

**LOCAL GOVERNMENT STANDARDS PANEL**

<b>Panel Members</b>	<b>Mr B Jolly (Presiding Member)</b> <b>Cr C Adams (8, 15 and 29 June 2011)</b> <b>Mr P Best (4 November 2011 and 19 December 2011)</b> <b>Mr J Lyon</b>
<b>Considered</b>	<b>8, 15 and 29 June 2011 &amp; 4 November 2011</b>
<b>Reasons delivered:</b>	<b>Determined on the documents 19 December 2011</b>
<b>COMPLAINANT:</b>	<b>(Mayor) Terrence Gilbert KENYON JP</b>
<b>COUNCIL MEMBERS COMPLAINED ABOUT</b>	<b>Cr Michael ANDERTON JP</b> <b>Cr Michael SABATINO</b> <b>Cr Terrence BLANCHARD</b>
<b>Local Govt</b>	<b>City of Bayswater</b>
<b>Reg alleged and found breached</b>	<b>Reg 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>.</b>
<b>Proceedings No.</b>	<b>SP 45 of 2010 (DLG 20100230)</b>

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**REASONS FOR FINDING AND DECISION IN REGARD TO CR ANDERTON****Summary of finding**

The Panel found that Councillor Anderton has committed a breach of regulation 7(1)(b).

**Summary of decision**

The Panel's decision was to deal with the subject minor breach pursuant to section 5.110(6)(b)(i) by ordering that Councillor Anderton be publicly censured as specified in the Minute of Order in **Attachment C**.

**Preliminary and procedural matters**

1. The matters mentioned in **Attachment A** are incorporated here as if set out in full. As mentioned in paragraph 6 of Attachment A, the information before the Panel in relation to this matter is the information and documents described in the table under the heading 'Available information' in that Attachment. These documents are referred to in these Reasons, 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.

## **Allegation of minor breach made in the complaint**

2. The only allegation of minor breach that is made in the complaint and that relates to Councillor Anderton is as follows:

***That on or about 12 August 2010 Councillor Anderton contravened regulation 7(1)(b) in that he made improper use of his office of Council member to cause detriment to the City by producing or causing to be produced a letter to the City's ratepayers, for distribution among them.***  
(herein, **the subject allegation**)

## **Facts – the context of the subject allegation**

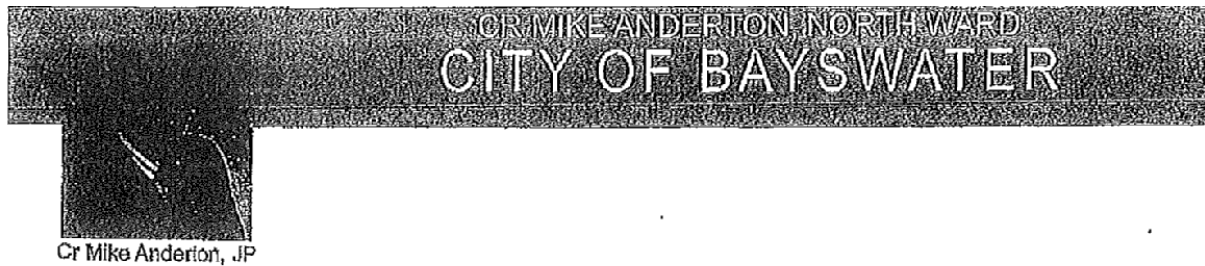
3. On the available information the Panel is reasonably satisfied (i.e. satisfied to the degree required by the Briginshaw principles<sup>1</sup>) and accordingly finds, that the facts and the context that are relevant in this matter are as follows:

- (1) Councillor Anderton is a person who is a Council member.
- (2) At all times material in this matter, Councillor Anderton was a person who was a Council member.
- (3) On 12 and 20 July 2010 a Special Meeting of Council (herein, **the 2010/11 Budget Meeting**) was held at which Council:
  - (a) resolved by an absolute majority of 6/4 (with Councillors Blanchard, Anderton, Albert and Sabatino voting against the motion) to adopt Council's Municipal, Reserve and Trust Fund budgets, as presented in the statutory budget papers for the 2010/11 fiscal year, with figures being adjusted to delete the need for a \$3.8 million loan by implementing certain identified deferment/deletions (herein, **the City's 2010/11 Budget**); and
  - (b) resolved by an absolute majority of 9/1 (with Councillor Sabatino voting against the motion) to determine the City's rates and refuse collection charges as presented in the City's 2010/11 Budget – the uniform rate adopted being a 6.75% increase in the rate in the dollar on the previous year's residential rate (herein, **the rates rise**).
- (4) A resident of the City, Mr James Wishart (herein, **Mr Wishart**), disagreed with the rates rise and was the organiser of a public meeting on 25 August 2010 (herein, **the public meeting**) held to form an action group regarding the rates rise.
- (5) Mr Wishart asked Councillor Anderton and other Councillors to assist him to advertise the public meeting. On or about 12 August 2010 Councillor Anderton so assisted Mr Wishart, by:
  - (a) producing a letter (herein, **the relevant letter**) on his Council member letterhead;
  - (b) providing a number of copies of the relevant letter for the purpose of distributing them among the City's ratepayers; and
  - (c) contributing financially to that distribution.(herein, **the relevant assistance**)

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<sup>1</sup> See the definitions in paragraph 1 of Attachment A.

(6) A copy of the relevant letter follows:



12th August 2010

Dear Resident,

**I WRITE TO YOU REGARDING THE COUNCIL RATE INCREASES.**



**Civic Centre**

61 Brown Avenue  
Morley WA 6062

Postal Address:  
PO Box 467  
Morley WA 6943

[www.bayswater.wa.gov.au](http://www.bayswater.wa.gov.au)

Telephone: (08) 9272 0822  
Facsimile: (08) 9272 0610

Mobile: 0424 295 465

E-mail Address:  
[mike.anderton@bayswater.wa.gov.au](mailto:mike.anderton@bayswater.wa.gov.au)

You will have recently received your annual rates from the City of Bayswater and you will see that you have been SLUGGED with a large increase 6.75% plus.

As your north ward councillor I share your concern over this improper increase that has been applied to residents.

Recently numerous ratepayers have contacted myself and other councillors so much so that one resident has sought my assistance to arrange a public meeting to form an action group over these rate rises.

This meeting is to be held at MORLEY WINDMILLS SOCCER CLUB, EMBLETON AVENUE at 7.30pm on Wednesday the 25th of August 2010.

A number of Councillors will be there who share your concerns and who will be able to provide detailed information on the budget process and what has occurred in the formulation of this budget and answer any questions that arise.

I would ask that you and your neighbours attend this important meeting, why you may ask, it is by strong community support that we are able to make change, a good example is the huge turnout by the residents adjacent to Strutt Reserve only tonight and the impact it had on the Mayor and councillors, they were visibly moved and the message was truly delivered and taken onboard to be acted on by council at it's next meeting.

Cr Mike Anderton

North Ward

0424 295 465

- (7) At all times material to the subject allegation, the City's Policy No. EO-P03 (on Elected Members Issue of Stationery, Publications and Equipment) (herein, **the City's Policy EO-P03**) read:

**"PURPOSE/OBJECTIVE**

To ensure Elected Members are adequately supplied with the necessary stationery, publications and equipment for their term.

