, advised Council: *"However, it is agreed with the applicant that there is no statutory basis for the City to seek to require the retention of the vehicle servicing component. Therefore the City cannot impose a condition that the applicant needs to provide a mechanic's garage as part of the development."*
- (3) The statement in the article – *"The current Martino service station is in keeping with the objectives of the Stirling City Centre the new proposal does not appear to parallel itself!"* – was more likely than not to have been a reference by Councillor Re to what she believes is an issue relating to the City's sustainability, and not a reference to whether or not the redevelopment application complied with the relevant town planning principles and requirements.

- (4) The statement in the article – *“It was especially disappointing to see the other local ward Councillor Proud (9446 6929) and Councillor Italiano (9244 8355) vote for the redevelopment.”* – was a selective attribution or implication of fault or blameworthiness to Councillor Proud and Councillor Italiano, in that there were 4 other Councillors who had also voted for the redevelopment application and who were not focused on or singled out in the article.
- (5) The statement in the article – *“If either [of Councillor Proud or Councillor Italiano] (just one) had voted against the redevelopment, the results would have been different.”*:
 - (a) was also a selective attribution or implication of fault or blameworthiness to Councillor Proud and Councillor Italiano, in that there were 4 other Councillors who had also voted for the redevelopment application and who were not focused on or singled out in the article; and
 - (b) omits the crucial qualifying circumstance that, while the outcome of Council’s voting at the October 2009 OCM on the redevelopment would have been different, the overall result would be – as the Councillors present during the debate on the redevelopment at the October 2009 OCM were aware or should have been aware, through the dealings with the earlier application to redevelop the land, the contents of the Officer Report and comments made during the debate – that it was likely that the applicant would apply to the SAT for a review of that different decision, and that the SAT was likely to rule in favour of the redevelopment if it was required to.
- (6) The statement in the article – *“If you contact them [Councillor Proud and Councillor Italiano] you may be able to find answers that I can’t”* – was more likely than not to have been incorrect when made, on the basis that Council Proud maintains that when Councillor Re published that statement she (Council Proud) had not been asked by Councillor Proud what was/were her reason/s when she voted for the redevelopment.

15. It is the Panel’s view that:

- (1) On the ordinary and natural meaning of the words used in the article – i.e. the meaning that would be reasonably understood by the ordinary reasonable reader using his or her knowledge and experience of human affairs – the only reasonable inference that the recipients of the newsletter would more than likely make from a consideration of the whole of the article is that:
 - (a) the Martino Family would not have had to vacate the land within weeks of the October 2009 OCM if Council’s decision at that meeting had been to refuse the redevelopment application;
 - (b) the City had the power to lawfully require the owner of the land to include a vehicle servicing component in the redevelopment, and that Council had decided not to make that requirement;

- (c) Councillor Proud and Councillor Italiano (and Mayor Boothman) were the responsible Council members in particular for Council deciding not to make that requirement; and
 - (d) the particular City's Councillors that the community should hold responsible for 'forcing' the Martino family to leave and for allowing a service station without a vehicle servicing component on the land, were Councillor Proud and Councillor Italiano (and Mayor Boothman).
- (2) The imputation or inference mentioned in paragraph 15(1) above would tend to lower each of Councillor Proud and Councillor Italiano in the estimation of right-thinking members of society generally.

16. In relation to Councillor Re's comment to the Panel – in effect, that if the Panel were to make a finding in this matter that she has committed a breach of regulation 7(1)(b) as alleged by Councillor Proud, then such finding would be a "curtailment of the basic right" of Councillor Re as a member of the community to freely express herself in relation to community issues – it is the Panel's view that:

- (1) The collateral issue that her comment relates to appears to be whether or not regulation 7(1)(b) should be read down, having regard to the implied freedom of political communication under the Commonwealth *Constitution*.
- (2) On the basis of the SAT views in **Attachment H** that collateral issue appears to be answered in the negative.
- (3) When Councillor Re made the required declaration of office pursuant to section 2.29(1) after she was elected as a Council member in October 2009:
 - (a) she declared that she took that office upon herself and would duly, faithfully, honestly, and with integrity, fulfil the duties of the office for the people in the City's district (and not of any of its wards in particular) according to the best of her judgment and ability, and that she would observe the Regulations; and
 - (b) she voluntarily restricted herself as to the extent that she could express herself in relation to any community issue that had been before the Council.

17. In relation to Councillor Re's comments to the Panel: "*As you are aware, the role of a Councillor includes representing the interests of the electors, constituents and residents of my district providing leadership and guidance to the community in the district and participating in the Council's decision making processes*", it is the Panel's view that:

- (1) As mentioned in paragraphs 6(5), (6) and (7) in **Attachment E**:
 - (a) while a councillor has responsibility under the Act to his/her constituents, this responsibility – particularly the responsibilities under section 2.10(a) and (c) – is subject to (i.e. subordinate to) the councillor's duty to abide by the provisions of the Act and its regulations, any applicable code of conduct and the procedures and decisions of his/her local government;

- (b) the Act does not impose upon a councillor any right to conduct himself/herself in a manner whilst representing the interests of the members of the community, or during the facilitation of communication between the community and council, that is contrary to: the relevant provisions of the Act or its regulations; or the standards of conduct expected of a person in that position; or the council's responsibility for the performance of the local government's functions; and
 - (c) a councillor will carry out his or her role and functions under section 2.10 by observing and implementing section 2.7 and ensuring the needs and concerns of his or her community are addressed.
- (2) Broadly, there are 4 means by which a council member will carry out his/her functions under section 2.10(a), (b) and (c) – namely:
- (a) by reading the papers and otherwise preparing for council meetings and applicable committee meetings;
 - (b) by attending at such meetings, making any required disclosure of interest, and participating in the local government's decision-making processes at such meetings;
 - (c) representing his/her local government at organised events; and
 - (d) where appropriate, by acting as an intermediary or conduit in communications between, on the one hand, electors, ratepayers and residents of his/her local government's district, and, on the other hand, his/her council.
- (3) Councillor Re's publishing and circulation of the newsletter with the article in it was not in the interests of the people of the City's district.

18. On the available information it is the Panel's view that Councillor Re's publication and circulation of the newsletter with the article in it contravened the standards of conduct that were expected of a member of the Council in February 2010, as follows:

- (1) Councillor Re contravened her fiduciary duty to act in good faith, in that when she published and circulated the newsletter with the article in it she did not act bona fide in what she considered to be the best interests of the Council.

- (2) Councillor Re contravened that part of the City's Code of Conduct that reads, relevantly:

"All Elected Members ... should behave appropriately towards each other Their conduct should contribute towards creating and maintaining a supportive work environment.

Appropriate behaviour includes conduct that is courteous, polite and businesslike. It involves treating colleagues with respect and courtesy. The City's values should be applied in all business dealings and underpin behaviour in relationships."

in that when she published and circulated the newsletter with the article in it:

- (a) she did not behave appropriately towards Councillor Proud or Councillor Italiano;
 - (b) she did not contribute towards creating or maintaining a supportive work environment; and
 - (c) for the reasons in **Attachment I**, she failed to treat each of Councillor Proud or Councillor Italiano with respect, in that the article was defamatory matter in relation to each of them.
- (3) Councillor Re contravened that part of the City's Code of Conduct that reads, relevantly:

"Elected Members ... must make every effort to be positive, helpful and effective when communicating with the community.

Elected Members are the public face of local government. Their dealings with people in the community are numerous. They communicate with them about their issues and act on their behalf at Council meetings. It is therefore important for Elected Members ... to ensure:

...

- *decisions, processes and policy information which affect the community are communicated accurately and in a timely way."*

in that when she published and circulated the newsletter with the article in it:

- (a) she was not being positive, helpful and effective when communicating with the community; and
- (b) she did not ensure that a Council decision which affected the community was communicated accurately and in a timely way.

- (4) Councillor Re contravened that part of the City's Code of Conduct that reads, relevantly:

"All contact Elected Members ... have with people outside the City, media or otherwise, should be positive, informative and appropriate."

in that when she published and circulated the newsletter with the article in it, the contact she had with the readers of the newsletter was not positive, informative and appropriate in relation to Council's decision to approve the redevelopment.

When Councillor Re circulated the email, did she believe that the intended result would be to cause detriment to both or either of Councillor Italiano and/or Councillor Proud?

19. It is the Panel's view that, as mentioned in paragraph 9 of **Attachment B**, "the term 'detriment' [in reg 7(1)(b)] is to be construed widely, and includes a financial or a non-financial loss, damage, or injury, of any state, circumstance, opportunity or means specially unfavourable. Accordingly, 'detriment' may include a tendency for others to think less favourably of a person, humiliation, denigration, intimidation, harassment, discrimination, disadvantage, adverse treatment, and dismissal from, or prejudice in, employment."

20. In the Panel's view, the only reasonable inference which is open on a consideration of all of the available information is that when Councillor Re published and circulated the newsletter with the article in it her intention and belief was that the intended result would be to cause detriment to each of Councillor Proud or Councillor Italiano – such detriment being: that at least some of the people in the City's district would think less favourably of each of them; denigration for having voted for the redevelopment; and adverse treatment from those readers of the newsletter who took up Councillor Re's invitation in the article to contact either of them.

20. The Panel notes that paragraphs 6(10), (11) and (12) of **Attachment E** set out views and material on a council member's duty of loyalty to his or her local government's decisions (particularly those made by its council) because the council is a collegiate decision-maker. In the Panel's view, when Councillor Re published and circulated the newsletter with the article in it, she contravened her duty of loyalty to her Council.

Panel finding on the subject allegation

21. On the available information, for the above reasons and as required by section 5.110(2), the Panel is satisfied on the available information to the degree required by the Briginshaw principles, and finds, that it is more likely than not that:

- (1) On or about 5 February 2010 Councillor Re committed a breach of regulation 7(1)(b) in that she made improper use of her office of Council member to cause detriment to Councillor Giovanni Italiano JP and to Councillor Stephanie Proud respectively by publishing and circulating an article headed 'Martino service station – Ampol – Scarborough Beach Road Innaloo' in her "WAG 3 Update 4 February" edition of her electronic newsletter known as WAG Update.
- (2) When Councillor Re published and circulated her "WAG 3 Update 4 February" with the article in it the detriment that she intended to cause to each of Councillor Proud or Councillor Italiano was that: that at least some of the people in the City's district would think less favourably of each of them; denigration for having voted for the redevelopment; and adverse treatment from those readers of the newsletter who took up Councillor Re's invitation in the article to contact either of them.

.....
Brad Jolly (Presiding Member)

.....
Carol Adams (Member)

.....
John Lyon (Member)

Attachment A

BACKGROUND AND PROCEDURAL MATTERS

References to sections and regulations, and the term “viewed objectively”

1. In these Reasons, unless otherwise indicated:

- (1) A reference to a regulation is a reference to the corresponding regulation of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations), a reference to a section is a reference to the corresponding section of the *Local Government Act 1995* (the Act), and a reference to the Department is a reference to the Department of Local Government.
- (2) 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).

Details of the complaint

2. Mr Aaron Bowman, the Complaints Officer (the Complaints Officer) of the City of Stirling (City), has sent to the Panel a complaint dated 28 April 2010 (the complaint) made by Councillor Proud about alleged conduct of Councillor Re, a current member of the City’s Council (the Council). The complaint consists of a 2-page *Complaint of Minor Breach* dated 28 April 2010 [Doc B1] and its attachments [Doc B2] and [Doc B3]. The Complaints Officer, on his own initiative, has also sent [Doc B4] and [Doc B5] to the Panel as material that is relevant to the complaint.

Identifying / clarifying allegation of minor breach

3. By a letter dated 2 July 2010 [Doc C] Councillor Proud requested to clarify her allegation and provide further information in this matter. Councillor Proud responded with her letter dated 29 July 2010 and its attachments [Doc D].

Preliminary matters

4. The complaint is in the form approved by the Minister for Local Government and was made within time. There is an allegation made in the complaint that Councillor Re, a member of the Council at the time of the alleged incident, has committed a minor breach as defined under section 5.105(1)(a).

Councillor Re’s response sought and received

5. On 16 August 2010 the Presiding Member sent a *Notice of Complaint* [Doc E] to Councillor Re advising her, among other things, of the allegation of minor breach that the Panel will consider in this matter and inviting her to respond to that allegation. Councillor Re responded by: her letter dated 17 September 2010 [Doc F1] and its attachment [Doc F2]; and her email of 20 September 2010 [Doc F3].

