

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 48 of 2008 (DLGRD 20090001)
Heard: Determined on the documents
Considered: 5 November 2009
Coram: Mr B. Jolly (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)

SP 48 of 2008

Complainant: (Mr) Jason BUCKLEY

Council member complained about: Councillor Rodney BRADLEY

Local Government: Town of Cambridge

Regulations alleged breached: Regulations 7(1), 10(3)(a) and 10(3)(b)

FINDINGS AND REASONS FOR FINDINGS

DEFAMATION CAUTION

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SUMMARY OF FINDINGS

The Panel found that Councillor Bradley:

- (a) committed a breach of regulation 7(1)(b); and
- (b) did not breach regulation 10(3)(a) or 10(3)(b).

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 in the 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 B3]* refers to the document that is Doc ID B3 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 B3]* refers to pages 3 - 4 of Doc ID B3.

FINDING/S AND REASONS FOR FINDING/S

Alleged conduct

1. Broadly, Mr Buckley’s complaint is about alleged conduct by a member of the Town’s Council (“Council”), Councillor Bradley, in and when giving evidence for Mr Carmelo Charles Saliba (“Mr Saliba”) at the Perth Magistrates Court on 23 July 2008 in PE 34738 of 2008 (Town of Cambridge v Carmelo Charles Saliba) (“the court case”), in which the Town was prosecuting Mr Saliba for non-compliance with an order of the State Administrative Tribunal (“SAT”) to fix the unfinished house and defects on the property at 67 Ruislip Street, West Leederville (“Mr Saliba’s property”).

Allegations of minor breach

2. In the complaint, as supplemented by Mr Buckley’s response of 7 May 2009 (*[Doc D]*) and its attachments (*[Docs D1 to D5]*), Mr Buckley makes 3 allegations of minor breach. They can be expressed as follows:

- (1) On 23 July 2008 Councillor Bradley made improper use of his office of Council member to cause detriment to the Town, and thus contravened regulation 7(1), by giving evidence for Mr Saliba in the court case (“allegation (1)”). Mr Buckley alleges that the detriment that Councillor Bradley intended was the undermining of the Town’s evidence in its prosecution of Mr Saliba so that the prosecution would not be successful or, if the prosecution was successful, that any penalty imposed on Mr Saliba would be less than what would have been otherwise imposed if Councillor Bradley had not given the evidence he gave in support of Mr Saliba.
- (2) In giving evidence for Mr Saliba in the court case, Councillor Bradley did so in his capacity as a Council member while attending an organised event when members of the public were present, and that he contravened regulation 10(3)(a) by having orally made a statement or statements that a Town employee is incompetent or dishonest (“allegation (2)”). The alleged statement or statements so made, and the identity of the Town employee allegedly concerned, are not set out here for reasons that are apparent from the Panel’s view on this allegation later in these Reasons.

- (3) In giving evidence for Mr Saliba in the court case, Councillor Bradley did so in his capacity as a Council member while attending an organised event when members of the public were present, and that he contravened regulation 10(3)(b) by having orally used an offensive or objectionable expression, or offensive or objectionable expressions, in reference to a Town employee ("allegation (3)"). The alleged expression or expressions so used, and the identities of the Town employees allegedly concerned, are not set out here for reasons that are apparent from the Panel's view on this allegation later in these Reasons.

Probable facts

3. 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:

- (1) As recorded in the published minutes (part of which are [Doc B2]) of the Town's Ordinary Council Meeting held on 18 December 2007 ("the December 2007 OCM"):

- (a) item DV07.174 at the December 2007 OCM concerned the outcome of a then relevant legal action by the Town against Mr Saliba in relation to Mr Saliba's property;
- (b) Council's 7/0 decision at the December 2007 OCM in relation to item DV07.174, when Councillor Bradley was present, followed the relevant Committee's and the Administration's recommendation, and was:

"That:-

- (i) the report on the outcome of recent legal action against the owner of 67 Ruislip Street, West Leederville, be received;*
- (ii) should the owner fail to bring the construction of the house at 67 Ruislip Street, West Leederville into compliance with the Notice dated 16 August 2004, issued pursuant to the provisions of the Local Government (Miscellaneous Provisions) Act 1960 (as amended by the State Administrative Tribunal) by 29 February 2008, the Chief Executive Officer be authorised to initiate further legal action against Mr CC Saliba as the owner of 67 Ruislip Street, West Leederville;*
- (iii) should the owner fail to bring the construction of the house at 67 Ruislip Street, West Leederville into compliance with the requirements of the Notice dated 16 August 2004 issued pursuant to the provisions of the Local Government (Miscellaneous Provisions) Act 1960 (as amended by the State Administrative Tribunal) by 29 February 2008, the Chief Executive Officer be authorised to issue a notice under section 409A (1) of the Local Government (Miscellaneous Provisions) Act 1960 on Mr CC Saliba as the owner of the building, requiring him to show cause, within 60 days of the service of the notice, why the building should not be demolished and removed."*

- (2) This decision was the Council decision that authorised the Town commencing and prosecuting the court case.
- (3) The court case transcript [Doc D5] is an accurate record of the relevant proceedings in the court case.

The Panel notes that the available information includes a letter from Councillor Bradley to the Presiding Member, dated 20 May 2009, [Doc F] in relation to Complaint SP 47 of 2008 which the Panel has previously considered and that also relates to the court case. This letter is relevant to this matter by virtue that:

- (a) at the bottom of page 2 and at the top of page 3 of the letter, Councillor Bradley mentions complaints about him to the Panel in reference to his “*appearance at the Perth Magistrate’s Court at the request of a ratepayer*”;
- (b) in dealing with Complaint SP 47 of 2008 the Panel has treated this reference by Councillor Bradley to be a reference to his attendance at and giving evidence in the court case at Mr Saliba’s request;
- (c) at the top of page 3 of the letter, Councillor Bradley also states:

“I reserve any discussion of that matter [i.e. his appearance at the Perth Magistrate’s Court at the request of a ratepayer] until it is raised formally with me under the terms of [formal complaints against him by the CEO]. There are serious issues that I will raise with you then.”;
- (d) notwithstanding this advice from Councillor Bradley, he did not respond to the Notice of Complaint [Doc E] sent to him in this matter.

Allegation (1)

4. The Panel now considers, in turn, the allegations of minor breach made in the complaint. As mentioned in paragraph 2(1) above, allegation (1) is:

“On 23 July 2008 Councillor Bradley made improper use of his office of Council member to cause detriment to the Town, and thus contravened regulation 7(1), by giving evidence for Mr Saliba in the court case.”

Attachment B consists of the provisions of regulation 7(1) followed by the Panel’s views in relation to it and associated matters, all of which are incorporated here as if set out in full.

5. In the Panel’s view the required standards of conduct of Councillor Bradley as a Council member at 23 July 2008 were the standards that flow from the fiduciary obligations owed by him to Council (or, the Town) as varied and 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. The Panel notes that:

- (1) The Town's "Code of Conduct for Elected Members and Staff", adopted by Council on 22 November 2005 ("the Town's Code of Conduct") [Doc G] is a relevant code of conduct that at 23 July 2008 was applicable to Council members.
- (2) Clause 3.1 of the Town's Code of Conduct reads, in part:

"(a) Members ... will:-

 - (i) act, and be seen to act, properly and in accordance with the requirements of the law and the terms of this Code;*
 - ...*
 - (v) always act in accordance with their obligation of fidelity to the Town;*

(b) Members will represent and promote the interests of the Town, while recognising their special duty to their own constituents."
- (3) Clause 3.7 of the Town's Code of Conduct reads, in part:

"An effective Elected Member will work as part of the Council team with the Chief Executive Officer and Executive Managers. That teamwork will only occur if Members and Staff have a mutual respect and co-operate with each other to achieve the Council's strategies. To achieve that position Members need to:-

...