**POLICY**

1. An Elected Member shall be eligible to an issue of the following stationery:
  - Up to 4,000 (in lots of 500) letterheads, envelopes and business cards as required during his/her term of office. The stationery may include a photograph of the Elected Member (postage costs shall be at the Elected Members' expense);
  - an LGMA diary each year; and
  - 50 City of Bayswater Christmas cards, envelopes and postage.
2. An Elected Member shall be supplied with a name badge and personal briefcase and satchel at the commencement of his/her term of office as requested. Replacement briefcases and name badges shall be supplied if the equipment is lost, stolen or damaged. Elected Members will be offered new equipment at the commencement of each four (4) year term.
3. A copy of the current Local Government Act (loose leaf) shall be supplied to all Elected Members. Manual updates will be supplied to Elected Members and they shall be responsible for ensuring their manuals are kept up-to-date.
4. An Information Technology Allowance will be provided in accordance with Policy EOP04 and the Local Government (Administration) Regulations for the cost to cover operating related equipment (e.g. Internet access, stationery and supplies).
5. Equipment and Accessories shall be provided in accordance with Policy EO-P04.
6. A notebook computer and multifunction unit. (printer/fax/copier) will be provided to each Elected Member and shall be replaced every four (4) years.
  - The notebook and multifunction unit (printer/fax/copier) shall be returned to the City at each replacement cycle and licensed software will be removed.
  - The old machines will be reallocated within the City for office use, or disposed of in accordance with provisions of the Council Policy 'Disposal of Surplus Goods and Equipment' or traded.
  - PC support and maintenance shall be provided by the City.
  - The specifications of the notebook shall be in accordance with the requirements to operate programs relevant to the City of Bayswater."

**Regulation 7(1)(b) and the Panel's general views in relation to it**

4. The subject allegation relates to an alleged breach of regulation 7(1)(b). **Attachment B** sets out regulations 7(1)(b) and 7(2) and the Panel's general views and relevant authorities on regulation 7(1)(b) where the Panel is reasonably satisfied, as the Panel is on the available information, that the conduct complained about was not conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.

## Elements of a breach of regulation 7(1)(b), in the present matter

5. The elements of a breach of regulation 7(1)(b) – i.e. the relevant legal issues involved in determining whether such a breach has occurred, with each issue being dependant on the previous issue being answered in the affirmative – are as mentioned in paragraph 12 of Attachment B, and are that:

- (a) a person who is currently a council member committed conduct;
- (b) the council member's conduct was a use of his/her office of council member;
- (c) viewed objectively<sup>2</sup>, that use was an improper use of the council member's office of council member; and
- (d) the council member committed his/her conduct with the intention and belief that the intended result would be to cause detriment to the local government or any other person.

## Councillor Anderton's response to the subject allegation – issues in dispute

6. Councillor Anderton's response to the subject allegation (herein, **Councillor Anderton's response**) consists of his 2-page undated Response [*Doc D1*] and its attachments [*Doc D2*] to [*Doc D4*]. In the Response:

- (1) Councillor Anderton admits, or does not dispute or deny:
  - (a) the facts and context mentioned in paragraph 3 above – in particular, that on or about 12 August 2010 he assisted Mr Wishart by: producing the relevant letter on his Council member letterhead; providing a number of copies of the relevant letter for the purpose of distributing them among the City's residents, and contributing financially to that distribution; and
  - (b) that his conduct identified in the within (a) above (herein, **Councillor Anderton's relevant conduct**) was a use of his office of Council member.
- (2) Councillor Anderton denies that his conduct identified in paragraph 6(1)(a) above was an improper use of his office of Council member, on the basis that:
  - (a) he "*assisted a ratepayer in his efforts to let the community voice it's concern over the budget process and outcome*";
  - (b) "*democracy allows for ratepayers who elected councillors [?to require those councillors to] explain their actions, ... the public wanted answers and the public record shows disharmony in this budget process*"; and
  - (c) "*As an elected councillor I am given 4,000 personalised letterheads, postage is my responsibility, [the City's] Policy EO-P03 does not specify what they should used for and no restrictions are identified however they are issued for the purpose of communication.*"
- (3) Councillor Anderton denies that he committed his conduct identified in paragraph 6(1)(a) above with the intention and belief that the intended result would be to cause detriment to the City, on the basis that:
  - (a) he has "*not gained by assisting a ratepayer in what had occurred at council*"; and

<sup>2</sup> See the definitions in paragraph 1 of Attachment A.

- (b) the public meeting “*has not caused detriment to the city it is the right of ratepayers to question the proper conduct of municipal spendings (sic) as it is the community that has to provide for this and if promises are made and broken you will always have angst and I and others are expected to assist when called upon.*”

***Viewed objectively, was Councillor Anderton’s relevant conduct an improper use of his office of Council member?***

*The expected and required standards of conduct of Councillor Anderton*

- *A council member’s obligation of fidelity to the council as the governing body of the local government*

**7. In the Panel’s view:**

- (1) The council of a local government is *an organised body of people performing certain common functions and sharing special privileges* and, accordingly:
  - (a) the council of a local government is a *collegiate* body and a *collegiate* decision-maker, with its members voluntarily elected by willing eligible electors from the community for whom they make decisions; and
  - (b) the council’s members are a group of colleagues.<sup>3</sup>
- (2) The council of a local government is also *a cooperative unit of people linked in a common purpose* – namely, the fulfilment of the council’s role pursuant to section 2.7 – and, accordingly, a local government’s council is a team, and each council member is a member of the team.
- (3) Council members, as the members of a collegiate body and a team, are expected, where appropriate and in an appropriate forum, to *appropriately* criticise the views of their fellow councillors on a matter, *until such time as the local government has made its decision on the matter*.
- (4) The collegial status of the council’s decision making is apparent from the nature of the councillor debate where:
  - (a) facts are to be brought to light about each proposal to enable the council to get to the heart of the matter and understand exactly what issues need to be considered; and
  - (b) implications and alternatives are to be taken into account, opinions aired, and the whole matter intelligently discussed with a view to arriving at a unanimity of thinking,
 and, when a unanimity of thinking is not possible, the eventual decision reflects the majority viewpoint as to what is in the best interests of the local government.
- (5) When a person makes the required declaration of office pursuant to section 2.29(1) after he/she has been elected as a council member, he/she:
  - (a) declares that he/she takes that office upon himself/herself and will duly, faithfully, honestly, and with integrity, fulfil the duties of the office for the people in the local government’s district according to the best of his/her judgment and ability, and that he/she will observe the Regulations; and

<sup>3</sup> By virtue that the term ‘collegiate’ has a secondary meaning derived from a secondary meaning of *college*: a body of equals (a group of colleagues).