Available information

6. The information before the Panel in relation to this matter (the available information) is described in the following table:

Doc ID	Description
A	Copy of (1-page) letter from the City of Stirling's Complaints Officer, dated 5 May 2010.
B1	Copy of (2-page) <i>Complaint of Minor Breach</i> (Complaint SP 15 of 2010) dated 28 April 2010 – its attachments being <i>[Doc B2]</i> and <i>[Doc B3]</i> .
B2	Copy of (2-page) <i>Attachment 1</i> to <i>[Doc B1]</i> .
B3	Copy of (1-page) <i>Attachment 2</i> to <i>[Doc B1]</i> .
B4	Copy of (14-page) pages 43-56 of the confirmed minutes of the City's Ordinary Council Meeting held on 13 October 2009 (the October 2009 OCM).
B5	Copy of a CD consisting of audio recordings, in regard to the subject development application, of the proceedings at the October 2009 OCM and at the City's Planning and Development Committee Meeting held on 29 September 2009.
C	Copy of (4-page) Presiding Member's letter to Cr Proud, dated 2 July 2010.
D	[Full colour] copy of (6-page) letter from Cr Proud, dated 29 July 2010, and its (18 pages) attachments.
E	Copy of (11-page) Notice of Complaint (and Attachments A, B & C) to Cr Re, dated 16 August 2010.
F1	Copy of (3-page) letter from Cr Re, dated 17 September 2010 – its attachment being <i>[Doc F2]</i> .
F2	Copy of (2-page) printout of WAG 3 Update 4 February issued on 5 February 2010.
F3	Copy of (3-page) printout of emails – including an email of 20 September 2010 from Cr Re.
G1	Copy of (1-page) printout of Caltex's internet "Our History" page, at http://www.caltex.com.au/AboutUs/Pages/OurHistory.aspx , as accessed on 13 October 2010.
G2	Copy of (1-page) page 147 of WALGA's "The Western Australian Local Government Directory 2010"

Panel's role - duty to make finding - required standard of proof

7. The Panel notes that:

- (1) Broadly, the Panel is a statutory decision-maker that is required to adjudicate on complaints made in writing, in a form approved by the Minister, that give certain details including the details of the contravention that is alleged to have resulted in the breach.
- (2) Under the Act and the common law the Panel: has no power or duty to carry out any investigation in relation to any complaint before it; and has no power to compel any information to be provided to it.

- (3) Clause 8 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.
- (4) The Panel is required to make a finding as to whether the breach alleged in the complaint occurred [section 5.110(2)]. In order for it to make any finding that any 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 [section 5.106].
- (5) This level or standard of proof is the same as in ordinary civil legal proceedings where it is referred to as being a preponderance of probabilities (or, the balance of probabilities).
- (6) The Panel is aware that when it makes a finding of a minor breach, the finding is a serious matter as it may affect individuals personally and professionally.
- (7) The approach to a court's findings described in the High Court of Australia case of *Briginshaw v Briginshaw*¹ (*Briginshaw*) is based on the principle that a court in a civil action should not lightly find that a party has engaged in criminal conduct. As accusations of wrongdoing usually involve serious consequences for the defendant, justice demands that the accuser, whether in civil or criminal matters, carries the burden of proof to the requisite standard.
- (8) *Briginshaw* is the leading authority, frequently applied, that where the allegation in a civil proceeding is a serious one:
 - (a) the importance and gravity of the allegation makes it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the evidence survives a careful scrutiny; and
 - (b) circumstantial evidence cannot satisfy a sound judgment of a state of facts if that evidence is susceptible of some other not improbable explanation; and
 - (c) if the evidence adduced, when subjected to these tests, satisfies the tribunal of fact that the conduct alleged was committed, it should so find.
- (9) The contents of paragraphs 7(8)(a) and 7(8)(b) immediately above, taken together, are referred to in these Reasons as the *Briginshaw* principles.
- (10) Her Honour Branson J, in her separate reasons for judgment in the Full Federal Court case of *Qantas Airways Limited v Gama*² (*Gama*), has considered and expressed her views on the *Briginshaw* approach - which views were generally agreed with by French J, as he then was, and Jacobson J in their joint reasons for judgment in *Gama*³.
- (11) In the Panel's view, the *Briginshaw* principles and Branson J's said views have relevance when the Panel is dealing with a minor breach complaint.

¹ [1938] HCA 34; (1938) 60 CLR 336

² [2008] FCAFC 69

³ *Supra*, at [110]

Attachment B

Relevant Background and Material Facts

1. The land concerned in this matter is commonly known as Lot 212, House Number 365, Scarborough Beach Road, Innaloo (the land). In July 2006, and since then, its freehold owner was or is in effect Caltex Australia Limited (which includes the former corporation commonly known as Ampol, after a merger in 1995 [Doc G1]) (Caltex).
2. In July 2006, the improvements on the land consisted of an Ampol Service Station, which had been leased to “the Martino Family” for many years. The service station was known as Ampol Doubleview, and as Martino’s Autos, and included a vehicle workshop for vehicle servicing and repairs.
3. In July 2006 an application to redevelop the land as a ‘Service Station Shop’ was lodged with the City. There were a number of outstanding items with the proposal, the application was not determined within the statutory timeframe, and was ‘deemed refused’. Then, there was an application by or on behalf of Caltex to the State Administrative Tribunal (the SAT) for a review of the refusal, which was withdrawn by Caltex or at its direction in order to reconsider the proposed development and to address the issues identified with the City. The subject development application (as described below) in this matter was the redesigned proposal arising from that reconsideration.
4. At the Ordinary Council Meeting held on 13 October 2009 (the October 2009 OCM) item 10.1/AP6 was for Council to consider: an application by Planning Solutions (on behalf of Caltex) for a Convenience Store/Service Station at the land (the subject development application) following comments received during the advertising period; and an amended Outline Development Plan (ODP) for Precinct 6 (south) of Town Planning Scheme No. 38, which precinct includes the land.
5. In relation to the said item 10.1/AP6, the publicly available confirmed minutes of the October 2009 OCM include the City’s Manager Approvals Report (of 11-12 pages) (the Officer Report) that includes the following relevant passages:

“Town Planning Scheme No. 38 identifies a number of ‘Preferred’ and ‘Contemplated’ uses for Precinct 6. Service Station is a ‘Preferred’ use, while the Convenience store element is neither a ‘Preferred’ nor ‘Contemplated’ use.”

...

“The current ODP designates the subject site as a ‘Service Station Shop’ and depicts an indicative site layout (i.e. building envelope, bowsters and parking configuration).”

...

“Applicant’s Justification

General comments

- 1.1 The proposed redevelopment is intended to facilitate improvement of the appearance and operation of the ‘Service Station’ use, improving the quality of service offered to the community by the business, and enhance the site’s effect on the amenity of the overall locality.

- 1.2 Specifically, the existing 'Service Station' will be re-branded from the 'Ampol' to 'Caltex' identity logo, and an associated 'Star Mart' component (a standard feature of Caltex Service Stations) will form part of the redevelopment. The redevelopment provides an improvement to the amenity of the area, whilst at the same time ensuring the operation and appearance of the facility is consistent with current trends in petroleum retailing.
- 1.3 The existing 'Service Station' development is approaching the end of its economic life. The appearance of the site is considered to be below the standard expected of a modern 'Convenience Store', and services available are limited. The proposal presented provides an excellent opportunity to improve the viability of the existing 'Service Station's service to the locality.
- 1.4 As the subject site is consistent with the intent of the subject site's zoning and the City's strategic planning for the locality, approval of the proposed redevelopment is justified and warranted."

...

Removal of vehicle servicing component

- 1.11 We understand the City has received a number of submissions and/or petitions with regard to the removal of the existing vehicle servicing component from the proposed redevelopment.

In this regard, we trust the City's officers will acknowledge the subject site is significantly constrained in terms of developable area. Quite simply, there is insufficient developable land area to accommodate a modern 'Convenience Store' and vehicle servicing component, which requires a considerable workshop area and additional car parking.

Notwithstanding, the City is required to consider the proposal as submitted, and is not to have regard to other uses which do not form part of the application. There is no statutory basis for the City to seek to require the retention of the vehicle servicing component."

...

"[Officer] Comment

Proposed Use

The proposal falls within the Outline Development Plan for Precinct 6 (south) of Town Planning Scheme No 38 for the area bounded by Scarborough Beach Road, Bowra Avenue and Ewen Street, Innaloo.

The development involves the demolition of the existing Ampol Service Station facility on Lot 12, House Number 365, Scarborough Beach Road, Innaloo and the construction of a new Caltex Star Mart Facility ('Service Station and associated 'Convenience Store').

The Convenience Store component of the new development is neither a contemplated or preferred use within Precinct 6 of the Stirling City Centre Scheme Area. As the use exists and the development is consistent with the existing use it is considered that the proposed use will not have a detrimental affect on the surrounding area.

The design of the convenience store / service station is such that the orientation of the canopy and convenience store building differs from the approved Outline Development Plan. It is noted that the Outline Development Plan is an indicative layout and the minor amendments proposed to the layout and orientation of buildings are considered to be acceptable.”

...

“Removal of vehicle servicing component

The proposal does not include the retention of the mechanic’s garage. The ‘Service Station’ use class which includes the greasing, servicing and repairing of motor vehicles is a preferred use within Precinct 6 of the Stirling City Centre Scheme. However, it is agreed with the applicant that there is no statutory basis for the City to seek to require the retention of the vehicle servicing component. Therefore the City cannot impose a condition that the applicant needs to provide a mechanic’s garage as part of the development.”

7. In relation to the said item 10.1/AP6, the publicly available confirmed minutes of the October 2009 OCM also record the following, among other things:

- (a) Council Resolution 1009/004, which is Council’s decision to approve the subject development application on stated conditions;
- (b) the motion that became that decision (the relevant motion) was in identical terms to the Officer Recommendation in the Officer Report;
- (c) the relevant motion was moved by Councillor Italiano, and seconded by Councillor Stewart;
- (d) the relevant motion was put and declared carried (7/6);
- (e) the 6 Councillors who voted for the relevant motion were Councillors Boothman, Getty, Italiano, Proud, Sebrechts and Stewart, and the 6 Councillors who voted against it were Councillors Collins, Furlong, Michael, Re, Thomas and Tyzack; and
- (f) the relevant motion was carried by the presiding person’s casting vote (sic, his second vote pursuant to section 5.21(3)) being for it.

8. The recording on the CD [*Doc B5*] in regard to the debate on said item 10.1/AP6 at the October 2009 OCM, records among other things that:

- (1) Councillor Italiano merely moved the relevant motion in accordance with the said Officer Recommendation – i.e. he did not speak for it.
- (2) Councillor Stewart seconded the relevant motion, and said there was no valid reason why the said Officer Recommendation should not proceed.

- (3) Councillor Re spoke against the redevelopment apparently on the basis, in essence, that:
- (a) no Councillor other than her lives near Martino Autos, although Councillor Thomas may often drive past it;
 - (b) the land is only 200m away from the BP service station and convenience store;
 - (c) it would be a repeat of the City's poor planning decisions in the past for Council to approve the redevelopment;
 - (d) a lot of elderly people have their cars serviced at Martino Autos;
 - (e) the Martino family provide services to the local community, and the City runs a service organisation;
 - (f) if the redevelopment was approved Woodlands' people would no longer have access to Martino Autos and would have to go all the way to Osborne Park, through all that traffic in-between as a result of poor planning in the past;
 - (g) if the redevelopment was approved there would be less people employed at the new service station/convenience store than are currently employed at Martino Autos,
 - (h) a consequence of less people being employed at the new service station/convenience store would be that there would be a greater need for safety in the area;
 - (i) the redevelopment is purely a money making exercise;
 - (j) it would be a travesty for Council to approve the redevelopment;
 - (k) if Council approve the redevelopment the decision would be against the City Centre's sustainability; and
 - (l) if Council approve the redevelopment the City would be going backwards to the developers.
- (4) Councillor Sebrechts asked what would happen if Council rejects the redevelopment. Mr Ross Povey, the City's Director Planning and Development, advised Council, among other things that in his view the applicant may apply to the SAT for a review of Council's decision, as it had previously done.

9. On 5 February 2010 Councillor Re circulated to a number of persons an email newsletter with the subject/heading "WAG 3 Update 4 February" (the newsletter). The style is that of an informal community newsletter. The first 4 items were respectively headed "Wembley Downs Soccer Club – registration"; "Samba drum workshop"; "slam volleyball carnival" and "Funtopia kids carnival". The article being Item 5 of the newsletter (the article) read:

"5. Martino service station – Ampol - Scarborough beach Road Innaloo

It is with deep regret that I officially inform you that the majority of Councillors at the City of Stirling voted for the redevelopment of the Martino service station site and they have to leave within weeks to make way for just a petrol station and convenience store (like BP 200 metres down the road).

The redevelopment could have included a service centre if Councillors had voted that it stayed on the site and the area cosmetically attended to!