 - refrain from publicly criticising staff in a way that casts aspersions on their professional competence and credibility."*

7. In the present matter allegation (1) is that Councillor Bradley contravened regulation 7(1) by giving evidence for Mr Saliba in the court case to cause detriment to the Town. In the light of the Panel views and material in Attachment B and in paragraphs 5 and 6 above, it is the Panel's view in relation to allegation (1) that:

- (1) By virtue of the section 2.29(1) declaration made by Councillor Bradley before acting in the office of Council member, among other things he voluntarily undertook an obligation of constraining himself by his promise to a particular course of action – namely, that he took the office upon himself and would duly, faithfully, honestly, and with integrity fulfil the duties of the office for the people in the Town's district according to the best of his judgment and ability, and that he would observe the *Local Government (Rules of Conduct) Regulations 2007*.
- (2) Councillor Bradley gave evidence for Mr Saliba in the court case purportedly in his capacity as a Council member [see p. 55 of the court case transcript], and thus his attending the court case and giving that evidence was a use of his office of Council member.
- (3) At 23 July 2008, as a Council member, Councillor Bradley had statutory and ethical duties to his fellow councillors and the Town. He was bound to respect Council's decisions, and the processes by which those decisions were implemented, for better or worse.

- (4) Councillor Bradley was present when the Council made its decision set out in paragraph 3(1)(b) above. Notwithstanding this, Councillor Bradley later gave evidence for Mr Saliba in the court case for the sole or dominant purpose (motive or intent) of attacking the Town's evidence and attempting to influence the court to resolve the prosecution action against the Town, or, if that did not occur, to influence the court to impose a lesser penalty on Mr Saliba than would have been otherwise imposed if Councillor Bradley had not given the evidence he gave in support of Mr Saliba.
- (5) The due administration of justice requires that the provisions of the Town's Code of Conduct have no application in relation to the evidence that a council member, in his or her capacity as a council member, in fact gives in a court hearing. It is for this reason that the part of clause 3.7 of the Town's Code of Conduct quoted above does not apply in this matter.
- (6) However, the provisions of the Town's Code of Conduct may have application in relation to a council member's conduct in voluntarily attending a court hearing to give evidence against his or her local government's case.
- (7) Viewed objectively, Councillor Bradley's conduct in voluntarily attending at the court case and voluntarily giving evidence for Mr Saliba was conduct in breach of Councillor Bradley's duties under clause 3.1 of the Town's Code of Conduct, in that by such conduct Councillor Bradley:
 - (a) did not act in accordance with his obligation of fidelity to the Town; and
 - (b) did not represent and promote the interests of the Town.
- (8) Viewed objectively, Councillor Bradley's conduct in voluntarily attending at the court case and voluntarily giving evidence for Mr Saliba was an improper use of his office of Council member by virtue of the fact that such conduct was, as mentioned in paragraph 7(7) above, in breach of Councillor Bradley's duties under clause 3.1 of the Town's Code of Conduct.
- (9) In any event, if the Panel's view in paragraph 7(8) above is not correct, viewed objectively, Councillor Bradley's conduct in voluntarily attending at the court case and voluntarily giving evidence for Mr Saliba was an improper use of his office of Council member by virtue of the fact that such conduct was in breach of his duty of loyalty or his obligation of fidelity to Council's decision in relation to item DV07.174 at the December 2007 OCM, and the processes by which that decision were being implemented.
- (10) Viewed objectively, there is a rational inference arising from the available information that it is more likely than not that Councillor Bradley voluntarily gave his evidence for Mr Saliba in the court case with the intent to cause detriment to the Town – such detriment being at least a tendency for others to think less favourably of the Town – and it is more likely than not that such inference is the only inference open to reasonable persons upon a consideration of all of the available information.

- (11) Alternatively to paragraph 7(10) above if the conclusion in that paragraph is not correct, there is a rational inference arising from the available information that it is more likely than not that Councillor Bradley voluntarily gave evidence for Mr Saliba in the court case with reckless indifference that the detriment mentioned in paragraph 7(10) above was a probable or likely consequence of his giving that evidence, and it is more likely than not that such inference is the only inference open to reasonable persons upon a consideration of all of the available information.

Panel finding on allegation (1)

8. In the light of the contents of Attachment B and paragraphs 3 to 7 (both inclusive) above, and the available information, the Panel finds that Councillor Bradley committed a breach of regulation 7(1)(b) on 23 July 2008, by voluntarily giving evidence for Mr Saliba in the Town's prosecution against Mr Saliba in the court case, to cause detriment to the Town.

Allegation (2) & allegation (3)

9. The Panel notes that regulation 10(3) commences with the wording: *"If a person, in his or her capacity as a council member, is attending a council meeting, committee meeting or other organised event ..."*. In the Panel's view the determinative questions in relation to allegation (2) and allegation (3) are:

- (a) whether or not a court hearing is an 'organised event' within the meaning of regulation 10(3); and
- (b) in any event, whether or not regulation 10(3) has any application in the circumstances of this matter.