- (b) voluntarily takes on an obligation of fidelity<sup>4</sup> or faithfulness, owed to the council as the governing body of the local government, to unfailingly and strictly adhere to the terms of the declaration (herein, **a councillor's obligation of fidelity to council**, or, **obligation of fidelity to council**); and
  - (c) voluntarily restricts himself/herself as to the extent that he/she is able to lawfully express himself/herself on many matters; and the member is expected to observe standards of conduct that may restrict what he/she can write or say, and these restrictions where applicable may be perceived as limiting the implied freedom of political communication under the *Commonwealth Constitution*.
- (6) A council member, as a member of a collegiate decision-maker and by virtue of a councillor's obligation of fidelity to council, has as an obligation of loyalty to his/her local government's decisions (particularly those made by its council), irrespective whether:
- (a) the decision was made at a regularly held meeting of the council or a relevant committee; or
  - (b) the council member was present when the decision was made; or
  - (c) the council member voted for or against the decision; or
  - (d) the council member agreed or not with the decision or the reason or any of the reasons for the decision; or
  - (e) the decision was made, under delegation, by his/her local government's CEO or another staff person.<sup>5</sup>
- (7) It is imperative that council members accept that a consequence of their obligation of fidelity to council is that whenever they are acting in their capacity as a council member or are otherwise using their office of council member in relation to a decision made by the council while they are a council member, they are required to adhere to and actively observe and carry out all of the functions, responsibilities and obligations that they have as a council member.

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<sup>4</sup> Each of the nouns 'fidelity', 'fealty' and 'loyalty' denote faithfulness. *Fidelity* refers to the unfailing fulfilment of one's duties and obligations and strict adherence to vows or promises. *Fealty*, once applied to the obligation of a tenant or vassal to be faithful to his feudal lord and defend him against all his enemies, now refers to the faithfulness that one has pledged to uphold: e.g. *swore fealty to the laws of that country*. *Loyalty* refers to a steadfast and devoted attachment that is not easily turned aside: e.g. *loyalty to an oath*.

<sup>5</sup> However, there are situations when a council member's obligation of loyalty to his/her local government's decisions does not apply – for example, without limiting other examples: (a) where a matter before a council 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; or (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: bring the matter to the attention of council by lodging an appropriate notice of motion; and, 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.)

- Relevant obligations under the City's Code of Conduct

8. In the Panel's view:

- (1) In addition to a councillor's obligation of fidelity to council, in light of the contents of paragraph 3 of Attachment B, when Councillor Anderton's relevant conduct was committed by him the expected and required standards of conduct of him as a Council member were those flowing from the fiduciary obligations owed by him 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.
- (2) For the reason mentioned in paragraph 8(1) above, the expected and required standards of conduct of Councillor Anderton as a Council member at all times relevant to the subject allegation included the due observance of the provisions of the *City's Code of Conduct for Elected Members and Employees*, dated October 2007 (herein, **the City's Code of Conduct**).
- (3) For the reason mentioned in paragraph 8(2) above, at all times relevant to the subject allegation Councillor Anderton's obligations as a Council member included the following obligations:
  - (a) to act, and be seen to act, properly and in accordance with the requirements of the City's Code of Conduct [clause 5.1(a)(i) of the City's Code of Conduct];
  - (b) to act in good faith (i.e. honestly, for the proper purpose, and without exceeding his powers) in the interests of the Council and the community [clause 5.1(a)(iii) of the City's Code of Conduct];
  - (c) to always act in accordance with his obligation of fidelity to the Council [clause 5.1(a)(v) of the City's Code of Conduct];
  - (d) to represent and promote the interests of the Council [clause 5.1(b) of the City's Code of Conduct];
  - (e) to observe the highest standards of honesty and integrity, and avoid conduct which might suggest any departure from those standards [clause 5.2(a) of the City's Code of Conduct];
  - (f) to treat his fellow Councillors honestly and fairly [clause 5.3(c) of the City's Code of Conduct];
  - (g) to adequately communicate the attitudes and decisions of the Council [clause 5.6(b)(ii) of the City's Code of Conduct];
  - (h) in adequately communicating the attitudes and decisions of the Council, to acknowledge that as an elected member of the Council there is respect for the decision making processes of the Council which are based on a decision of the majority of the Council [clause 5.6(b)(ii) of the City's Code of Conduct];
  - (i) in adequately communicating the attitudes and decisions of the Council, to acknowledge that information concerning adopted policies, procedures and decisions of the Council is conveyed accurately [clause 5.6(b)(ii) of the City's Code of Conduct];
  - (j) to be scrupulously honest in his use of the Council's resources and not to misuse them [clause 6.1(a) of the City's Code of Conduct]; and
  - (k) to use the Council resources entrusted to him effectively and economically in the course of his duties [clause 6.1(b) of the City's Code of Conduct].



Panel views on Councillor Anderton's views or justifications

9. Councillor Anderton's views or justifications in relation to Councillor Anderton's relevant conduct are as mentioned in paragraph 6(2) above. In relation to Councillor Anderton's view or justification – that he *“assisted a ratepayer in his efforts to let the community voice its concern over the budget process and outcome”* – it is the Panel's view that:

- (1) Councillor Anderton's view is that he acted in accord with his obligations and responsibility of a Council member pursuant to section 2.10(a), (b) or (c)<sup>6</sup>, or a combination of them.
- (2) The Panel does not share Councillor Anderton's view mentioned in the within (1) above, or that such view is valid or a proper justification for Councillor Anderton's relevant conduct, on the basis that:
  - (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;
  - (c) a councillor will carry out his or her role and functions under section 2.10 by observing and implementing section 2.7<sup>7</sup> and ensuring the needs and concerns of his or her community are addressed; and
  - (d) 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:
    - (i) by reading the papers and otherwise preparing for council meetings and applicable committee meetings;
    - (ii) by attending at such meetings, making any required disclosure of interest, and participating in the local government's decision-making processes at such meetings;
    - (iii) representing his/her local government at organised events; and
    - (iv) 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.

<sup>6</sup> Sections 2.10(a), (b) and (c) read: “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;”

<sup>7</sup> Section 2.7 states the role of the council, and 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.”

**10.** In relation to Councillor Anderton's view and justification – "*democracy allows for ratepayers who elected councillors [?to require those councillors to] explain their actions, ... the public wanted answers and the public record shows disharmony in this budget process*" – it is the Panel's view that:

- (1) With respect to Councillor Anderton, it is not 'democracy' – rather it is the Act, primarily, and other things – that allows for or requires an elected Council member to be accountable to the electors, ratepayers and residents of the City's district.
- (2) A private citizen has a right of free speech (i.e. speech without adverse legal consequences) that is conditional on such lawful limitations as are applicable at the time – e.g. under the respective laws relating to defamation and disorderly conduct through speech.
- (3) Relevantly, the common law relating to defamation that is applicable in WA accepts that there is an implied freedom of political communication under the *Commonwealth Constitution* and accordingly:
  - (a) 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;
  - (b) 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; and
  - (c) 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.<sup>8</sup>
- (4) The contents of paragraph 7(5)(c) above are repeated here.
- (5) In *Treby and Local Government Standards Panel*<sup>9</sup>, the then Deputy President of the State Administrative Tribunal, Judge J Pritchard (as she then was) considered the issue of whether or not regulation 7(1)(b) should be read down having regard to the implied freedom of political communication under the *Commonwealth Constitution*, and concluded that in her view that regulation 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*, and that accordingly there was no warrant to give that regulation a more limited operation than its ordinary and natural meaning suggests.

<sup>8</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571.

<sup>9</sup> [2010] WASAT 81 at [43] – [59].