This site was held by the four generations of the local Martino family for 53 years, which supported their families and our community. They employed around 15 local people, was the only local place to hire a trailer or a lawn mower, get your car serviced (and often a free lift home while it was being worked on) and actually do drive way service if you didn't want to put petrol in your car and all of course with a smile and a friendly chat ☺. The current Martino service station is in keeping with the objectives of the Stirling City Centre the new proposal does not appear to parallel itself! The passage below is taken from the Council minutes from the meeting, the whole of the item and other items are available on the Council's website www.stirling.wa.gov.au

It was especially disappointing to see the other local ward Councillor Proud (9446 6929) and Councillor Italiano (9244 8355) vote for the redevelopment. If either councilor (just one) had voted against the redevelopment, the results would have been different. If you contact them you may be able to find answers that I can't and also contact Mayor Boothman (9207 3033) who used his two votes to push the Martino family out of the 53 year old local family business

Council Resolution - 1009/004

Moved Councillor Italiano, seconded Councillor Stewart

1. That the Western Australian Planning commission be ADVISED that the amended Outline Development Plan for Precinct 6 (south) for the area bounded by Scarborough Beach Road, Bowra Avenue and Ewen Street, Innaloo be **approved**.
2. That Pursuant to clause 2.8.2 (b) of Town Planning Scheme No 38 the application for a convenience Store/Service Station at Lot 212, House Number 365, Scarborough Beach Road, Innaloo be **APPROVED** subject to the following conditions:
[The conditions, as per the said minutes, are then set out in full]

The motion was put and declared CARRIED (7/6).

FOR: Councillors Boothman, Getty, Italiano, Proud, Sebrechts and Stewart.

Against: Councillors Collins, Furlong, Michael, Re, Thomas and Tyzack.

Mayors Casting Vote - For: Councillor Boothman."

[Formatting, emphases and differing print sizes similar to that supplied]

10. At the time of the October 2009 OCM and in February 2010, Councillor Proud and Councillor Re were the City's Councillors elected by the Doubleview Ward electors, and Councillor Giovanni Italiano JP (Councillor Italiano) was one of the two City's Councillors elected by the Osborne Ward electors. [Doc G2]

Attachment C

Councillor Proud's claims

1. The Panel notes that in her attachment 1 [p2DocB2] to the complaint, Councillor Proud says:

"The decision made was a Council decision however, Cr. Re, in omitting key information and facts pertaining to the item mislead the readers of her publication by allowing/encouraging them to believe that I (or the other councillor named) were solely responsible for the inevitable closure of the Martino workshop business.

Additionally, Cr. Re encouraged the readers of her newsletter to contact me and another Councillor *to find answers that I can't...*"

These actions resulted in members of the community (readers of her newsletter) making contact with me. This contact was generally of a vicious and nasty nature, eg. aggressive, accusatory and rude tone. Additionally, anomalous messages containing offensive language were left on my home answering machine which my family has access to.

While I accept in my role as a Councillor, I contribute to decisions being made by Council that sometimes have a negative effect on an individual and/or group, I do not accept that the above demonstrated actions of Cr. Re were in the best interest of the City and/or that of an Elected member. I strongly believe they were done to cause detriment to myself personally and in my role as her co-ward Councillor.

Cr. Re, in the next edition of her electronic newsletter dated February 15, 2010 reiterated her encouragement and further incited public backlash towards me. See below,

Subject: WAG 3 update 15 February 2010

Hi Everyone

[Deleted]

Irrelevant comments

Thank you to everyone who emailed and rang me with their concerns over what is happening with the voting by Councillors on local issues, especially with regard to the Martino's issue. I can't explain why Councillors vote for or against any item and suggest that you ask them personally as to why they would vote on issues, such as for a redevelopment not to include a workshop, ? why they would want a 53 old, local, family business to leave the neighbourhood?. I don't have the answers. All I can do is just copy the decisions straight from the Stirling website and inform you of the decisions that were made and who made them, the rest is up to you to find the answers!"

2. The Panel notes that in her letter of 29 July 2010 [Doc D] Councillor Proud also says, relevantly:

- (1) At [p1Doc D]: "In the case of the Martino Garage, Caltex had entered into a contractual agreement and were the owners of the property when they applied for a development approval of their land. The City could not dictate to the applicant as to the configuration of their development simply because an aggrieved party wanted to retain their garage. Council can only consider the application as presented by the applicant on its planning merits. Additionally, Council could not modify the design so as to approve the application. It is the applicant's decision as to what is presented for consideration by Council."
- (2) At [pp2-3Doc D]: "... the Item (10. 2/AP6) Council considered on October 13, 2009 did not allow for the retention of the Martino workshop garage. Personally, I would have been in favour of the Applicant retaining the existing workshop garage however, this was a 'commercial' decision made by the site owner (Caltex) in relation to their tenant (Martino). Council did not have the luxury of requesting or demanding that the Applicant include the workshop garage in their (Scheme provision compliant) application."

Cr. Re, in her February 2010 edition of the WAG Update, had every opportunity to convey to her readers that Council did not have the ability to force the Applicant (Caltex) to include the workshop garage in their application to Council. Cr. Re is an experienced councillor having been elected in October 2005 and was a member of the Planning & Development committee when this application was before Council on October 13, 2009. She would have been fully aware of the Quasi-Judicial decision-making role of a councillor, See Attachment B — P&D Quasi-Judicial Decision Making Role of Councillors, Councillors' Friday Update – Friday, 12 February 2010 ...

Instead, Cr. Re chose to target myself and Councillor Italiano (giving our telephone numbers) suggesting that if either one of us had voted against the redevelopment, the results would have been different and I quote from the 4th para ...

... *"It was especially disappointing to see the other local ward Councillor Proud (9446 6929) and Councillor Italiano (9244 8355) vote for the redevelopment. **If either councillor (just one) had voted against the redevelopment, the results would have been different.** If you contact them you may be able to find answers that I can't and also contact Mayor Boothman (92073033) who used his two votes to push the Martino family out of the 53 year old local family business [emphasis supplied]*

Worth noting is the fact that Cr. Re informed her readers in the first paragraph of the same WAG Edition that the majority of Councillors at the City of Stirling voted for the redevelopment of the Martino service station site and I quote the 1st para ...

*It is with deep regret that I officially inform you that the **majority of Councillors at the City of Stirling voted for the redevelopment of the Martino service station site....** [emphases supplied]*

As it was an equal 6/6 vote there was not a majority – the Mayor’s casting vote in favour of the application decided the outcome. Having said that, it could therefore have been any one of the 6 councillors voting/or the application that would have changed the outcome however, Cr. Re chose to highlight myself & Cr. Italiano as being responsible and to contact them (Cr. Italiano & I) *to find answers that I can* ‘t. I would have been more than happy to give the reason for my vote had Cr. Re asked me.

Cr. Re also states incorrectly in the 1st para. “... *and they [Martino’s] have to leave within weeks*” ... Mr. Steve Martino (proprietor of workshop/garage) confirmed to me that Caltex had given them 12 months Notice to Vacate in August 2009. Therefore, Cr. Re’s February WAG Update edition was clearly incorrect – they had 6 months of their tenancy to vacate the site. The fact that Martino’s relocated their workshop garage business at the end of March 2010 to a site in Osborne Park was due to an incentive offered to them by Caltex (the owner of the site). See Attachment C Advertising flyer notifying customers of their business relocation.

Cr. Re may or may not have known the above information however, Mr. Martino would have readily confirmed this to her had she chosen to find out the facts. Instead, by omitting the key facts to the community (readers of her WAG Update) she encourages readers to be dismayed and angry with those she portrays as being responsible.”

- (3) At [p3Doc D]: “Detriment caused to me personally and in my role as Cr. Re’s co-ward councillor by including the article in the publication include:

- 2.2.1 Abusive (anonymous) phone calls and messages left on my answering machine of which my family (including child) has access to.
- 2.2.2 Personal confrontations at functions, events and whilst out shopping.
- 2.2.3 Emails from community members critically questioning why I voted the way I did on ‘the Martino service station’.
- 2.2.4 Negative publicity damaging to my reputation as a local councillor ‘that didn’t support the local community’ could well decrease the likelihood of my being re-elected when I re-nominate in 2011.
- 2.2.5 Personal health due to stress.

Although it was beneficial to have the opportunity to inform those residents who contacted me of ‘all of the facts’ in relation to the issue, it is/was stressful to be incorrectly portrayed and targeted ‘as the one responsible for the loss of a family’s income and business’.

Of the people that contacted or confronted me, most understood (and even agreed) with the reason for my decision when hearing the full facts surrounding the issue.

Of ongoing concern to me are the members of the community who **didn't** contact me and are not aware of the full facts in relation to the issue. It is reasonable to expect that they would believe what was published in Cr. Re's WAG Update and remain unaware of the full facts.

Questionable is Cr. Re's timing of offering her comments regarding the Convenience Store/Service Station in Innaloo item in her WAG Update in February 2010 considering the item was a council-decision made in October the previous year (October, 2009 - some 4 months earlier).

The most disappointing aspect of Cr. Re's WAG update comments in February 10, 2010 is that they provided no benefit to the community and only achieved angst and anger." [bold emphasis supplied]

- (4) At [p4DocD]: "... Information that supports the view that Cr. Re issued the publication containing the Martino Service Station article with the sole or dominant intention to cause detriment to me.

...

I believe Cr. Re's deliberate and negative highlighting of me as, *"the other local ward Councillor Proud (9446 6929)"* ... If either councillor (just one) *"had voted against the redevelopment, the results would have been different ..."*

This was simply untrue – there were 6 councillors who voted FOR the item on October 13, 2009. If any one of the 6 had voted AGAINST, the item would have been lost. The question is: Why highlight me? Why suggest to the readers of her publication that they should contact me to find the answers 'to push the Martino family out of the 53 year old local family business'?

It is reasonable for any of Cr. Re's WAG Update readers to 'assume' that her publication is the whole story. Nobody could reasonably expect that the average resident would read *all* the minutes of an item where they would perhaps be able to determine the obvious outcome from the officer's comments, background information, consultative and submission details. And, even if they did, the wording and planning terms can be complex and make no sense to the average reader not familiar with such terminology. In short, Cr. Re's readers trusted her 'summarised version' and acted accordingly to her suggestion(s) to make personal contact with me.

By highlighting me and giving my personal contact number, Cr. Re gives her readers the tools to contact me demanding the reason(s) for the way I voted on the item."

The Panel notes that in her letter of 29 July 2010 [Doc D] Councillor Proud also says similar things in relation to Councillor Italiano, as is mentioned in paragraph's 2(3) and 2(4) in relation to herself.

Attachment D

Councillor Re's response to the subject allegation

The Panel notes that Councillor Re's response to the subject allegation is her letter of 17 September 2010 [Doc F1], the relevant text of which reads:

"...I respond to the complaint as follows:

General Background

In relation to the material that has been provided to you, I highlight the following:

1. The owner of the land on which is situated the Martino Service Station applied to redevelop the land with a petrol outlet and convenience store but without any motor vehicle repair or service facility.
2. There was a strong ground swell in the community against any redevelopment of the site which do not include a service centre.
3. A petition signed by approximately 3000 constituents and all the submissions received from the advertising of the redevelopment opposed the development without a service centre.
4. The officers of the Council recognise that the preferred use of the land was a service station which includes a greasing, servicing and repair of motor vehicles.
5. I had the view at the time of the lodgement of the development application, and I still hold that view today, that it was clearly in the interests of the constituents of the my Ward that a repair and servicing facility should remain on the site.
6. All councillors have a choice on how they vote on items and not all councillors agree on an item. On many occasions the constituents are aggrieved by the decisions of Council and will make angry and emotional telephone calls to Councillors.
7. After the decision was made by Council I received a plethora of complaints and enquiries from constituents wanting to know why Council had not ensured that a motor vehicle service centre remained on the site.
8. The complainant alleges that I initiated a public backlash which is not correct as the backlash was initiated by the manner in which the Council had voted to approve the redevelopment without a repair or service facility.
9. Constituents regularly approach me with queries and I do refer them to the Council website or to other people who may properly answer their questions.
10. At the time of issuing the newsletter and at the time that they had made the decision I did not understand the reasons behind the making of their decisions. It is normal and reasonable for local ratepayers to ask questions and query the decisions made by Council.

11. The community newsletter WAG was created by me in 1994 to inform residents of local issues and as a method of communication. I was elected to Council in 2005 and I still provide the community with my newsletter,
12. WAG is distributed to people who are interested in hearing about events and issues within the City of Stirling's district.
13. The motion in question was placed by Council on their website on the 17 October 2009 and I downloaded it from the City of Stirling public website and forwarded through WAG on the 15 February 2010 to provide information to the residents as the result of the numerous concerned and angry calls that I had received when the community realised the Martino's had to leave the site after 54 years of operation due to the Council decision,
14. I distribute the newsletter as a member of the community from my personal email account.
15. I enclose a copy of the relevant newsletter with the Martino Service Station article in it in order to show its true context.
16. I have never incited any constituent to abuse, threaten, councillor Proud or Councillor Italiano.