10. Attachment C sets out the Panel's comments and view in relation to the term 'organised event' in regulation 10(3), all of which are incorporated here as if set out in full. In the light of those comments and views, it is the Panel's view in relation to allegation (2) and allegation (3) that:

- (1) A court hearing is not an 'organised event' for the purposes of regulation 10(3).
- (2) In any event, the due administration of justice requires that regulation 10(3) has no application in relation to the evidence that a council member, in his or her capacity as a council member, gives in a court hearing.

Panel finding in relation to allegation (2) and allegation (3)

11. In the light of the contents of paragraphs 9 and 10 above and the available information, the Panel finds that Councillor Bradley did not contravene regulation 10(3)(a) or 10(3)(b) in giving the evidence that he gave for Mr Saliba in the court case on 23 July 2008.

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Brad Jolly (Presiding Member)

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Carol Adams (Member)

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John Lyon (Member)

Attachment A

BACKGROUND AND PROCEDURAL MATTERS

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

In these Reasons and in each attachment to them, 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”).
- (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

The complainant in this matter, Mr Buckley, is the complaints officer (“complaints officer”) and the Chief Executive Officer (“CEO”) of the Town of Cambridge (“Town”). His complaint (“the complaint” or “Complaint SP48”) consists of a 3-page *Complaint of Minor Breach* dated 24 December 2008 [Doc B] and the attachments to it [Docs B1 to B3].

By a letter [Doc C] Mr Buckley was requested to clarify his allegations and provide further information in this matter. His response was his 5-page letter of 7 May 2009 [Doc D] and the attachments to it [Docs D1 to D5].

Preliminary matters

The Panel notes that:

- (1) The complaint is in the form approved by the Minister for Local Government and was made within time.
- (2) Regulations 7 and 10 are rules of conduct under section 5.104(1). A contravention of regulation 7 or regulation 10 is a minor breach under section 5.105(1).
- (3) There are allegations made in the complaint that Councillor Bradley, a Council member at the relevant time, has committed minor breaches as defined under section 5.105(1)(a).

Procedural fairness

By a Panel *Notice of Complaint* dated 19 June 2009 [Doc E] Councillor Bradley was notified of the subject 3 allegations of minor breach and invited his response. At the time of signing of these Reasons, the Panel has not received any response from Councillor Bradley in relation to any of those allegations.

Available information

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 Mr Buckley, dated 24 December 2008 |
| B | Copy of the complaint (3-page Complaint No. SP 48 of 2008, dated 24 December 2008) |
| B1 | Copy of pages 55-59 of Transcript of Proceedings at Perth Magistrates Court on 23 July 2008 in <i>Town of Cambridge v Carmelo Charles Saliba</i> |
| B2 | Copy of pages 234 – 237 of the Minutes of the Ordinary Council Meeting held on 18 December 2007 |
| B3 | Copy of 2-page letter from McLeods, Barristers & Solicitors, to the Town, dated 24 July 2008 |
| C | Copy of 4-page letter to Mr Buckley, dated 14 January 2009 |
| D | Copy of 5-page letter from Mr Buckley, dated 7 May 2008 (sic, 2009) |
| D1 | Copy of pages 234 – 237 of the Minutes of the Ordinary Council Meeting held on 18 December 2007 |
| D2 | Copy of 3-page letter from Cr Bradley to Mr Buckley, dated 28 February 2008 |
| D3 | Copy of 1-page letter from Mr Buckley to Cr Bradley, dated 6 March 2008 |
| D4 | Copy of 2-page letter from Cr Bradley to Mr Buckley, dated 20 August 2008 |
| D5 | Copy of 94-page Transcript of Proceedings at Perth Magistrates Court on 23 July 2008 in <i>Town of Cambridge v Carmelo Charles Saliba</i> |
| E | Copy of 4-page <i>Notice of Complaint</i> to Cr Bradley, dated 19 June 2009 |
| F | Copy of 3-page letter from Cr Bradley to the Presiding Member, dated 20 May 2009 |
| G | Copy of 8-page “Town of Cambridge Code of Conduct for Elected Members and Staff” adopted by Council on 22 November 2005 |
| H | Copy of 2-page printout of the result of the Town’s ordinary elections held on 20 October 2007, obtained on 21 July 2009 from the website of the WA Electoral Commission at www.waec.wa.gov.au |

Attachment B

PANEL VIEWS & COMMENTS IN RELATION TO REGULATION 7(1)

Relevant legislation

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.”*

Section 5.93 states what constitutes the offence of and penalty for improper use of (confidential) information. *The Criminal Code* section 83 states what constitutes the crime of and penalty for corruption.