- (6) In light of the contents of the within (1) to (5) above, Councillor Anderton's views about 'democracy' and that "*the public wanted answers*" and "*the public record shows disharmony in this budget process*":
- (a) do not provide any justification for him to breach the expected and required standards of conduct of him as a Council member; and
  - (b) are of little relevance (if any) to the issue of whether or not, viewed objectively, Councillor Anderton's relevant conduct was an improper use of his office of Council member

**11.** In relation to Councillor Anderton's view and justification – "*As an elected councillor I am given 4,000 personalised letterheads, postage is my responsibility, [the City's] Policy EO-P03 does not specify what they should used for and no restrictions are identified however they are issued for the purpose of communication.*" – it is the Panel's view that:

- (1) The City's resources that it provides to its Council members are paid for from the money in the City's municipal fund, which money, by virtue of section 6.7(2), may be applied towards the performance of the functions and the exercise of the powers conferred on the City by the Act or any other written law.
- (2) The City's resources that it provides to him as a Council member, including his Councillor personalised letterheads, do not cease to be a part of its resources when they are provided to him - indeed, they are provided to him on the understanding and for the purpose only that he uses them in the proper performance or discharge of his functions, responsibilities and obligations as a Council member.
- (3) While his Councillor personalised letterheads may be used for the purpose of communication, the communications that are permitted are:
  - (a) communications that facilitate communication between the community and the Council, pursuant to section 2.10(c); and
  - (b) other communications in the proper performance or discharge of his functions, responsibilities and obligations as a Council member.
- (4) It is Councillor Anderton's responsibility for him to make himself aware of and to observe or comply with the standards of conduct expected and required of him as a Council member.
- (5) In light of the contents of the within (1) to (4) above, it is irrelevant to the present issue of whether or not, viewed objectively, Councillor Anderton's relevant conduct was an improper use of his office of Council member, that:
  - (a) he believes that he complied with the City's Policy EO-P03; or
  - (b) that such policy does not specify what his Councillor personalised letterhead should be used for and no restrictions on such use are identified (although it would be preferable if they were expressly identified in the policy).

- (6) In light of the contents of the within (1) to (5) above, Councillor Anderton's said view or justification:
- (a) does not provide any justification for him to breach the expected and required standards of conduct of him as a Council member; and
  - (b) is of little relevance (if any) to the issue of whether or not, viewed objectively, Councillor Anderton's relevant conduct was an improper use of his office of Council member.

*Has Councillor Anderton committed a breach of his obligation of fidelity to Council or any of his other obligations as a Council member?*

**12.** On the available information it is open for the Panel to form the view that Councillor Anderton's use of his Councillor personalised letterhead was not for the purpose of any of the permitted communications mentioned in paragraph 11(3) above. However, for the reasons that follow, the Panel is not compelled to reach a concluded view in that regard.

**13.** In regard to the relevant letter:

- (1) Councillor Anderton makes the following statements<sup>10</sup> (herein, **the Relevant Statements**) in the relevant letter:
- (a) *"You will have recently received your annual rates from the City of Bayswater and you will see that you have been SLUGGED with a large increase 6.75% plus.";*
  - (b) *"As your north ward councillor I share your concern over this improper increase that has been applied to residents.";*
  - (c) *"Recently numerous ratepayers have contacted myself and other councillors so much so that one resident has sought my assistance to arrange a public meeting to form an action group over these rate rises.";*
  - (d) *"A number of Councillors will be there who share your concerns and who will be able to provide detailed information on the budget process and what has occurred in the formulation of this budget and answer any questions that arise.";* and
  - (e) *"I would ask that you and your neighbours attend this important meeting, why you may ask, it is by strong community support that we are able to make change, a good example is the huge turnout by the residents adjacent to Strutt Reserve only tonight and the impact it had on the Mayor and councillors, they were visibly moved and the message was truly (sic) delivered and taken onboard to be acted on by council at it's (sic) next meeting."*
- (2) In the Panel's view, viewed objectively:
- (a) the term 'slugged' in the Relevant Statements is used by Councillor Anderton:
    - (i) in the colloquial sense, which the Panel notes is defined in the Macquarie Dictionary (5<sup>th</sup> ed), relevantly, as "to exact heavy payment for" and "a great expense", where the term 'heavy' appears to be used in the sense of "bearing hard upon; burdensome; harsh; distressing" (i.e. one of the definitions of 'heavy' in that dictionary, as in the phrase 'heavy taxes'); and

<sup>10</sup> See the definitions in paragraph 1 of Attachment A.

- (ii) to imply that the amount of the rate rise was harsh and burdensome on the City's residents; and
- (b) the term 'improper increase' in the Relevant Statements is used by Councillor Anderton to imply that the Council had not properly made its respective decisions at the 2010/11 Budget Meeting to adopt the City's 2010/11 Budget and the rates rise, in that the rate rise was not necessary.

**14.** On the available information the Panel is reasonably satisfied that Councillor Anderton's relevant conduct was a breach by him of his obligation of fidelity to Council, on the basis of the Panel's views mentioned in paragraph 7 above, and that:

- (1) The only reasonable and definite inference that arises from Councillor Anderton's relevant conduct and the Relevant Statements as a whole, is that Councillor Anderton was using his office of Council member to be disloyal to the Council and to make public his disagreement with the Council's respective decisions at the 2010/11 Budget Meeting to adopt the City's 2010/11 Budget and the rates rise.
- (2) The use mentioned in the within (1) above:
  - (a) was an abuse of power, in that such use is inconsistent with the discharge of the duties and obligations that arise from the office of Council member; and
  - (b) was improper, in that Councillor Anderton's relevant conduct consisted of the doing of acts which he as a Council member ought to have known that he had no authority to do.

**15.** On the available information the Panel is reasonably satisfied that Councillor Anderton's relevant conduct was a breach by him of his obligation mentioned in paragraph 8(3)(a) above – namely, "to act, and be seen to act, properly and in accordance with the requirements of the City's Code of Conduct" – on the basis of the contents of paragraphs 16 to 24 below.

**16.** On the available information the Panel is reasonably satisfied that Councillor Anderton's relevant conduct was a breach by him of his obligation mentioned in paragraph 8(3)(b) above – namely, "to act in good faith (i.e. honestly, for the proper purpose, and without exceeding his powers) in the interests of the Council and the community" – on the basis that, irrespective of whether or not he "acted in good faith" as so defined:

- (a) it is plainly not in the interests of the Council for any one or more of its members to fail to observe his/her/their obligation of fidelity to the Council; and
- (b) it is the Panel's view that Councillor Anderton's relevant conduct was a breach by him of his obligation of fidelity to the Council.

**17.** On the available information the Panel is reasonably satisfied that Councillor Anderton's relevant conduct was a breach by him of his obligation mentioned in paragraph 8(3)(c) above – namely, "to always act in accordance with his obligation of fidelity to the Council" – on the basis of the contents of paragraph 14 above.

**18.** On the available information the Panel is reasonably satisfied that Councillor Anderton's relevant conduct was a breach by him of his obligation mentioned in paragraph 8(3)(d) above – namely, "to represent and promote the interests of the Council" – on the basis that:

- (a) it is plainly not the representation and promotion of the interests of the Council for any one or more of its members to fail to observe his/her/their obligation of fidelity to the Council; and
- (b) it is the Panel's view that Councillor Anderton's relevant conduct was a breach by him of his obligation of fidelity to the Council.