Determinative Issues

In relation to the determinative issues in the matter I use your descriptions as set out in page 2 of your letter.

- (a) (i) I am the author of WAG.
- (b) (ii) WAG was issued on a regular basis (from 1994) prior to me becoming a Councillor (2005) and I continue to issue WAG in my personal capacity from my personal email account and I have never purported to be issuing that newsletter in my capacity as a Councillor.

(iii) The publication of WAG is not a use of my office as a Council member.
- (c) (i) Even if the newsletter was issued in my capacity as a Council member then I refute that I was making improper use of my office.

(ii) After the decision of Council was made I received numerous enquiries about the decision.

(iii) I could not and would not try to explain the reasoning that Cr Proud and Cr Italiano or any other Councillor who voted for the redevelopment had for making the decision that they did make.

(iv) As Cr Proud is the local ward member and Cr Italiano is a Councillor then I consider it entirely proper that they be able to justify or defend their decisions.

- (d) (i) As you are aware, the role of a Councillor includes representing the interests of the electors, constituents and residents of my district providing leadership and guidance to the community in the district and participating in the Council's decision making processes.
- (ii) The claim of detriment made by the complainant is that the complainant was abused by constituents and threats were made to the complainant by constituents.
- (iv) The complainant maintains in her complaint that of the people that contacted or confronted her, most understood and even agreed with the reason for her decision when hearing the full facts surrounding the issue. If that is the case, then no detriment was suffered by the complainant.
- (v) There is no evidence to suggest that people who did not contact the complainant have a negative view on the complainant. The Complainant is indulging in baseless speculation to make such an allegation.
- (vi) In any event, having to deal with angry constituents who are dissatisfied with a Council decision is not a detriment but duty of all Councillors.

Summary

All of the information that I disclosed in WAG relating to the Martino service station was already available in the public domain.

I believe that the complaint is vexatious and borne out of the party political interests of the Complainant.

Upholding a complaint that one Councillor (myself) should be responsible for the emotional response of a disgruntled constituent to another Councillor (the complainant) is a curtailment of the basic right of the members of the community to freely express themselves in relation to community issues and freely access council motions and decisions on the internet

I look forward to your response in relation to this matter."

Attachment E

Views and material on regulation 7(1) of the *Local Government (Rules of Conduct) Regulations 2007*

Relevant legislation

1. Regulation 7 reads:

- “(1) 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; or
(b) to cause detriment to the local government or any other person.
- (2) Subregulation (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.”*

[Note: Section 5.93 prescribes the offence and penalty for improper use of (confidential) information. *The Criminal Code* section 83 prescribes the crime and penalty for corruption.]

use of office

2. The Panel notes that section 83 of the *Criminal Code* [see regulation 7(2)] makes reference to a public officer who “acts in the performance or discharge of the functions of his office”, whereas regulation 7(1) refers only to “use of the person’s office”. Accordingly, it is the Panel’s view that improper conduct falling short of being in the performance or discharge of a council member’s office is caught by regulation 7 so long as it involves the use of office.

It is part of the Panel’s general views in relation to regulation 7(1) that:

- (1) An individual undertakes significant public duties when he/she becomes a member of the council of a local government. Those duties are inseparable from the position: he/she cannot retain the honour and divest himself/herself of the duties. This means that he/she can not effectively divest himself/herself of the character of a council member in any of his/her dealings in or with respect to a matter that has come before him/her as a council member or as a member of any of the council’s committees.
- (2) The effective discharge of a council member’s duties is necessarily left to the member's conscience and, in many cases, the judgment of his/her electors. However, the Act and the common law do not approve or support the creation of any position of a council member where his/her personal interest or concern is in breach of or is prejudicial or may lead him/her to act prejudicially to his/her fiduciary obligations or duties owed to his/her council as the governing body of the local government.

- (3) It is imperative that a council member accepts that whenever he/she is acting in his/her capacity as a council member, or is otherwise using his/her office of council member, or when he/she is approached to act or he/she is contemplating or considering acting in any way or in any capacity (other than as a Council member) in relation to a decision made by the Council while he/she is or was a Council member or which he/she is otherwise bound to observe, he/she is required to steadfastly adhere to and actively observe and carry out all of the legal duties and ethical duties that he/she has or had as a Council member, as the matter requires.

'improper use'

3. In *Treby and Local Government Standards Panel*⁴ the then Deputy President of the State Administrative Tribunal (the SAT), Judge J Pritchard (as she then was) said at [26] – [33], as to the term 'improper use' in regulation 7(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 [i.e. the *Local Government Act 1995*] or the Regulations [i.e. the *Local Government (Rules of Conduct) Regulations 2007*], and the regulation has not been the subject of any judicial determination in Western Australia.

According to the *Shorter Oxford English Dictionary*, the meaning of 'improper' includes 'unsuitable' and 'inappropriate'. It is clear that the meaning of the word 'improper' cannot be considered in isolation, but rather will take its flavour from the surrounding context, which includes an assessment of what is involved in role of a councillor, and, in the case of [the Mayor applicant], what is also involved in the role of a mayor, according to the LG Act and the Regulations, and the instruments made thereunder. The role of a councillor includes representing the interests of electors, ratepayers and residents of the district, providing leadership and guidance to the community in the district, and participating in the council's decision-making processes at council and committee meetings: s 2.10(a), (b) and (d) of the LG Act. The role of a mayor includes presiding at meetings in accordance with the LG Act, providing leadership and guidance to the community in the district, and speaking on behalf of the local government: s 2.8(1)(a), (b) and (d) and s 2.8(2) of the LG Act.

...

The meaning of the word 'improper' in the context of provisions similar to reg 7(1)(b) was considered in *Chew v The Queen* (1992) 173 CLR 626 (*Chew*), *R v Byrnes* (1995) 183 CLR 501 (*Byrnes*) and *Doyle v Australian Securities and Investments Commission* (2005) 227 CLR 18 (*Doyle*). In *Chew* and *Byrnes* the Court considered s 229(4) of the *Companies (South Australia) Code* while in *Doyle* the Court construed s 232(6) of the *Corporations Law* (Cth). Each provision prohibited an officer or employee of a corporation from making improper use of his or her position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the corporation. Although s 229(4) created a criminal offence, and s 232(6) is a civil penalty provision, the observations of the Court are highly relevant to the construction and application of reg 7(1)(b), given the similarity between its terms and s 229(4) and s 232(6). In view of these authorities, the following conclusions can be drawn 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 Regulations.

⁴ [2010] WASAT 81

First, impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the [councillor] by reasonable persons with knowledge of the duties, powers and authority of his position as a councillor and the circumstances of the case: *Chew* at 634 (Mason CJ, Brennan, Gaudron and McHugh JJ) and at 647 (Toohey J); *Byrnes* at 514, 515 (Brennan, Deane, Toohey and Gaudron JJ); *Doyle* at [35] (the Court).

Secondly, 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: *Chew* at 640, 641 (Dawson J); *Byrnes* at 514, 515 (Brennan, Deane, Toohey and Gaudron JJ) and at 521 (McHugh J).

Thirdly, 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 or employment: cf *Byrnes* at 521 (McHugh J). Alternatively, impropriety will arise from the doing of an act which a councillor knows or ought to know that he has no authority to do: cf *Byrnes* at 514, 515 (Brennan, Deane, Toohey and Gaudron JJ); *Doyle* at [37] (the Court).

Fourthly, 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 purpose or intention in exercising the power will be important factors in determining whether the power has been abused: *Chew* at 640, 641 (Dawson J); *Byrnes* at 514, 515 (Brennan, Deane, Toohey and Gaudron JJ) and at 521 (McHugh J).

Fifthly, 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 the Council: *Chew* at 634 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Byrnes* at 521, 522 (McHugh J)."

The standards of conduct that are expected of a member of a local government

4. In *Treby and Local Government Standards Panel*⁵ Judge Pritchard said at [87] - [91], on the standards of conduct that are expected of a member of a local government:

"Counsel for the intervenor submitted that 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 in a range of statutory and non-statutory instruments, including the LG Act itself, and the codes 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 governments. Counsel for the intervenor pointed to a variety of such instruments, including s 2.10 of the LG Act, reg 3 of the Regulations, the Standing Orders, including standing order 11.9, and Pt 2 of the Code of Conduct which relates to the conduct of councillors during debates. In relation to [the Mayor applicant], counsel for the intervenor submitted that as the Mayor, [the Mayor applicant] was subject to additional expectations in terms of standards of behaviour, reflected in s 2.8(1) of the LG Act and in the expectation that a mayor, as the chair of council meetings, will remain impartial: Gifford, *The Western Australian Council Meetings Handbook* (3rd ed, 1976) at 23; see also *Arcus v Castle and Wellington Hospital Board* [1954] NZLR 122 at 129.

...

⁵ [2010] WASAT 81

Counsel for the intervenor submitted that a failure to comply with any of the provisions he had identified 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 his position as a councillor and the circumstances of the case, and would therefore suggest an improper use of that office. I accept those submissions.

In the present case, Senior Member Parry concluded that the remarks made by the applicants constituted a breach of Standing Order 11.9 of the Standing Orders. That supports the conclusion that in making the remarks the applicants engaged in an improper use of their office as councillors.

In addition, the nature of the remarks made by the applicants constituted a clear failure to treat [the 3 Councillors concerned] with respect and fairness, and thereby constituted a failure to meet the standard of behaviour for councillors reflected in reg 3(1)(g) of the Regulations. Regulation 3 sets out general principles to guide the behaviour of council members. Although those general principles are for the guidance of council members, it is not a rule of conduct that those principles be observed: reg 3(2) of the Regulations. However, in my view, that does not detract from the fact that those principles provide an indication of the standards which can reasonably be expected of councillors. The contravention of reg 3(2) therefore also supports the conclusion that in making the remarks the applicants engaged in an improper use of their office as councillors."

5. In the Panel's view, the required standards of conduct of council members are in essence those flowing from the fiduciary obligations owed by a council member to his or her council (or local government) as varied or complemented by the Act (which includes all regulations, including the Regulations, made under it), the common law, any relevant code of conduct, and his or her council's decisions and policies.

6. In the Panel's view, the role, responsibilities, empowerment and limitations of a council member include the following:

(1) The role of the council of a local government is set out by section 2.7, which reads:

"(1) The council –

(a) governs the local government's affairs; and

(b) is responsible for the performance of the local government's functions.

(2) Without limiting subsection (1), the council is to –

(a) oversee the allocation of the local government's finances and resources; and

(b) determine the local government's policies."

(2) Thus, by virtue of section 2.7 and the definition of the term 'function' in section 5 of the *Interpretation Act 1984*, it is the role of the council to govern the local government's affairs and to be responsible for the performance of the local government's functions, powers, duties, responsibilities, authorities and jurisdictions.

(3) Section 2.10 defines the role of a councillor:

“A councillor -

- (a) represents the interests of electors, ratepayers and residents of the district;*
- (b) provides leadership and guidance to the community in the district;*
- (c) facilitates communication between the community and the council;*
- (d) participates in the local government's decision-making processes at council and committee meetings; and*
- (e) performs such other functions as are given to a councillor by this Act or any other written law.”*

- (4) Elected members constitute a local government's council. They are responsible for observing and implementing section 2.7 and ensuring the needs and concerns of their community are addressed.
- (5) While a councillor has responsibility under the Act to his/her constituents, this responsibility – particularly the responsibilities under section 2.10(a) and (c) – is subject to (i.e. subordinate to) the councillor's duty to abide by the provisions of the Act and its regulations, any applicable code of conduct and the procedures and decisions of his/her local government.
- (6) The Act does not impose upon a councillor any right to conduct himself/herself in a manner whilst representing the interests of the members of the community, or during the facilitation of communication between the community and council, that is contrary to: the relevant provisions of the Act or its regulations; or the standards of conduct expected of a person in that position; or the council's responsibility for the performance of the local government's functions.
- (7) A councillor will carry out his or her role and functions under section 2.10 by observing and implementing section 2.7 and ensuring the needs and concerns of his or her community are addressed.
- (8) The essential features of the fiduciary relationship, and the fiduciary duties, owed by a council member to his or her council as the governing body of the local government may be summarised as:
 - (a) a duty to act in good faith – i.e. the council member must in his dealings act bona fide in what he considers to be the best interests of the council;
 - (b) an obligation to exercise powers conferred on the council member only for the purposes for which they were conferred – i.e. for “proper purposes”;
 - (c) the no conflict rule – i.e. a council member cannot have a personal interest (i.e. a pecuniary interest) or an inconsistent engagement with a third party where there is a real and sensible possibility of conflict; and
 - (d) the no profit rule – i.e. a council member cannot obtain an advantage for himself or others from the property, powers, confidential information or opportunities afforded to the member by virtue of his position.