Elements of regulation 7(1)

The elements of a breach of regulation 7(1) are that:

- a council member
- committed the alleged conduct
- the member's conduct was a use of the member's office as a council member
- viewed objectively, the member's conduct constituted making improper use of the member's office as a council member (where the term “viewed objectively” means as viewed by a reasonable person – i.e. a hypothetical person with an ordinary degree of reason, prudence, care, self-control, foresight and intelligence, who knows the relevant facts)
- viewed objectively, the member's conduct was committed by the member for the sole or dominant purpose (motive or intent) of:
 - gaining directly or indirectly an advantage for the member or any other person; and / or
 - causing detriment to the local government or any other person.

Panel views

In the Panel's view:

1. Conduct has been held to be “improper” where it involves “a breach of the standards of conduct that would be expected of a person or body in the position of the public body by reasonable persons with knowledge of the duties, powers and authority of the position and circumstances of the case.”: *R v Byrnes: Re Hopgood* (1995) 183 CLR 501 at 514 – 5.

2. 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.
3. For regulation 7(1) to be breached, it is not necessary that an advantage has actually been directly or indirectly gained or that a detriment has been actually suffered, as it is sufficient that the council member had the intention of directly or indirectly gaining an advantage or of causing a detriment: *Chew v R* (1992) 173 CLR 626.
4. Moreover, the test for impropriety being objective, it is not a requirement for the existence of impropriety that there be conscious wrongdoing: *Chew*, at 647; *R v Byrnes* at 514 – 5.
5. In considering the meaning of the term “detriment” in regulation 7(1)(b), the Macquarie Dictionary (2nd ed) defines:
 - (a) the noun “detriment” as “loss, damage, or injury” and “a cause of loss or damage”;
 - (b) the noun “loss”, relevantly, as “detriment or disadvantage from failure to keep, have or get”;
 - (c) the noun “damage” as “injury or harm that impairs value or usefulness”;
 - (d) the noun “harm” as “injury; damage; hurt” and “moral injury; evil; wrong”; and
 - (e) the noun “disadvantage”, relevantly, as “any unfavourable circumstance or condition” and “injury to interest, reputation, credit, profit, etc”.
6. The term “detriment” is to be construed widely, and includes a financial or a non-financial loss, damage, or injury, or 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.

[Note: In *Ryan and Local Government Standards Panel* [2009] WASAT 154 Mr Justice J A Chaney (President), at [32], agreed with the observations set out in 3, 4, 5 and 6 above.]

7. The Panel may find that a council member intended by his/her conduct to cause a detriment to a person if:
 - (a) the member's admission/s is/are to that effect; or
 - (b) there is a rational inference arising from the circumstantial evidence that it is more likely than not that:
 - (i) the member intended to cause the detriment; or
 - (ii) the member's conduct was done with reckless indifference that the detriment was a probable or likely consequence of that conduct, and it is more likely than not that such inference is the only inference open to reasonable persons upon a consideration of all the facts in evidence.

8. In considering the meaning of the term 'advantage' in regulation 7(1)(a), 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 ...".
9. 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.
10. 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, 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.
11. A council member's right of freedom of expression is a factor in considering what constitutes improper conduct by him or her.
12. 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) directs and controls 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 direct and control 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.
13. In relation to the fiduciary obligations owed by a council member to his or her council (or local government):
- (1) In considering the meaning of the terms 'obligation' and 'fidelity', it is noted that the Shorter Oxford English Dictionary (6th ed) defines:
 - (a) the noun 'obligation' variously and relevantly as:
 - (i) "the action of constraining oneself by promise or contract to a particular course of action";
 - (ii) (at law) "a binding agreement committing a person to a payment or other action ...; the created or liability incurred by such an agreement";
 - (iii) "moral or legal constraint; the condition of being morally or legally bound; the constraining power of a law, duty, contract, etc";
 - (iv) "an act or course of action to which a person is morally or legally obliged; what one is bound to do; (a) duty; an enforced or burdensome task or responsibility"; and
 - (v) "legal liability"; and
 - (b) the noun 'fidelity' as, relevantly, "loyalty, faithfulness, unswerving allegiance (to a person, spouse, cause, etc.)".
 - (2) The term 'fidelity' implies the unfailing fulfilment of one's duties and obligations and strict adherence to vows or promises, and the term 'loyalty' implies a steadfast and devoted attachment that is not easily turned aside.