**19.** On the available information the Panel is reasonably satisfied that Councillor Anderton's relevant conduct was a breach by him of his obligation mentioned in paragraph 8(3)(e) above – namely, "to observe the highest standards of honesty and integrity, and avoid conduct which might suggest any departure from those standards" – on the basis that:

- (1) The Shorter Oxford English Dictionary (6<sup>th</sup> ed) defines:
  - (a) the noun 'honesty', relevantly, as "*the quality of being honest*";
  - (b) the adjective 'honesty', when used 'of a person', as "*marked by uprightness or probity; fair and righteous in speech and act; fundamentally sincere, or truthful; not lying, cheating, or stealing*"; and
  - (c) the noun 'integrity', relevantly, as "*soundness of moral principle; the character of uncorrupted virtue; uprightness, honesty, sincerity*".
- (2) In the Panel's view, the ordinary and natural meaning of:
  - (a) the word 'honesty' is 'sincerity and truthfulness', where the word 'sincerity' refers to 'freedom from pretence or hypocrisy; straightforwardness; genuineness'; and
  - (b) the word 'integrity' is 'continuous adherence to relevant ethical standards' or 'continuous adherence to the expected and required standards of conduct applicable to the person'.
- (3) When Councillor Anderton's relevant conduct was committed he was not observing the highest standard of honesty, and he did not avoid conduct which might suggest any departure from that standard, in that, for the reasons mentioned in paragraphs 14(2) and 19(1) and (2) above, Councillor Anderton's relevant conduct appears not to have been committed with truthfulness.
- (4) When Councillor Anderton's relevant conduct was committed he was not observing the highest standard of integrity, and he did not avoid conduct which might suggest any departure from that standard, in that, for the reasons mentioned in paragraphs 12, 14, 15, 16, 17, 18 and 19(3) above and in paragraphs 20 to 24 below, Councillor Anderton's relevant conduct was a departure by him from the continuous adherence to the expected and required standards of conduct applicable to him as a Council member.

**20.** On the available information the Panel is reasonably satisfied that Councillor Anderton's relevant conduct was a breach by him of his obligation mentioned in paragraph 8(3)(f) above – namely, "to treat his fellow Councillors honestly and fairly" – on the basis that:

- (a) for the reasons mentioned in paragraphs 14(2) and 19(1) and (2) above Councillor Anderton's relevant conduct appears not to have been committed with truthfulness, or honesty; and
- (b) Councillor Anderton's relevant conduct was not just or equitable (or, fair) treatment of his fellow Councillors, particularly those of them who voted for the Council's respective decisions at the 2010/11 Budget Meeting to adopt the City's 2010/11 Budget and the rates rise.

**21.** On the available information the Panel is reasonably satisfied that Councillor Anderton's relevant conduct was a breach by him of his obligation mentioned in paragraph 8(3)(g) above – namely, "to adequately communicate the attitudes and decisions of the Council" – on the basis that the relevant letter:

- (a) did not adequately communicate the attitude of the Council when it adopted the City's 2010/11 Budget and the rates rise; and
- (b) did not adequately communicate the Council's respective decisions at the 2010/11 Budget Meeting to adopt the City's 2010/11 Budget and the rates rise.

**22.** On the available information the Panel is reasonably satisfied that Councillor Anderton's relevant conduct was a breach by him of his obligation mentioned in paragraph 8(3)(h) above – namely, "in adequately communicating the attitudes and decisions of the Council, to acknowledge that as an elected member of the Council there is respect for the decision making processes of the Council which are based on a decision of the majority of the Council" – on the basis that Councillor Anderton's relevant conduct demonstrates a lack of respect for the decision making processes of the Council which are based on a decision of the majority of the Council.

**23.** On the available information the Panel is reasonably satisfied that Councillor Anderton's relevant conduct was a breach by him of his obligation mentioned in paragraph 8(3)(i) above – namely, "in adequately communicating the attitudes and decisions of the Council, to acknowledge that information concerning adopted policies, procedures and decisions of the Council is conveyed accurately" – on the basis that the Relevant Statements included information concerning adopted decisions of the Council that was not conveyed accurately.

**24.** On the available information the Panel is reasonably satisfied that Councillor Anderton's relevant conduct was a breach by him of each of his obligations mentioned in paragraph 8(3)(j) and (k) above respectively – namely, "to be scrupulously honest in his use of the Council's resources and not to misuse them" and "to use the Council resources entrusted to him effectively and economically in the course of his duties" – on the basis that his use in this matter of his personalised Council-issued letterhead: was a misuse of the Council's resources; and was not used in the course of his duties as a Council member.

**25.** On the available information and in light of the contents of paragraphs 7 to 24 above, the Panel is reasonably satisfied that, viewed objectively, Councillor Anderton's relevant conduct:

- (a) was the use of his position in a way that was inconsistent with the discharge of the obligations arising from his office of Council member; and
- (b) accordingly, was an improper use of his office of Council member.

***Was Councillor Anderton's relevant conduct committed by him with the intention and belief that the intended result would be to cause detriment to the City or any other person?***

**26.** The term 'detriment' in regulation 7(1)(b) includes a tendency for others to think less favourably of the local government or any person.

**27.** As mentioned in paragraph 14(1) above, the only reasonable and definite inference that arises from Councillor Anderton's relevant conduct and the Relevant Statements as a whole, is that Councillor Anderton was using his office of Council member to be disloyal to the Council and to make public his disagreement with the Council's respective decisions at the 2010/11 Budget Meeting to adopt the City's 2010/11 Budget and the rates rise.

**28.** On the available information the Panel is reasonably satisfied that when Councillor Anderton committed each part of Councillor Anderton's relevant conduct:

- (a) he did so with the intention and belief that the intended result would be that at least some of the persons who read a distributed copy of the relevant letter would think less favourably of the Council as the City's governing body; and
- (b) accordingly, he did so with the intention and belief that the intended result would be to cause detriment to the City.

### **Panel's finding of breach in relation to the subject allegation**

**29.** On the available information, for the reasons mentioned above, and as required by section 5.110(2), the Panel finds that Councillor Michael Anderton, a member of the Council of the City of Bayswater, **committed a breach** of regulation 7(1)(b) on or about 12 August 2010 in that he made improper use of his office of Council member to cause detriment to the City when he provided a letter on his personalised Council-issued letterhead for distribution, and other assistance, in regard to the advertising of a public meeting to form an action group regarding the 2010/11 fiscal year rates rise made by the City's Council – such detriment being that at least some of the persons who read a distributed copy of his letter would think less favourably of the Council as the City's governing body.



## EVENTS SUBSEQUENT TO THE PANEL'S MINOR BREACH FINDING IN THIS MATTER

**30.** The following paragraphs address relevant events subsequent to the Panel making its minor breach finding in paragraph 29 above (the breach finding), and sets out the Panel's reasons for its decision on how the subject found minor breach (the subject minor breach) is dealt with pursuant to section 5.110(6)<sup>11</sup>.

### Procedural fairness

**31.** The Panel through its Presiding Member has given to Councillor Anderton: notice of the breach finding; a document (the Reasons for Finding) signed by the Panel members that in essence consists of paragraphs 1 to 29 of these Reasons, Attachment A and Attachment B; and a reasonable opportunity for Councillor Anderton to make submissions about how the subject minor breach should be dealt with under section 5.110(6).