- (9) Those fiduciary duties are the paramount duties of a councillor by virtue of the fact that councillors are representatives of their community and elected by and from that community, and take precedence notwithstanding that:
- (a) a councillor, when acting in his capacity as a private citizen, has a conditional right of free expression – i.e. that right is subject only to any lawful restrictions on the right of free speech;
 - (b) it may be expected that councillors will support particular views as to what is in the best interests of the community and that often they will have strong personal views as to what ought to occur in the community;
 - (c) councillors may be expected to hold particular views as to how they would wish their community to develop and to discharge their duties as councillors by reference to those views;
 - (d) councillors may be assumed to hold and to express views on a variety of matters relevant to the exercise of the functions of the council;
 - (e) a councillor's expression of such views is part of the electoral process;
 - (f) by virtue of the political nature of the processes they are involved in as representatives of their community, as recognised under the Act, councillors can obtain input from numerous sources and bring their own opinion to bear on matters for council decisions; and
 - (g) it is expected councillors will have views about the matters before council and express those views in a way which in a tribunal or court context could or would be considered biased, as this reflects the nature of the decision-making process undertaken by councils.
- (10) The council of a local government is an organised body of people performing certain common functions and sharing special privileges. Accordingly, the council of a local government is a collegiate decision-maker, with its members voluntarily elected by willing eligible electors from the community for whom they make decisions.
- (11) As a member of council, the member's '*obligation of fidelity*' to council includes a duty or obligation of loyalty (i.e. to be loyal): to council's decisions made lawfully at a regularly held council meeting; and to a relevant committee's decisions made lawfully at a regularly held committee meeting.
- (12) A council member's duty of loyalty to his or her local government's decisions (particularly those made by its council) exists irrespective whether: the member was present when the decision was made; the member voted for or against the decision; the member agreed or not with the decision or the reason or any of the reasons for the decision. However, there are situations when this duty of loyalty does not apply – for example, without limiting other examples:
- (a) when a matter before a council meeting or a relevant committee meeting is in relation to a motion or a notice of motion to revoke or change a decision of the council or the committee; and

- (b) when a council member has doubt about the facts or lawfulness of a proposed or actual process or decision by council, a relevant committee or otherwise by or on behalf of the local government – in which case, it is appropriate that the member:
 - (i) bring the matter to the attention of council by lodging an appropriate notice of motion; and
 - (ii) if council fails to deal with the notice of motion in a lawful manner or in a way that is not satisfactory to the member, to report the matter to the appropriate agency as the case requires.

‘advantage’

7. In considering the meaning of the term ‘advantage’ in regulation 7(1)(a), the Panel notes that the definitions of the noun ‘advantage’ in the Shorter Oxford English Dictionary (6th ed) include: “*a favouring circumstance; something which gives one a better position ... benefit; increased well-being or convenience ... pecuniary profit*”. In the light of these definitions, and the below views on ‘detriment’, it is the Panel’s view that the term ‘advantage’ in regulation 7(1)(a) is to be construed widely, and includes a financial or a non-financial benefit, gain or profit, or any state, circumstance, opportunity or means specially favourable.

‘detriment’

8. In *Treby and Local Government Standards Panel*⁶ Judge Pritchard said at [94] – [96] and [103], as to the meaning of ‘detriment’ in regulation 7(1)(b) of the Regulations

“I accept the submission of counsel for the intervenor that the ordinary and natural meaning of the word ‘detriment’ is loss or damage done or caused to, or sustained by, any person or thing: *Shorter Oxford English Dictionary*.

The meaning of ‘loss’ is the ‘diminution of one’s possessions or advantages; detriment or disadvantage involved in being deprived of something, or resulting from a change in conditions’, while ‘damage’ means ‘loss or detriment to one’s property, reputation etc’ and ‘harm done to a thing or person’ *Shorter Oxford English Dictionary*.

A contravention of reg 7(1)(b) does not depend on actual detriment being suffered by a person: cf *Chew* at 633 (Mason CJ, Brennan, Gaudron and McHugh JJ). However, it must be established that the councillor believed that the intended result of his or her conduct would be that the other person would suffer detriment: cf *Chew* at 634 (Mason CJ, Brennan, Gaudron and McHugh JJ).

...

In my view, therefore, the word ‘detriment’ in reg 7(1)(b) should be given its ordinary and natural meaning.”

⁶ [2010] WASAT 81

9. In *Ryan and Local Government Standards Panel*⁷ the then President of the SAT, Judge J A Chaney (as he then was) agreed with the Panel's previously expressed view on the same matter that "the term 'detriment' [in reg 7(1)(b)] is to be constructed widely, and includes a financial or a non-financial loss, damage, or injury, of any state, circumstance, opportunity or means specially unfavourable. Accordingly, 'detriment' may include a tendency for others to think less favourably of a person, humiliation, denigration, intimidation, harassment, discrimination, disadvantage, adverse treatment, and dismissal from, or prejudice in, employment."

intention - 'to gain an advantage or to cause detriment'

10. The High Court of Australia case of *Chew v The Queen*⁸ ('Chew') considered s. 229(4) of the *Companies (Western Australia) Code*, which read: "An officer or employee of a corporation shall not make improper use of his position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the corporation." In *Chew*, Mason C.J., Brennan, Gaudron and McHugh JJ concluded at [8] that "to" in s. 229(4) should be read as "in order to", and said, at [9] and at [12]:

"Once, as a matter of interpretation, the conclusion is reached that "to" means "in order to", s. 229(4) expressly declares purpose to be an element of the offence and purpose, in the context of that sub-section, is the equivalent of a specific intention."

...

In the course of argument, it was suggested that it was not necessary to establish that an accused person perceived that the alleged advantage or detriment was an advantage or detriment. We do not read the provision in that way. **Once one concludes that there is a purposive element in the offence, it is necessary to establish not merely that the accused intended that a result should ensue, but also that the accused believed that the intended result would be an advantage for himself or herself or for some other person or a detriment to the corporation.**" [Bold emphasis added]

11. Accordingly, in the Panel's view, *Chew* appears to stand as authority in Western Australia for the following propositions:

- (1) The proper interpretation of "to" in regulation 7(1) is "in order to", and thus regulation 7(1) on its face reads: "A person who is a council member must not make improper use of the person's office as a council member: *[in order to]* gain directly or indirectly an advantage for the person or any other person; or *[in order to]* cause detriment to the local government or any other person."
- (2) Regulation 7(1) expressly declares purpose to be an element of the offence, and purpose in the context of that regulation, is the equivalent of a specific intention.
- (3) When considering whether a breach of regulation 7(1) has occurred, it is the subjective purpose or the specific intent of the council member with which the Panel is concerned.

⁷ [2009] WASAT 154 at [31]-[32].

⁸ [1992] HCA 18; (1992) 173 CLR 626

The test for establishing a Council member's specific intent

12. In criminal law proceedings under the traditional common law, the guilt or innocence of a person relied upon whether they had committed the crime, *actus reus*, and whether they intended to commit the crime, *mens rea*. Put simply, *mens rea* refers to the mental element of the offence that accompanies the *actus reus*. In some jurisdictions in Australia the terms *mens rea* and *actus reus* have been superseded by alternative terminology – e.g. the elements of all federal offences are now designated as "fault elements" (*mens rea*) and "physical elements" (*actus reus*).

13. It is not always possible to prove directly the state of mind of a person involved in a particular event or activity. Often, in criminal proceedings, there will be no direct evidence of the *mens rea* (or subjective intention) with which an accused performed the act complained of. But that will not prevent a jury or trial judge from being able to be satisfied beyond a reasonable doubt that the accused acted with such an intent. A person's subjective intention and state of mind can be inferred in all the circumstances.

14. In *Cutter v R*⁹ Kirby J said the following (relevantly, and without references to authorities):

"..., there was no real dispute either in this Court, or in the Courts below, about the governing principles. The first category concerns those principles which govern the trier of fact in drawing inferences as to the intention of an accused person. ...

As to the rules governing the determination of the intention of an accused person, it was not contested that the Crown bore the onus of establishing beyond reasonable doubt that the appellant intended to kill the constable when he stabbed him. Although the English courts, for a time, pursued a flirtation with a doctrine of presumed intention - such that an accused person was taken to intend the natural and probable consequences of his or her acts - that approach was rejected by this Court. It insisted that the inquiry must be addressed to the so-called "subjective" state of mind of the accused rather than the "objective" state of intention which the law attributed to the accused upon the basis of the objective facts. The foundation for the rule upheld by this Court is the fundamental principle that, statutory exceptions apart, intention must go with the act in order to constitute the crime.

Where, as in the case of s 283(1) of the Code, intention is an element of the offence, there must be proof of a specific intent of the kind charged. Mere recklessness towards, or foresight of the likelihood of, such harm occurring without such a specific intent is not sufficient. The Crown accepted that the law on offences of specific intent in Western Australia was settled. The trier of fact had to be satisfied, to the requisite standard, as to the subjective intent of the accused.

However, because the accused is ordinarily entitled to remain silent, putting the prosecution to the proof of the crime alleged, a practical problem is commonly presented in the proof of intention where the accused gives no direct evidence, or believable evidence, as to the intention at the relevant time. Intention cannot be proved as a fact. The only course open to the trier of fact (judge or jury) is to draw inferences as to the accused's intention at the relevant time from the facts proved in the evidence. As Kennedy J observed in this case:

⁹ [1997] HCA 7; (1997) 143 ALR 498; (1997) 71 ALJR 638 (29 April 1997)

"The intention with which the applicant acted resided ... in the mind of the applicant himself, and any finding of an intention to kill was necessarily a matter of inference from the facts."

The same thought appears, but with emphasis upon the criminal standard of proof, in what Dixon J said in *Martin v Osborne*:

"If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculcation of an accused person the evidentiary circumstances must bear no other reasonable explanation."

It has been repeatedly pointed out, by reference to this dictum, that the task of the trier of fact is not to evaluate competing hypotheses and to consider whether they are equally open to acceptance or whether one is "'more consistent' as if there could be degrees of consistency". In *Plomp v The Queen*, Dixon CJ explained, citing his own earlier words in *Martin v Osborne*:

"This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed".

In *Shepherd v The Queen*, Dawson J (with the concurrence of Mason CJ, Toohey and Gaudron JJ) remarked:

"[Intention] is something which, apart from admissions, must be proved by inference. But the jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately."

It is important to draw a distinction between the intention of the accused and his or her motives, desires, wishes or hopes in doing the act alleged to constitute the crime charged. Attempts have been made to define the meaning of "intent" or its derivatives. However, the better view is that the word, being one of ordinary acceptation, should not be defined but should be left to the trier of fact without elaboration as to its meaning. The only exception is a case where some element in the evidence suggests the need for elucidation, so as to draw the distinction between intention, on the one hand, and the accused's motives, desires, wishes, hopes, reasons or expectations, on the other.

Clearly enough, where there is no direct evidence to which the trier of fact can safely resort, so as to draw an inference as to the "subjective" intention of the accused, the principal focus of attention will ordinarily be the facts surrounding the alleged offence.

...

In *Shepherd v The Queen*, Dawson J had earlier said:

"[T]he guilt of the accused must be established beyond reasonable doubt and ... [the trier of fact] must entertain such a doubt where any other inference consistent with innocence is reasonably open on the evidence."

15. On the distinction between 'motive' and 'intention', in the House of Lords case *Hyams v DPP*¹⁰ Lord Hailsham of St. Marylebone said, at p.7:

"It has been pointed out more than once that "motive" has two distinct but related meanings. I do not claim to say which sense is correct. Both are used, but it is important to realise that they are not the same. In the first sense "motive" means an emotion prompting an act. This is the sense in which I used the term when I said that the admitted motive of the appellant was jealousy The motive for murder in this sense may be jealousy, fear, hatred, desire for money, perverted lust, or even, as in so called "mercy killings", compassion or love. In this sense motive is entirely distinct from intention or purpose.

It is the emotion which gives rise to the intention and it is the latter and not the former which converts an *actus reus* into a criminal act.

...

It is, however, important to realise that in the second sense too, motive, which in that sense is to be equated with the ultimate "end" of a course of action, often described as its "purpose" or object", although a "kind" of intention", is not co-extensive with intention, which embraces, in addition to the end, all the necessary consequences of an action including the means to the end and any consequences intended along with the end."