- (3) The classic statement of the nature of fiduciary relationships is that of the High Court in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, at 96-97 (and see, too, *Chan v Zacharia* (1984) 154 CLR 178):

"The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf. Phipps v Boardman (1967) 2 AC 46, at 127), viz., trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of', and 'in the interests of' signify that the fiduciary acts in a 'representative' character in the exercise of his responsibility ... "

- (4) In Meagher, Gurnmow and Lehane's *Equity: Doctrines and Remedies* (2002), at p158, the learned authors state:

"The distinguishing characteristic of a fiduciary relationship is that its essence, or purpose, is to serve exclusively the interests of a person or group of persons; or, to put it negatively, it is a relationship in which the parties are not each free to pursue their separate interests."

- (5) In other words, the fiduciary duty is one, having regard to the trust and confidence reposed in a person by virtue of his or her position, not to act unconscionably and thereby abuse that trust and confidence.
- (6) *Keech v Sandford* (1726) 25 ER 223 is a foundational case on the fiduciary duty of loyalty. It concerns the law of trusts and has affected much of the thinking on directors' duties in company law. It is authority for the position that a trustee owes a strict duty of loyalty so that there can never be a possibility of any conflict of interest.
- (7) A fiduciary's duties are different to a trustee's duties, although some of the respective duties may be similar or overlap.
- (8) It is settled that during the term of his or her employment an employee is under an implied contractual "duty of fidelity". In a South Australian Industrial Relations Commission case, *Cocks v Adelaide City Council* [2002] SAIRComm 6 (12 February 2002), Commissioner KM Bartel said, omitting authorities and citations:

At [68–69]: *"The duty of fidelity and good faith is a convenient term which covers a range of obligations owed by an employee and which are intended to ensure that honest and faithful service is rendered to the employer. Among the range of obligations, are the implied duties of loyalty, honesty, confidentiality and mutual trust."*

The duty of fidelity and good faith is an implied term in every contract of employment. The scope and content of that duty will vary according to the nature and circumstances of the contract of employment.”

At [75]: *“What is required by good faith and fidelity has to be determined on consideration of the circumstances, including the nature of the employer's business, the position of the employee in it and the actual or potential impact of what the employee does on the employer's interests.”*

- (9) In *Youyang Pty Limited v Minter Ellison Morris Fletcher* [2003] HCA 15, the Court [Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ at [40]] approved the statement of principle of McLachlin J in *Canson Enterprises Limited v Boughton & Co* [1991] 3 SCR 534 at 543 that “The essence of a fiduciary relationship ... is that one party pledges itself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged.””
- (10) The Shorter Oxford English Dictionary (6th ed) defines:
 - (a) the noun ‘college’ in its primary sense as “an organised body of people performing certain common functions and sharing special privileges”; and
 - (b) the adjective ‘collegiate’ in its primary sense as “of the nature of, constituted as, a college”.
- (11) 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) subject to section 5.21 and regulation 11, the no conflict rule – i.e. subject to section 5.21 and regulation 11, a council member cannot have a personal interest or 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.

- (12) 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.
- (13) By virtue of the section 2.29(1) declaration made by a council member before acting in the office, the member has voluntarily undertaken an obligation of constraining himself or herself by his or her promise to a particular course of action – namely, that he or she takes the office “upon myself and will duly, faithfully, honestly, and with integrity, fulfil the duties of the office for the people in the district according to the best of [his or her] judgment and ability, and will observe the *Local Government (Rules of Conduct) Regulations 2007*”.
- (14) A reference in a local government's code of code, or otherwise, to a council member having an ‘*obligation of fidelity*’ to his or her local government's council as the governing body of that local government:
- (a) is a reference to the council member's duty, having regard to the trust and confidence reposed in a council member by virtue of his or her position, not to act unconscionably and thereby abuse that trust and confidence; and