### Councillor Anderton's submissions

**32.** By a letter dated 14 July 2011 Hardy Bowen, Lawyers among other things advised the Panel that they were acting for Councillor Anderton in regard to making submissions. Hardy Bowen then made submissions on behalf of Councillor Anderton in their letter dated 17 August 2011. After a careful consideration of Councillor Anderton's submissions the Panel considers that they can be summarised or described relevantly as: (a) he does not agree with the breach finding; (b) he attempts to agitate issues which he has had previous opportunity to put before the Panel prior to it making the breach finding, but did not do so; (c) he attempts to re-agitate issues which as a matter of substance have already been determined or commented on by the Panel in the Reasons for Finding given to him; and (d) he submits that the Panel should deal with the subject minor breach pursuant to section 5.110(6) by either dismissing the complaint or ordering that he undertake training in a course or courses presented by the Western Australian Local Government Association (i.e. WALGA) in the roles and responsibilities of being an elected member and the ethics and conduct of being an elected member.

**33.** The Panel observes that in Councillor Anderton's submissions he does not take any responsibility, and does not express or indicate any acknowledgement of wrongdoing or any remorse or contrition, for his offending conduct in breaching his obligation of fidelity to Council, particularly his obligation of fidelity to a Council decision, in committing the subject minor breach.

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<sup>11</sup> Section 5.110(6) reads:

*"The breach is to be dealt with by —*

*(a) dismissing the complaint;*

*(b) ordering that —*

*(i) the person against whom the complaint was made be publicly censured as specified in the order;*

*(ii) the person against whom the complaint was made apologise publicly as specified in the order;*  
*or*

*(iii) the person against whom the complaint was made undertake training as specified in the order;*  
*or*

*(c) ordering 2 or more of the sanctions described in paragraph (b)."*

## **The general interests of local government in WA**

**34.** Pursuant to clause 8(6) of Schedule 5.1 to the Act, each of the Panel's members is to have regard to the general interests of local government in Western Australia.

## **Councillor Anderton a current sitting Council member**

**35.** The Panel understands that Councillor Anderton is a current sitting Council member by virtue of his re-election on 15 October 2011 as a member of the City's Council for a term expiring on 17 October 2015.

## **Councillor Anderton's antecedents**

**36.** At the time of signing these Reasons, Councillor Anderton has not been previously been found under Part 5 Division 9 of the Act to have committed any minor breach as defined in section 5.105(1).

## **Is a public censure appropriate?**

**37.** The Panel acknowledges that when it makes an order that a Notice of Public Censure be published, the Notice is to be published by the local government's CEO at the expense of the local government, which is a significant expense.

**38.** 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.<sup>12</sup> While a public censure has that character or effect it is aimed at reformation of the offending council member and prevention of further offending acts.

**39.** 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.

**40.** In the Panel's view Councillor Anderton's offending conduct in committing the subject minor breach is serious enough to warrant the making of an order that he be publicly censured for having committed such conduct.

## **Is a public apology also appropriate?**

**41.** A public apology of the kind ordered by the Panel is a significant sanction, as it involves a high degree of public admonition of the conduct of the council member concerned.

**42.** The circumstances that will in almost all occasions deserve the sanction of a public apology to another person include those where a council member's offending conduct is or conveys a slight or a personal attack on the other person, particularly where the other person is an employee of the council member's local government.

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<sup>12</sup> *Mazza and Local Government Standards Panel* [2009] WASAT 165 per Judge J Pritchard (Deputy President) (as Her Honour then was) at [107].

**43.** 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.

**44.** In the Panel's view Councillor Anderton's offending conduct in relation to the subject minor breach was not a slight or a personal attack on any particular person, and accordingly an order for a public apology is not appropriate in relation to that breach.

**Is training also appropriate?**

**45.** The Panel notes that its consideration of how a breach should be dealt with under section 5.110(6) must embrace the issue of whether or not it is appropriate for the Panel to order that the council member concerned undertake such training as it may specify. Additionally, in this matter Councillor Anderton submits that training is the appropriate sanction in this matter if the Panel is not minded to dismiss the complaint.

**46.** The Panel confirms its previous general view that the circumstances in which it may be appropriate for the Panel to order that the council member concerned undertake training include where the member communicates to the Panel:

- (a) his/her acknowledgement that he/she has committed the minor breach found by the Panel to more likely than not have occurred, and his/her willingness to undertake training; or
- (b) his/her acknowledgement that he/she has committed the minor breach found by the Panel to more likely than not have occurred, but that such breach occurred through his/her lack of knowledge or education on the issue or issues concerned; or
- (c) the member communicates to the Panel his/her remorse or contrition for his/her offending conduct in committing the minor breach found by the Panel to more likely than not have occurred, and the Panel's view is that training may be of use to the member so as to not repeat his/her offending conduct;

and the type of training is reasonably available for the member to undertake.

**47.** In this context, the contents of paragraph 33 above are repeated here.

**48.** In light of Councillor Anderton's submissions, the Panel considers that what is required of him is not, as he submits, training in the roles and responsibilities of being an elected member and the ethics and conduct of being an elected member. Rather, it is for Councillor Anderton to accept and act on the Panel's views in these Reasons. In particular, he needs to unfailingly and strictly adhere to his obligation of fidelity to Council, particularly his obligation of fidelity to Council decisions.

**49.** After due consideration of the information available to the Panel when it made the minor breach finding (including Councillor Anderton's response to the then subject allegation), and in light of the contents of paragraphs 46, 47 and 48 above, it is the Panel's view that it is not appropriate that it make an order that Councillor Anderton undertake training in relation to the subject minor breach.

## Is a dismissal of the complaint appropriate?

**50.** In light of the contents of paragraphs 37 to 49 above, it is not appropriate to deal with the subject minor breach by dismissing the complaint.

## Panel decision

**51.** Having regard to: the Reasons for Findings; the contents of paragraphs 37 to 49 above; and the general interests of local government in Western Australia:

- (a) the Panel considers that it is appropriate and proportionate to the gravity of the subject minor breach that Councillor Anderton should be admonished by the Panel by being publicly censured; and
- (b) the Panel's decision on how the subject minor breach is dealt with under section 5.110(6) is that, pursuant to subsection (b)(i) of that section, it orders that Councillor Anderton be publicly censured, as specified in the Minute of Order in **Attachment C**.

## Right to have the Panel's decision reviewed

**52. Attachment D** is a formal notice to the parties to the complaint that sets out their respective right to have the Panel's said decision reviewed by the State Administrative Tribunal.

.....  
Brad Jolly (Presiding Member)

.....  
Peter Best

.....  
John Lyon

## Attachment A

### PRELIMINARY AND PROCEDURAL MATTERS

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

1. In these Reasons (which include each of the Attachments to them), unless otherwise indicated:

- (a) a reference to a **regulation** is a reference to the corresponding regulation of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations), and a reference to a **section** is a reference to the corresponding section of the *Local Government Act 1995* (the Act);
- (b) the term ‘**Briginshaw principles**’ refers to the considerations which must affect the answer to the question whether the issue has been proved to the Panel’s reasonable satisfaction – namely, the seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, and the gravity of the consequences flowing from a particular finding<sup>13</sup>;
- (c) the term ‘**reasonable person**’ refers to a hypothetical natural person with an ordinary degree of reason, prudence, care, self-control, foresight and intelligence, who knows the relevant facts;
- (d) the term ‘**reasonably satisfied**’ means satisfied to the degree required by the Briginshaw principles;
- (e) the word ‘**statement**’ means a representation of fact or opinion; and
- (f) the term ‘**viewed objectively**’ means as viewed by a reasonable person.