16. It is also noted that an intentional act may involve multiple aspects, only one of which evinces a primary intention, while the others are indicative of secondary intentions. For example, a council member may have a particular result in mind (e.g. to gain an advantage for someone) in making improper use of his/her office even though he/she accepts that such act is also likely to result in detriment to his/her local government. The latter result, though perhaps regrettable to the council member, would be a secondary intention in that it is a likely effect willingly accepted. Equally, a council member may intend an act to cause detriment to someone in making improper use of his/her office even though he/she accepts that such act is also likely to result directly or indirectly in an advantage for him/her or someone else. Here, the advantage is a secondary intention in that it is a likely effect willingly accepted.

17. In view of the above material in this Attachment, it is the Panel's views that:

- (1) The test for establishing that a Council member had the necessary subjective purpose or specific intent in order for him/her to be culpable (i.e. guilty, blameworthy or responsible) for a breach of regulation 7(1), is whether or not the evidence demonstrates that it is more likely than not that in committing the relevant conduct the member believed that the intended result of such conduct would be both or either: to gain directly or indirectly an advantage for the member or any other person; and/or to cause detriment to the local government or any other person.
- (2) That belief may be inferred from both or either of the member's motives and/or the other circumstantial evidence, if such inference is more likely than not the only reasonable inference to be drawn from such motives and/or such circumstantial evidence, as the case may require.

¹⁰ [1974] UKHL 2

- (3) If it is established that a Council member has made improper use of his/her office and his/her intention in doing so was both to gain directly or indirectly an advantage for the member or any other person and/or to cause detriment to the local government or any other person, it may be appropriate that the relevant conduct is the subject of two Panel findings of minor breach – i.e that a breach of regulation 7(1)(a) has occurred, and that a breach of regulation 7(1)(b) has occurred – although any sanction under section 5.110(6) for such breaches may possibly be imposed on the basis that only one minor breach has occurred, noting that:

- (a) in *Treby and Local Government Standards Panel* Judge Pritchard said at [124] – [126]:

“The conclusion that a sanction should be imposed for the minor breaches raises for consideration whether separate sanctions should be imposed in respect of each minor breach by the applicants. That issue arises, in particular, because of the similarities between the provisions which the applicants contravened, and because the evidence which established each minor breach was the same.

In the criminal context, the general principle in Western Australia is that if the evidence necessary to establish two offences is identical, an offender should not be punished twice for the same conduct: cf s 11 of the *Sentencing Act 1995* (WA) and *Plenty v Bargain* [1999] WASCA 67 at [69] - [72] (McKechnie J); cf *Pearce v The Queen* (1998) 194 CLR 610 at 623 (McHugh, Hayne and Callinan JJ).

In the present case, although standing order 11.9 and reg 7(1)(b) contain some similar elements, they are not identical, but the evidence which was relied upon to establish each breach - namely the transcript of the Special Meeting - was the same. Counsel for the intervenor accepted that if this was a criminal case, then s 11 of the *Sentencing Act 1995* (WA) would apply. Although the minor breaches are not criminal offences, the same general principle which is applied in the criminal context should be applied in determining the appropriate sanction in this case. In my view, it would therefore be inappropriate to impose a sanction for each minor breach in this case.”

and

- (b) section 11(1) of the *Sentencing Act 1995* (W.A.) reads:

“If the evidence necessary to establish the commission by a person of an offence under the law of this State is also the evidence necessary to establish the commission by that person of another such offence, the person may be charged and convicted of each offence but is not to be sentenced for more than one of the offences.”

Attachment F

Issues arising, and issues in dispute, in dealing with the subject allegation

Issues arising in dealing with the subject allegation

1. In the light of the views and material set out in **Attachment E**, it is the Panel's view that the issues which arise, and the issues in dispute, in dealing with the subject allegation are.

- (1) Was Councillor Re a person who was a Council member at the October 2009 OCM and in February 2010?
- (2) If issue (1) is answered in the affirmative, on 5 February 2010 did Councillor Re circulate to a number of persons her email with the subject/heading "WAG 3 Update 4 February"?
- (3) If issue (2) is answered in the affirmative, was such conduct a use of Councillor Re's office as a Council member?
- (4) If issue (3) is answered in the affirmative, viewed objectively, was such conduct an improper use of Councillor Re's office as a Council member?
- (5) If issue (4) is answered in the affirmative, in committing the relevant conduct did Councillor Re believe that the intended result would be to cause detriment to both or either of Councillor Italiano and/or Councillor Proud.

Issues in dispute in relation to the subject allegation

2. The Panel notes that:

- (1) In Councillor Re's response [*Doc F1*] she:
 - (a) admits, does not dispute or indicates that there is no dispute in respect of, some of the several issues identified in paragraph 8 above, namely:
 - (i) that she was a person who was a Council member at the October 2009 OCM and in February 2010; and
 - (ii) that on 5 February 2010 she circulated to a number of persons her email with the subject/heading "WAG 3 Update 4 February"; and
 - (b) does not appear to contend that any issue, other than the issues identified in paragraph 2 above in this attachment arise in relation to the subject allegation.
- (2) Accordingly, the issues in dispute in relation to the subject allegation are confined to issues (3), (4) and (5) identified in paragraph 1 above in this attachment.

Attachment G

Some passages and provisions of the City of Stirling Code of Conduct (as adopted by Council on 13 October 2009, and amended on 15 December 2009)

[At the commencement:]

[The City's] **Values** are: **integrity; diversity; environment; respect; community participation; and accountability**

[At page 5:]

“What is Expected of Elected Members and Employees?”

Elected Members and Employees serve the people who live within the City's boundaries and must look after the best interests of these people. This places both Elected Members and Employees in a unique position of trust. Consistent standards of ethical behaviour must be applied to meet the interests and expectations of these people.

Elected Members and Employees are bound by the standards of ethical behaviour provided in the Code. In addition, Elected Members must observe the standards of conduct provided in the [Local Government (Rules of Conduct) Regulations 2007]. The Code may refer to those standards or where appropriate set additional guiding standards.”

[At page 9:]

“All Elected Members and Employees should behave appropriately towards each other and in the course of carrying out public duties. Their conduct should contribute towards creating and maintaining a supportive work environment.

Appropriate behaviour includes conduct that is courteous, polite and businesslike. It involves treating colleagues with respect and courtesy. The City's values should be applied in all business dealings and underpin behaviour in relationships.”

[At page 12:]

“Contact with the Community

Elected Members and Employees must make every effort to be positive, helpful and effective when communicating with the community.

Elected Members are the public face of local government. Their dealings with people in the community are numerous. They communicate with them about their issues and act on their behalf at Council meetings. It is therefore important for Elected Members and Employees to ensure:

- confidential information remains confidential unless it is determined by law or otherwise that release of the information is appropriate; and
- decisions, processes and policy information which affect the community are communicated accurately and in a timely way.

[At pages 14-15:]

“Dealing with the Media – Making Public Comment

The media includes all traditional forms of media and extends to dealings with reporters from newspaper, television and radio and contributions made to social media sites such as Facebook, Twitter etc.

Only the Mayor, or the CEO if the Mayor agrees, can speak on behalf of the City. The City's media contact policy provides the following are authorised to release media statements on behalf of Council:

- Mayor;
- CEO;
- Executive Managers;
- persons authorised by a resolution of Council;
- persons authorised by the above to represent the City as spokespeople.

Unless otherwise authorised to do so, Elected Members or Employees who make public statements express them as opinions only, which do not necessarily represent the City's position. Elected Members and Employees who speak publicly against any Council resolution without authorisation to do so could be using the information, or be seen to use the information improperly and run the risk of causing detriment to the City. Consequently, Elected Members and Employees should not speak publicly about Council business without authorisation to do so.

...

All contact Elected Members and Employees have with people outside the City, media or otherwise, should be positive, informative and appropriate.”

Attachment H

Whether regulation 7(1)(b) should be read down, having regard to the implied freedom of political communication under the Commonwealth *Constitution*

On this issue, in *Treby and Local Government Standards Panel* [2010] WASAT 81, the then Deputy President of the State Administrative Tribunal, Judge J Pritchard (as she then was) said at [43] – [59]:

“In their submissions, the applicants contended that reg 7(1)(b) should be read down, in so far as it is capable of application to debate in a council chamber. In making that submission they relied on the decisions of the High Court in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 (*Theophanous*) and *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 (*Stephens*) in which the High Court affirmed its conclusion (in previous cases) that the Commonwealth *Constitution* contains an implied freedom to discuss and publish material concerning political matters. The applicants expressly confirmed that they did not rely on those authorities to advance a submission that reg 7(1)(b) was invalid. As the applicants did not challenge the existence or scope of the implied freedom and as the applicants' case was confined to the construction of reg 7(1)(b) without challenging its validity, I accepted the submission of counsel for the intervenor that this was not a case in which it was necessary to ensure compliance with s 78B of the *Judiciary Act 1903* (Cth).

In order to assess the relevance (if any) of the implied freedom of political communication to the present case, it is necessary to identify more specifically the principle itself. The principles referred to in *Theophanous* and in *Stephens* were discussed in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (*Lange*). In that case, the Court confirmed that the basis for the implied freedom of political communication lies in the system of representative and responsible government established under s 7 and s 24, together with related provisions, including s 1, s 6, s 7, s 8, s 13, s 24, s 25, s 28, s 30, s 49, s 62, s 64, s 83 and s 128, of the *Constitution* (the system of Government established by the *Constitution*). Those sections require the members of the Senate and the House of Representatives to be directly chosen at periodic elections by the people of the States and of the Commonwealth respectively, provide for the fundamental features of representative government, establish the relationship between the Executive Government and the Parliament and provide for a system of responsible ministerial government, and provide for the means by which the *Constitution* may be altered, following the expression of the will of the electors: *Lange* at 55–559.

In *Lange* the Court noted (at 559) that '[f]reedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the *Constitution* creates by directing that the members of the House of Representatives and the Senate shall be 'directly chosen by the people' of the Commonwealth and the States, respectively'. The Court went on to observe (at 560) that '[c]ommunications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation'. The Court therefore held (at 560) that the system of Government established under the *Constitution* implied the existence of a freedom of communication about political matters, because

that freedom was necessary in order for electors to be able to exercise a free and informed choice as electors.

Against that background, the following points can be made in relation to the parameters of the implied freedom of political communication.

First, the implied freedom does not exist only in an election period. Were that so, '[m]ost of the matters necessary to enable 'the people' to make an informed choice will occur during the period between the holding of one, and the calling of the next, election. If the freedom to receive and disseminate information were confined to election periods, the electors would be deprived of the greater part of the information necessary to make an effective choice at the election': *Lange* at 561. Furthermore, this is also apparent from the presence of s 128, and of s 6, s 49, s 62, s 64 and s 83 of the *Constitution* which amongst other things set out the process for amendment of the Constitution and deal with the executive government. Electors need to be able to obtain information about matters that might be relevant to the vote they cast in a referendum to amend the *Constitution* or concerning the conduct of the executive branch of government throughout the life of a federal Parliament: *Lange* at 561.

Secondly, the implied freedom of communication which the *Constitution* protects is not absolute: see, for example, *Nationwide News Ltd v Wills* (1992) 177 CLR 1 at 51, 76 77, 94 95. The implied freedom is limited to what is necessary for the effective operation of the system of government established by the *Constitution*: *Lange* at 561.

Thirdly, s 7 and s 24 and the related provisions of the *Constitution* do not confer personal rights on individuals, but rather 'they preclude the curtailment of the protected freedom by the exercise of legislative or executive power': *Lange* at 560.

Fourthly, in order to determine whether a law of a State or Federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by the provisions of the *Constitution* referred to above, two questions must be answered. First, does the law effectively burden freedom of communication about government or political matters, in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the system of government established by the *Constitution*? If the first question is answered 'yes' and the second is answered 'no' the law will be invalid: *Lange* at 561 2, 567 568; *Coleman v Power* (2004) 220 CLR 1 (*Coleman*) at [96], [196], and [211].

Fifthly, each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters affecting the people of Australia. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege, and those categories are now recognised as protecting a communication made to the public on a government or political matter. Discussion of government or politics at State or Territory level and even at local government level is amenable to protection by the extended category of qualified privilege, whether or not it bears on matters at the federal level: *Lange* at 571.

Sixthly, in some cases it has been accepted that communications about State matters may fall within the implied freedom: *Roberts v Bass* (2002) 212 CLR 1; *Coleman*. However, it is not yet settled as to precisely when a law that impinges on freedom of communication about State or local matters will infringe the implied constitutional freedom of political communication: see, for example, the discussion in L. Zines, *The High Court and the Constitution* (5th ed, 2008) at 545–548; see also the references cited in *McLure v The Mayor and Councillors of the City of Stirling* [No. 2] [2008] WASC 286 at [81] – [82] (Beech J) (but cf *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [197] [198] (Kirby J)).

Dealing with the last point, in the present context it seems to me that there is room for argument as to whether communications of the kind involved in the applicants' remarks would be subject to the implied freedom of political communication. It is difficult to immediately see any connection between those remarks, the subjects of them, or the context in which they were made, on the one hand, and the system of government established under the *Constitution* on the other hand. However that matter was not the subject of argument at the hearing. For present purposes, it suffices to say that even if the implied freedom of political communication applies to communications of the present kind, reg 7(1)(b) does not need to be construed in a manner different from the ordinary and natural construction outlined above, in order to operate consistently with the implied freedom.

The applicants submitted that if reg 7(1)(b) was construed in the manner I have outlined above, it would not be reasonably appropriate and adapted to a legitimate end. They submitted that a construction of reg 7(1)(b) which would be appropriate and adapted to a legitimate end was that if there was a good faith belief and no malicious intent, then elected members of a council should be permitted to publicly discuss any matter that the public was entitled to receive. They submitted that the standard in *Theophanous* and *Lange* was the appropriate standard by reference to which their conduct in the Special Meeting should be assessed in determining if that conduct amounted to an improper use of their offices.

The applicants also submitted that the conclusion that their remarks constituted an improper use of their office as a council member would have the consequence of prohibiting any elected member of a local government in Western Australia from effectively communicating with the community about political and government matters that are directly relevant to the system of representative and responsible government.

I am unable to accept the applicants' submissions. As I explained above, reg 7 is directed, amongst other things, to ensuring that the debate within a council meeting is conducted in a fair, orderly and courteous fashion and that councillors are given the opportunity to speak and to be heard, with the objective of facilitating the proper consideration and determination of council business. However, reg 7 does not prohibit a council member from discussing council business, to question, and in some cases, no doubt, to criticise, the actions of others which impact on matters relevant to the affairs of a local government and the community it serves. In dealing with the finding made by the Panel of a breach of cl 11.9 of the Standing Orders in Treby, Senior Member Parry observed (at [19]):

A councillor is able to meaningfully participate in the good government of the persons in the district and to duly, faithfully, honestly and with integrity fulfil the duties of the office for the people in the district according to his or her best judgment and ability, without reflecting adversely upon the character or actions of, or imputing any motive to, another member or an officer of the local government. Indeed, good government requires courtesy amongst those elected to govern.

The sentiment behind that observation is equally apt to reg 7(1)(b).

In addition, reg 7(1)(b) only limits the freedom of a councillor to engage in such communications in two ways: by doing so in a way which constitutes an improper use of a councillor's office, and by doing so in a way which causes detriment to another person. Provided that the communication does not constitute an improper use of a councillor's office, the fact that the communication causes detriment to another person will not be sufficient to contravene reg 7(1)(b). Similarly, even if the communication involves conduct which is judged to be an improper use of a councillor's office, that would not result in a contravention of reg 7(1)(b) unless the communication is also made to cause detriment to another person. In my view, therefore, reg 7(1)(b) is reasonably appropriate and adapted to the legitimate end of facilitating the proper consideration and determination of council business, in a manner which is compatible with the system of government established under the *Constitution*:

Accordingly, there is no warrant to give reg 7(1)(b) a more limited operation than its ordinary and natural meaning suggests."

Attachment I

The meaning of the term 'respect' in the phrase 'respect for a person'

1. The Panel notes that:

- (1) The Macquarie Dictionary defines 'respect', relevantly, as 'to show esteem, regard, or consideration for' and 'to treat with consideration; refrain from interfering with'.
- (2) The central tenet of Immanuel Kant (1724 – 1804) (Kant) on respect for persons is relevant. The tenet is: "*Act in such a way that you treat humanity, whether in your own person or the person of any other, never simply as a means but always at the same time as an end.*"¹¹
- (3) In Kant's view, the respect we owe others is "*to be understood as the maxim of limiting our self-esteem by the dignity of humanity in another person, and so as respect in the practical sense.*"¹²

2. In the Panel's view:

- (1) Although the contents of paragraphs 1(2) and 1(3) have been extensively discussed by proponents and critics alike, the core meaning of the phrase 'respect for a person' appears to remain as put forward by Kant.
- (2) A council member of a local government will fail to be respectful of another person, and will fail to treat the other person with respect, if the member fails to keep his or her own sense of self esteem (or, ego) in sufficient check so as to give appropriate recognition of the dignity of humanity in, or the majesty or worth of, the other person.
- (3) For practical intents and purposes, the circumstances where the behaviour or conduct of a council member will demonstrate a failure to be respectful of another person, and a failure to treat that other person with respect, include where the member:
 - (a) treats the other person merely as a means to something (because to do so values the other person as less than an end in himself or herself); or
 - (b) shows contempt for the other person (because to do so denies that the other person has any worth) – noting that the term 'contempt' in this context refers to the feeling or attitude with which one regards another person as worthless; or

¹¹ Kant, I., 1785 (1964) 4:429, *Grundlegung zur Metaphysik der Sitten*, translated as *Groundwork of the Metaphysics of Morals* by H.J. Paton, New York: Harper and Row

¹² Kant, I., 1797 (1991) 6:449, *Die Metaphysik der Sitten*, translated as *The Metaphysics of Morals* by M. Gregor, Cambridge: Cambridge University Press

- (c) treats the other person with arrogance (because to do so is a demand that the other person value the member more highly than the other person values himself or herself) – noting that the term ‘arrogance’ in this context refers to an offensive exhibition of assumed or real authority; or
- (d) defames the other person generally, or in a particular way; or
- (e) ridicules or mocks the other person – noting that:
 - (i) the term ‘ridicule’ in this context refers to two cases – namely:
 - (A) when a third person is or third persons are present or in the vicinity, the saying of words or the display of any action or gesture for the purpose (motive or intent) of causing contemptuous laughter at the other person; and
 - (B) otherwise, to deride or make fun of the other person; and
 - (ii) the term ‘mock’ in this context refers to two cases – namely:
 - (A) ridiculing the other person by mimicry of action or speech; or
 - (B) scoffing or jeering at the other person’s action or speech.

Decision-maker's Title: **LOCAL GOVERNMENT STANDARDS PANEL**
Jurisdiction: Complaints of minor breach by local government council members
Act: *Local Government Act 1995*
File No/s: SP 15 of 2010 (DLG 20100101)
Heard: Determined on the documents
Considered: 21 October 2010 & 16 December 2010
Coram: Mr B. Jolly (Presiding Member)
 Councillor C. Adams (Member)
 Mr J. Lyon (Member)

Complaint SP 15 of 2010**Complainant: (Cr) Stephanie PROUD****Council member complained about:****Councillor Elizabeth RE****Local Government:****City of Stirling****Regulation found breached:****Regulation 7(1)(b)****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.

FINDING OF MINOR BREACH

The Panel has made a finding of minor breach (the Finding) in relation to Complaint No. SP 15 of 2010 – namely, that it is more likely than not that:

- (1) On or about 5 February 2010 Councillor Re committed a breach of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) in that she made improper use of her office of Council member to cause detriment to Councillor Giovanni Italiano JP (Councillor Italiano) and to Councillor Stephanie Proud (Councillor Proud) respectively by publishing and circulating an article headed 'Martino service station – Ampol – Scarborough Beach Road Innaloo' in her "WAG 3 Update 4 February" edition of her electronic newsletter known as WAG Update.
- (2) When Councillor Re published and circulated her "WAG 3 Update 4 February" with the article in it the detriment that she intended to cause to each of Councillor Proud and Councillor Italiano was that: that at least some of the people in the City's district would think less favourably of each of them; denigration for having voted for the redevelopment; and adverse treatment from those readers of the newsletter who took up Councillor Re's invitation in the article to contact either of them.

SUMMARY OF DECISION

The Panel's decision on how the said minor breach (the Minor Breach) is dealt with under section 5.110(6) of the *Local Government Act 1995* (the Act) was that, for the following reasons, it ordered the sanction described in subsection (b)(ii) of that section – namely that Councillor Re apologise publicly to each of Councillor Italiano and Councillor Proud, as specified in the attached Minute of Order.

DECISION & REASONS FOR DECISION

References to sections and regulations

1. In these Reasons, unless otherwise indicated a reference to a section is a reference to the corresponding section in the Act, and a reference to a regulation is a reference to the corresponding regulation in the Regulations.

Procedural fairness matters

2. The Panel notes that through its Presiding Member it has given to Councillor Re: notice of the Finding (the notice of the finding); a copy of the Panel's *Finding and Reasons for Finding* in this matter (the Reasons for Finding); and a reasonable opportunity for her to make submissions about how the Minor Breach should be dealt with under section 5.110(6).

Councillor Re's response

3. Councillor Re has responded to the notice of finding and the Reasons for Finding by her letter of 2 December 2010 and its attachments (Councillor Re's response), in excess of 100 pages.

Panel's views on Councillor Re's response

4. The Panel notes that:

- (1) The Shorter Oxford English Dictionary (6th ed) defines the adjective 'relevant' as "Bearing on, connected with, or pertinent to the matter in hand. (Foll. by to.)".
- (2) Under the common law, relevant evidence is evidence that could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings.¹³
- (3) The term 'submission', in the legal sense, refers to a contention presented by a person as part of the matter or case the person is arguing, and the term 'contention' means a point asserted as part of an argument.

5. In regard to Councillor Re's response generally, the Panel notes that:

- (1) Councillor Re foreshadows her intent that she is:

"... prepared to provide additional supporting documentation and make application to the State Administrative Tribunal for a review of the standards Panel decision pursuant to section 5.125 of the Local Government Act if

¹³ *Washer v Western Australia* (2007) 234 CLR 492 at [5], n 4.

required, to ensure my good community standing and professional integrity is upheld."

- (2) Some parts of Councillor Re's response relate to the alleged motives or reasons that she says why Complaint SP 15 of 2010 (the complaint) was made by Councillor Proud.
- (3) The Panel has an obligation to make a finding as to whether the breach alleged in the complaint occurred. [section 5.110(2)]
- (4) The Panel has an obligation to ensure that a finding that a minor breach has occurred 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. [section 5.106]
- (5) It appears that the Panel has no power to dismiss a complaint if it is the Panel's view that a complaint is 'vexatious' in the legal sense – i.e., that the complaint:
 - (a) was instituted with the intention of annoying or embarrassing the council member complained about; or
 - (b) was brought for collateral purposes, and not for the purpose of having the Panel, or another standards panel, adjudicate on the issues arising from the allegation or allegations of breach made in the complaint; or
 - (c) irrespective of the motive of the complainant, is so obviously untenable or manifestly groundless as to be utterly hopeless.¹⁴
- (6) It is doubtful that the current state of the common law is such that an adjudicating body such as the Panel has inherent power to refuse to deal with, or to dismiss, a complaint on the basis that it is an abuse of process.
- (7) In the context of the contents of paragraphs 5(1) to 5(6) above (both inclusive), the Panel considers that the obligation mentioned in paragraph 5(3) above must be observed, irrespective of the complainant's motives or intention in making the complaint.
- (8) The major portion of Councillor Re's response seeks to re-agitate issues which have, as a matter of substance, already been determined or commented on by the Panel in the Reasons for Finding.
- (9) Other parts of Councillor Re's response consist of her allegations about alleged conduct by others, where such conduct – even if it were shown to have occurred – does not appear to have relevance to:
 - (a) the relevant issues involved in the determination of whether or not it is more likely that not that the Minor Breach occurred; or
 - (b) how the Minor Breach should be dealt with under section 5.110(6).

6. The Panel also notes that:

- (1) Item 19 under the heading "Summary" in Councillor Re's response commences:

¹⁴ *Attorney-General v Wentworth* (1988) 14 NSWLR 481 per Roden J at p.481; See also the Western Australian Industrial Appeal Court judgment of Buss J at [33] in *The Commissioner of Police of Western Australia -v- AM* [2010] WASCA 163 (S).

"How elected members vote on items is their own personal choice and their choice alone"

- (2) Item 5 under the heading "General Background" in Councillor Re's response, reads:

"I had the view at the time of the lodgement of the development application, and I still hold that view today, that it was clearly in the interests of the constituents of the my Ward that a repair and servicing facility should remain on the site."