#### Details of the complaint

2. Ms Francesca Lefante (herein, the City’s CEO), the Chief Executive Officer of the City of Bayswater (herein, the City), in her capacity as the City’s Complaints Officer (herein, the Complaints Officer), has sent to the Panel a formal complaint (herein, the complaint) made by the City’s Mayor, Terrence Gilbert Kenyon JP (herein, Mayor Kenyon, or, the complainant), about alleged conduct of 3 current members of the City’s Council (herein, the Council): Councillor Michael Anderton JP (herein, Councillor Anderton); Councillor Michael Sabatino (herein, Councillor Sabatino); and Councillor Terrence Blanchard (herein, Councillor Blanchard).

The complaint consists of a 3-page *Complaint of Minor Breach* dated 27 August 2010 [Doc B1] and its attachments, which in relation to the subject allegation in the complaint that concerns Cr Anderton in this matter are [Doc B2] to [Doc B5].

#### Panel to afford procedural fairness to the council member complained about

3. The Panel is required by the common law to afford procedural fairness (or, natural justice) to the council member complained about in a complaint before it, according to the circumstances of the matter. The importance of procedural fairness has been explained as follows: “*It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. ‘When something is obvious’, they may say, ‘why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.’ Those who take this view do not, I think,*

<sup>13</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J in at 362

*do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.”<sup>14</sup>*

### Procedural fairness and respect for parties to complaints

4. The Panel aims to make accurate findings and decisions in its dealing with the complaints that come before it, on the basis that:

- (a) treating a person in accordance with legal standards is itself an important aspect of according respect for the person; and
- (b) accurate decisions are not merely a step towards respect for persons: *‘accurate decisions themselves constitute an important element of fair treatment, which in turn constitutes an important element of respect for persons’*.<sup>15</sup>

### Councillor Anderton’s formal response to the subject allegation sought and received

5. A *Notice of Complaint [Doc C]* was sent to Councillor Anderton advising him, among other things, of the subject allegation of minor breach that the Panel will consider in this matter and inviting him to respond to it. Councillor Anderton responded by his 2-page undated Response *[Doc D1]* and its attachments being *[Doc D2]* to *[Doc D4]*.

### Available information

6. The information before the Panel in relation to the allegation in the complaint that concerns Councillor Anderton in this matter (herein, the available information) is described in the following table:

Doc ID	Description
A	Copy of (1-page) letter from the Complaints Officer, dated 30 August 2010.
	<b>The complaint and its supporting information:</b>
B1	Copy of (3-page) <b>Complaint of Minor Breach No. SP 45 of 2010</b> (the complaint), dated 27 August 2010 made by Mayor Kenyon – its attachments in relation to the allegation in the complaint that concerns Cr Anderton in this matter being <i>[Doc B2]</i> to <i>[Doc B5]</i> .
B2	Copy of (1-page) letter to the City’s residents issued by Cr Anderton, dated 12 August 2010 (herein, <b>the relevant letter</b> ).
B3	Copy of (29-page) the minutes of the Council’s Special Meeting held on 5, 12 and 20 July 2010.
B4	Copy of (2-page) the cover sheet and page 7 of the minutes of the Council’s Ordinary Meeting held on 24 August 2010.
B5	Copy of (14-page) document titled “Rally Against Unwanted Rate Rises”, undated

<sup>14</sup> *John v Rees* [1970] Ch 345 per Megarry J at 402

<sup>15</sup> D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford: Clarendon Press, 1996) at 78.

	<b>Procedural fairness:</b>
<b>C</b>	Copy of (4-pages) 2-page letter, and 2-page Complaint Summary attachment, to Cr Anderton, dated 29 March 2011.
	<b>Cr Anderton's response to the subject allegation:</b>
<b>D1</b>	Copy of (2-page) Response from Cr Anderton, undated – its attachments being [Doc D2] to [Doc D4].
<b>D2</b>	Copy of (2-page) statutory declaration (headed "Affidavit of Christopher Stanley Fayle") made by Christopher Stanley Fayle, dated 13 April 2011.
<b>D3</b>	Copy of (1-page) Form A completed by Cr Anderton
<b>D4</b>	Copy of (1-page) Form B completed by Cr Anderton
	<b>Other material:</b>
<b>E</b>	Copy of (1-page) the City's Policy No. EO-P03.
<b>F</b>	Copy of (13-page) the City's <i>Code of Conduct for Elected Members and Employees</i> , dated October 2007.

### Standing of the subject allegation

#### 7. The Panel notes that:

- (1) The complaint is in the form approved by the Minister for Local Government and was made within time.
- (2) There is an allegation made in the complaint that Councillor Anderton, 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).
- (3) The subject allegation is that a breach of regulation 7(1) has occurred. 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 that regulation is a minor breach. A contravention of regulation 7(1) occurs if there is a contravention of both or either of regulation 7(1)(a) or 7(1)(b) occurs.

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

#### 8. 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 the Panel 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].

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).

- (5) 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.

Accordingly, in determining whether on the evidence the standard of proof - on the balance of probabilities - has been satisfied, the Panel recognises that each of the *Briginshaw* principles applies in complaint proceedings against a council member.

- (6) As the High Court of Australia has expressed the position, the significance of *Briginshaw*<sup>16</sup> is that the seriousness of the matter and of its consequences does not affect the standard of proof but goes to the strength of the evidence necessary to establish a fact required to meet that standard. So much reflects a conventional perception that (relevantly) local government council members do not ordinarily engage in improper conduct generally and in circumstances where to do so is likely to render them liable to a punitive sanction.<sup>17</sup>
- (7) The following passage (without the authorities) from the High Court's decision in *Bradshaw v McEwans Pty Ltd*<sup>18</sup> is also relevant in complaint proceedings against a council member:

*"The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture. But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise."* [Underlining added]

<sup>16</sup> *ibid*

<sup>17</sup> *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.

<sup>18</sup> (1951) 217 ALR 1 at 5



## Attachment B

### **Panel's general views and relevant authorities on regulation 7(1)(b) (where the Panel is reasonably satisfied that the conduct complained about was not conduct that contravenes s. 5.93 of the Act or The Criminal Code s. 83)**

#### **Legislation**

Regulation 7(1)(b) reads:

*"A person who is a council member must not make improper use of the person's office as a council member ... to cause detriment to the local government or any other person."*

Regulation 7(2) reads:

*"Subregulation (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83."*

#### **Panel's general views and relevant authorities**

In the predicated circumstance (i.e. where the Panel is reasonably satisfied that the Council member's conduct complained about was not conduct that contravenes section 5.93 or *The Criminal Code* section 83) the Panel's general views on regulation 7(1)(b) and relevant authorities are as follows:

1. 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 that office.
2. 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, in *Treby and Local Government Standards Panel*<sup>19</sup> (herein, *Treby*) the then Deputy President of the State Administrative Tribunal (herein, the SAT), Judge J Pritchard (as she then was) said<sup>20</sup>, relevantly and without references or authorities, that the following conclusions can be drawn:

*"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.*

*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.*

*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. 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.*

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<sup>19</sup> [2010] WASAT 81

<sup>20</sup> *Ibid* at [26] – [33]

*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.*

*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."*

3. The required standards of conduct of a council member are in essence those flowing from the fiduciary obligations owed by the member to his/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, and any relevant code of conduct: *Treby*<sup>21</sup> The issue of what, viewed objectively, is 'improper use' of the office of council member, is to be determined according to the particular functions and responsibilities of the council member whose conduct is impugned: *Treby*<sup>22</sup>.

4. The essential features of the fiduciary relationship, and the fiduciary obligations, owed by a council member to his/her council as the governing body of the local government may be summarised as:

- (a) an obligation to act in good faith – i.e. the council member must in his/her dealings act in good faith in what he/she 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/herself or others from the property, powers, confidential information or opportunities afforded to the member by virtue of his/her position.

5. In relation to a council member's obligation to act in good faith, the term 'in good faith' refers to a state of mind that embraces: an honest and conscientious approach<sup>23</sup>; an absence of intent to seek unconscionable advantage<sup>24</sup>; and a belief that all is being regularly and properly done.<sup>25</sup>

6. The fiduciary obligations owed by a council member to their council are the paramount obligations of a councillor by virtue of the fact that council members are representatives of their community and elected by and from that community.

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<sup>21</sup> Ibid at [87] - [90]

<sup>22</sup> Ibid at [87] - [90]

<sup>23</sup> *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 (6 February 2004), an appeal that involved consideration of the term 'in good faith' in s 18D of the *Racial Discrimination Act 1975 (Cth)*, per French J (as he then was) at [90] – [91].

<sup>24</sup> Ibid

<sup>25</sup> *Cannane v J Cannane Pty Ltd (In Liquidation)* [1998] HCA 26; 192 CLR 557; 153 ALR 163; 72 ALJR 794 (7 April 1998) per Kirby J at [101]

7. The fiduciary obligations owed by a council member to their council take precedence notwithstanding that:

- (a) it may be expected that council members 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;
- (b) council members may be expected to hold particular views as to how they would wish their community to develop and to discharge their duties as council members by reference to those views;
- (c) council members may be assumed to hold and to express views on a variety of matters relevant to the exercise of the functions of the council;
- (d) by virtue of the political nature of the processes they are involved in as representatives of their community, as recognised under the Act, council members can obtain input from numerous sources and bring their own opinion to bear on matters for council decisions.

8. The general principles set out in regulation 3(1) are a reflection and an indication of the standards of behaviour which can reasonably be expected of councillors: *Treby*<sup>26</sup>

9. In relation to the meaning of 'detriment' in regulation 7(1)(b):

- (a) in *Treby*<sup>27</sup> Judge Pritchard said the following, relevantly and without authorities:
 

*"I accept the submission ... 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.*

*In my view, ...the word 'detriment' in reg 7(1)(b) should be given its ordinary and natural meaning."*; and
- (b) in *Ryan and Local Government Standards Panel*<sup>28</sup> 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 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."*

10. The High Court of Australia case of *Chew v The Queen*<sup>29</sup> and *Treby* are authority in Western Australia for the following propositions:

- (a) the proper interpretation of "to" in regulation 7(1) is "in order to", and thus regulation 7(1)(b) 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*] cause detriment to the local government or any other person";

<sup>26</sup> Ibid at [91]

<sup>27</sup> Ibid at [94] – [95] and [103]

<sup>28</sup> [2009] WASAT 154 at [31]-[32].

<sup>29</sup> [1992] HCA 18; (1992) 173 CLR 626

- (b) 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; and
- (c) 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.

**11. In relation to establishing a Council member's specific intent:**

- (a) the noun 'motive' means an emotion prompting an act. It is the emotion which gives rise to a person's intention and, in this sense, motive is entirely distinct from intention (or purpose) 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<sup>30</sup>;
- (b) a person's subjective intention and state of mind can be inferred in all the circumstances<sup>31</sup>;
- (c) 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)(b), 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 to cause detriment to the local government or any other person; and
- (d) The member's belief mentioned in the within (c) above 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 and definite inference to be drawn from such motives and/or such circumstantial evidence, as the case may require.<sup>32</sup>

**Issues relevant to dealing with an allegation that a breach of regulation 7(1)(b) has occurred**

**12.** In light of the foregoing views and authorities, where the Panel is reasonably satisfied that the conduct complained about was not conduct that contravenes section 5.93 of the Act or *The Criminal Code* section 83, the elements of a breach of regulation 7(1)(b) – or, the relevant legal issues involved in determining whether such a breach has occurred, with each issue being dependant on the previous issue being answered in the affirmative – are that:

- (a) a person who is currently a council member committed conduct;
- (b) the council member's conduct was a use of his/her office of council member;
- (c) viewed objectively, that use was an improper use of the council member's office of council member; and
- (d) the council member committed his/her conduct with the intention and belief that the intended result would be to cause detriment to the local government or any other person.

<sup>30</sup> *Hyams v DPP* [1974] UKHL 2 per Lord Hailsham of St. Marylebone, at p.7.

<sup>31</sup> See the lengthy discussion on this issue by Kirby J in *Cutter v R* [1997] HCA 7; (1997) 143 ALR 498; (1997) 71 ALJR 638 (29 April 1997).

<sup>32</sup> *ibid.*

**Attachment C****MINUTE OF ORDER****THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:**

1. Michael Anderton, a member of the Council of the City of Bayswater, be publicly censured as specified in paragraph 2 below.
2. Within the period of 29 days to 43 days from the day following the date of service of this Order on the Chief Executive Officer of the City of Bayswater, such Chief Executive Officer *arrange* the following Notice of Public Censure to *be published* as soon as is possible after the date being 43 days from the day following the date of such service, *in no less than 9 point print*.
  - (a) as a one-column or a two-column display advertisement in the first 15 pages of “The West Australian” newspaper; and
  - (b) as a one-column or a two-column display advertisement in the first 15 pages of the “Eastern Suburbs Reporter” newspaper.

**NOTICE OF PUBLIC CENSURE**

The Local Government Standards Panel (the Panel) has made a finding to the effect that on or about 12 August 2010 **CR MICHAEL ANDERTON JP, a member of the Council of the City of Bayswater**, committed a breach of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* when he provided a letter on his personalised Council-issued letterhead for distribution, and other assistance, in regard to the advertising of a public meeting to form an action group regarding the 2010/11 fiscal year rates rise made by the said Council.

The Panel found that such conduct constituted an improper use by Cr Anderton of his office (including a breach of his obligation of fidelity) and that by such conduct he intended to cause detriment to the City in that at least some of the persons who read a distributed copy of his letter would think less favourably of the Council.

The Panel censures Cr Anderton for this breach of regulation 7(1)(b).

**LOCAL GOVERNMENT  
STANDARDS PANEL**

## Attachment D

### NOTICE TO THE PARTIES TO THE COMPLAINT

#### 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, the term "decision" means a decision to dismiss the complaint or to make an order.**
- (2) By rule 9(a) of the *State Administrative Tribunal Rules 2004*, subject to those rules **an application to the SAT under its review jurisdiction must be made within 28 days of the day on which the Panel (as the decision-maker) gives a notice** [see the Note below] **under the *State Administrative Tribunal Act 2004* (SAT Act) section 20(1).**
- (3) **The Panel's *Reasons* to which this notice is attached constitute the Panel's notice (i.e. the decision-maker's notice) given under the SAT Act section 20(1).**

**Note:**

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

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

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