7. In the Panel's view, the part of Councillor Re's response reproduced in paragraph 6(1) above is to be understood on the basis mentioned in paragraph 8 below, and that:

- (1) It appears to the Panel that, broadly, under the area of law known as administrative law or the law of judicial review, when an administrative decision-maker makes a decision – such as the council of a local government making its decision to approve or refuse a development application – the decision-maker (and each of its members, where the decision-maker consists of more than one individual) has an obligation to have regard to relevant considerations only, and not to any irrelevant consideration.
- (2) The Panel is of the view that if a development application is before the council of a local government for its decision:
- (a) the only relevant consideration or issue is, broadly, whether or not the application satisfies all of the relevant town planning criteria or considerations for approval;
 - (b) if the application satisfies all of the relevant town planning criteria or considerations for approval, each council member present has an obligation to approve the application; and
 - (c) if the application satisfies all of the relevant town planning criteria or considerations for approval, and a council member present votes against the approval of the application on the basis that an unlawful condition should be a part of any approval:
 - (i) the council member contravenes the obligation mentioned in paragraph 7(1) above; and
 - (ii) the council member's conduct in so voting is not in the City's interests, nor is it in the interest of the good governance of the people in the City's district.
- (3) The Panel view mentioned in paragraph 14(2) of the Reasons for Finding is relevant – namely, that:

"The statement in the article – "The redevelopment could have included a service centre if Councillors had voted that it stayed on the site and the area cosmetically attended to!" – was more likely than not to have been incorrect when made, on the basis that that the City's Manager Approvals, through the Officer Report considered at the October 2009 OCM, advised Council: "However, it is agreed with the applicant that there is no statutory basis for the City to seek to require the retention of the vehicle servicing component."

Therefore the City cannot impose a condition that the applicant needs to provide a mechanic's garage as part of the development."

- (4) In the light of the contents of paragraphs 7(1) and 7(2) above, and the City's Manager Approvals' advice mentioned in paragraph 7(3) above, it appears to the Panel that Councillor Re – and each other Council member who attended at the City's Ordinary Council Meeting held on 13 October 2009 and voted against the approval of the subject development application on the basis that it did not include a vehicle servicing component – failed to observe both of the obligations mentioned in paragraph 7(2)(b) above.

8. In relation to the part of Councillor Re's response reproduced in paragraph 6(2) above:

- (1) The Panel notes its view mentioned in paragraph 16(3) of the Reasons for Finding, that:
"When Councillor Re made the required declaration of office pursuant to section 2.29(1) after she was elected as a Council member in October 2009:
(a) she declared that she took that office upon herself and would duly, faithfully, honestly, and with integrity, fulfil the duties of the office for the people in the City's district (and not of any of its wards in particular) according to the best of her judgment and ability, and that she would observe the Regulations; and
(b) she voluntarily restricted herself as to the extent that she could express herself in relation to any community issue that had been before the Council."

9. In the Panel's view, Councillor Re's response does not establish any ground or reason why the Panel should doubt the validity of the Finding.

Summary of Councillor Re's submissions

10. In the Panel's view, Councillor Re's response insofar as it consists of her submissions (Councillor Re's submissions) that appear to be or may be relevant to the issue of how the minor breach should be dealt with under section 5.110(6), are the following paragraphs in Councillor Re's response:

- (1) [Item 1 under the heading "Summary" in Councillor Re's response]:

"I do not accept that I have committed the minor breach as alleged in the complaint and believe that this complaint should be dismissed"

- (5) [The penultimate paragraph of Councillor Re's response]

"In summary given my belief of the motivation of the complaint the appropriate method of finalizing this matter, is that it be dismissed"

Panel's views on how the minor breach should be dealt with under section 5.110(6)

11. The Panel notes that:

- (1) Councillor Re has not previously been found under Part 5 Division 9 of the Act to have committed any minor breach.
- (2) When dealing with unrelated complaints, the Panel has previously expressed the views that:
 - (a) a breach of regulation 7(1) is a serious matter and will in almost all occasions deserve the sanction of a publicly 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 the institution of local government and those council members who properly observe the standards of conduct expected of them; and
 - (b) a breach of regulation 7(1) to cause detriment to another person – whether or not the other person is a council member – is a very serious matter and will in almost all occasions deserve the sanction of a public apology to the other person/member, in addition to a public censure.
- (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.¹⁵
- (4) Councillor Re's response indicates that:
 - (a) she rejects the Panel's finding of minor breach and its reasons in the Reasons for Finding; and
 - (b) notwithstanding the Panel's reasons in the Reasons for Finding:
 - (i) she does not express any remorse or contrition for her conduct that the Panel has found was her offending conduct in this matter; and
 - (ii) her approach in these proceedings has at all times been to seek to justify her own conduct.
- (5) Council's decision to approve the subject development application was made on 13 October 2009 and Councillor Re published the subject newsletter ("WAG 3 Update") on 5 February 2010, nearly 4 months later. Accordingly, it can *not* be said that Councillor Re published the subject newsletter, with the offending article in it, in the heat of the moment or without premeditation.
- (6) Councillor Re's publication of the subject newsletter with the offending article in it is a serious matter. It involved taking advantage of her position as a Council member:
 - (a) to breach her duty of loyalty to her Council (as mentioned in the second paragraph 20 of the Reasons for Finding); and
 - (b) to make unwarranted and disparaging comments to members of the public about those of her fellow Councillors who voted to approve the subject development application, in particular Councillor Proud and Councillor Italiano, in effect for complying with their obligations as Council members when deciding whether or not to approve the subject development application.
- (7) As mentioned in the first paragraph 20 of the Reasons for Finding:

¹⁵ *Mazza and Local Government Standards Panel* [2009] WASAT 165 per Judge J Pritchard (Deputy President) at [107].

"In the Panel's view, the only reasonable inference which is open on a consideration of all of the available information is that when Councillor Re published and circulated the newsletter with the article in it her intention and belief was that the intended result would be to cause detriment to each of Councillor Proud or Councillor Italiano – such detriment being: that at least some of the people in the City's district would think less favourably of each of them; denigration for having voted for the redevelopment; and adverse treatment from those readers of the newsletter who took up Councillor Re's invitation in the article to contact either of them."

Appropriate sanctions for the minor breach

12. It is the Panel's view that:

- (1) The Panel's finding that the minor breach occurred constitutes the first time that the Panel has found that Councillor Re has committed any minor breach.
- (2) Notwithstanding Councillor Re's response and the contents of paragraph 11(2) above, the Panel has formed the view with some hesitation that, on balance, Councillor Re's offending conduct in this matter, while serious, is not so serious as to warrant the sanction of a public censure as well as being required to publicly apologise to each of Councillor Italiano and Councillor Proud
- (3) Taking into account Councillor Re's submissions and the reasoning and matters mentioned in paragraphs 11, 12(1) and 12(2) above, it is appropriate and proportionate to the gravity of the minor breach that Councillor Re should apologise publicly to each of Councillor Italiano and Councillor Proud, as specified in the attached Minute of Order, as that sanction:
 - (a) is an appropriate reflection of the seriousness of the minor breach; and
 - (b) is an appropriate reflection of the fact that Councillor Italiano and Councillor Proud were the primary subjects of the respective offending implications made by Councillor Re.

Form of the public apology

13. The Panel notes that:

- (1) When it has dealt with a minor breach by ordering that a council member publicly apologise, the form of the apology specified by the Panel has often been a concise description of the found minor breach/es and a statement by the council member that he or she apologises to the person/s concerned for the offending conduct and for any embarrassment or distress that such conduct caused to such person/s.
- (2) In the context of Part 5 Division 9 of the Act and the Regulations, the components of a full apology (or, a good apology) appear to consist of an acknowledgment of the offending conduct, acceptance of responsibility, expression of remorse or regret, and a promise or undertaking not to repeat the offending conduct.
- (3) However, a forced public apology in the form described in paragraph 13(1) above will often be sufficient to publicise the relevant council member's conduct

in such a way that his/her unacceptable conduct is identified to the public and he/she is effectively sanctioned.

- (4) Where it thinks appropriate, the Panel may order that the person against whom the complaint was made make a full public apology in terms that consist of all of the components mentioned in paragraph 13(2) above.

Panel decision

14. Having regard to the Reasons for Findings, the matters mentioned in paragraphs 11, 12 and 13 above, and the general interests of local government in Western Australia, the Panel's decision on how the minor breach is dealt with under section 5.110(6) is that it orders the sanction described in subsection (b)(ii) of that section – namely that Councillor Re apologise publicly to each of Councillor Italiano and Councillor Proud, as specified in the attached Minute of Order.

.....
Brad Jolly (Presiding Member)

.....
Carol Adams (Member)

.....
John Lyon (Member)

NOTICE TO THE PARTIES TO THE COMPLAINT/S

RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (the 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 "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 under the *State Administrative Tribunal Act 2004* (SAT Act) section 20(1).**
- (3) **The Panel's *Reasons for Finding* and these *Reasons for Decision* constitute the Panel's notice (i.e. the decision-maker's notice) given under the SAT Act section 20(1).**

Attachment

Decision-maker's Title: **LOCAL GOVERNMENT STANDARDS PANEL**
Jurisdiction: Complaints of minor breach by local government council members
Act: *Local Government Act 1995*
File No/s: SP 15 of 2010 (DLG 20100101)
Heard: Determined on the documents
Considered: 21 October 2010 & 16 December 2010
Coram: Mr B. Jolly (Presiding Member)
 Councillor C. Adams (Member)
 Mr J. Lyon (Member)

Complaint SP 15 of 2010

Complainant: (Cr) Stephanie PROUD

Council member complained about:

Councillor Elizabeth RE

Local Government:

City of Stirling

Regulation found breached:

Regulation 7(1)(b)

MINUTE OF ORDER

THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Elizabeth Re, a member of the Council of the City of Stirling, apologise publicly to Councillor Giovanni Italiano JP and to Councillor Stephanie Proud, as specified in paragraph 2 or paragraph 3 below, as the case requires.
2. At the next City of Stirling Ordinary Council Meeting immediately following the date of service of this Order on the said Elizabeth Re:
 - (a) the said Elizabeth Re shall request the presiding person for his/her permission to address the meeting immediately following Public Question Time or during the Announcements part of the meeting or at such time during the meeting when it is open to the public as the presiding member thinks fit, for the purpose of the said Elizabeth Re making a public apology to Councillor Giovanni Italiano JP and to Councillor Stephanie Proud; and
 - (b) subject to the said presiding person giving such permission, at the time permitted by the said presiding person the said Elizabeth Re shall verbally address the City's Council as follows, without her making any introductory words prior to her address, and without her making any comment or statement after her address:

"I advise this meeting that:

- (1) *A formal complaint has been made to the Local Government Standards Panel about certain conduct by me as a member of this*

Council, in publishing my newsletter known as "WAG 3 Update" on 5 February 2010 with an article in it headed "Martino service station - Ampol - Scarborough Beach Road Innaloo" in relation to the City's previous decision to approve a redevelopment application for a service station, without a vehicle servicing component, at the land being 365 Scarborough Beach Road, Innaloo.

- (2) *The Local Government Standards Panel has considered the complaint and made a finding of minor breach: namely, that in publishing the said article I breached regulation 7(1)(b) of the Local Government (Rules of Conduct) Regulations 2007 in that I made improper use of my office of Council member to cause detriment to Councillor Giovanni Italiano JP and to Councillor Stephanie Proud, such detriment being: that at least some of the people in the City's district would think less favourably of each of them; denigration for having voted for the redevelopment; and adverse treatment from those readers of the newsletter who took up my invitation in the article to contact either of them.*
- (3) *I separately apologise to Councillor Italiano and to Councillor Proud for so making improper use of my office, and regret any hurt, inconvenience or unpleasantness I have respectively caused to them."*

3. If the said Elizabeth Re:

- (a) fails to comply with the requirements of paragraph 2 above; or
- (b) is not able to so comply due only to the presiding person refusing to give her the permission described in paragraph 2 above,

within 14 days after the next City of Stirling Ordinary Council Meeting immediately following the date of service of this Order on her, the said Elizabeth Re shall cause the following Notice of Public Apology to be published, in no less than 10 point print, as a one-column or a two-column display advertisement in the first 15 pages of the "Stirling Times" newspaper.

PUBLIC APOLOGY

A formal complaint has been made to the Local Government Standards Panel (the Panel) about certain conduct by me as **a member of the Council of the City of Stirling**, in publishing my newsletter known as "WAG 3 Update" on 5 February 2010 with an article in it headed "*Martino service station - Ampol - Scarborough Beach Road Innaloo*" in relation to the City's previous decision to approve a redevelopment application for a service station, without a vehicle servicing component,

at the land being 365 Scarborough Beach Road, Innaloo.

The Panel has considered the complaint and made a finding of minor breach: namely, that in publishing the said article I breached regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* in that I made improper use of my office of Council member to cause detriment to Councillor Giovanni Italiano JP and to Councillor Stephanie Proud, such detriment being: that at least some of the people in the City's district would think less favourably of each of them; denigration for having voted for the redevelopment; and adverse treatment from those readers of the newsletter who took up my invitation in the article to contact either of them.

I separately apologise to Councillor Italiano and to Councillor Proud for so making improper use of my office, and regret any hurt, inconvenience or unpleasantness I have respectively caused to them.

Elizabeth Re