- (b) is to use a convenient term which refers to and covers all of the fiduciary duties that such a member has in fact to his or her local government's council as that governing body.
- (15) A local government makes its decisions by its council, its committees to which a local government power or duty has been delegated, and by delegation under section 5.42 or section 5.44.
- (16) Prior to a council making a decision on a matter, a council member may lobby or attempt to persuade any one or more of the other council members or the committee members to vote in a certain way.
- (17) 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.
- (18) 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.
- (19) 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, 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.
- (20) A council member's duty of loyalty to his or her local government's decisions will be subordinated in the public interest of the due administration of justice where:
 - (a) there are current or pending proceedings (whether legal, civil or administrative proceedings) in relation to any one or more of his or her local government's decisions ("relevant proceedings"); and
 - (b) the member is or proposes to be a party, or has any direct or indirect interest in a party or a proposed party ("related party"), to the relevant proceedings for the purpose of disputing any one or more of his or her local government's decisions and for the determination of the dispute as to his or her and/or such other party's legal rights and liabilities; or
 - (c) any other person (i.e. any person other than his or her local government or any related party) ("unrelated party") who or which is a party to the relevant proceedings gives or serves on the member a summons or a subpoena to be a witness in the relevant proceedings.

- (21) However, a council member will contravene his or her fiduciary duties to his or her council (or, his or her local government) if:
- (a) an unrelated party requests the member to give evidence, on behalf of the unrelated party, in any relevant proceedings and the member accedes to the request; or
 - (b) the member offers or volunteers to give evidence, on behalf of an unrelated party, in any relevant proceedings; or
 - (c) the member voluntarily attends the relevant proceedings and voluntarily gives evidence on behalf of an unrelated party.
- (22) In expressing its views in (20) and (21) above, the Panel does so with some hesitation bearing in mind the law relating to contempt of court – however, the Panel is satisfied that those views are not inconsistent with that law, as those views:
- (a) do not restrict or hinder a council member's access to the courts of criminal or civil jurisdiction for the determination of disputes as to his or her or any related party's legal rights and liabilities;
 - (b) do not prevent a council member from giving evidence under a summons or a subpoena to be a witness in any relevant proceeding;
 - (c) do not restrict the evidence that a council member might give in any relevant proceeding;
 - (d) do not usurp the function of any court to decide any proceeding or matter before it according to law; and
 - (e) otherwise do not pose a real risk of interference with the administration of justice.

Attachment C

PANEL COMMENTS & VIEWS IN RELATION TO THE TERM 'ORGANISED EVENT' IN REGULATION 10(3)

1. The Panel notes that:

(1) Regulation 10(3) reads:

"If a person, in his or her capacity as a council member, is attending a council meeting, committee meeting or other organised event and members of the public are present, the

person must not, either orally, in writing or by any other means —

(a) make a statement that a local government employee is incompetent or dishonest; or

(b) use offensive or objectionable expressions in reference to a local government employee."

(2) To date, there is only one decided matter before the State Administrative Tribunal (SAT) that relates to regulation 10(3), and that is *Hargreaves and Local Government Standards Panel* [2008] WASAT 300. In that case Judge J Chaney, Deputy President of SAT, as he then was, conducted a review of a Panel decision to make an order that a councillor make a public apology in relation to a breach of regulation 10(3)(b). Judge J Chaney, Deputy President of SAT, as he then was, conducted the review. In his Reasons for Decision, at par 17, he said:

"Regulation 10 is headed 'Relations with local government employees'. I accept the submissions of counsel for the Attorney General of Western Australia that reg 10(3) is designed to ensure that councillors do not use their position to publicly criticise employees within their local government. It is predicated on the proposition that concerns about the performance of employees should be dealt with within the local government organisation and through proper channels, rather than aired publicly in a council or committee meeting."

(3) The Shorter Oxford English Dictionary (6th ed) defines:

(a) the adjective 'organised' as, relevantly, "coordinated so as to form an orderly structure";

(b) the noun 'event' as, relevantly, "an occasion held out as offering attractions to the public";

(c) the noun 'occasion' as, relevantly, "an occurrence, an event, an incident" and "a special ceremony or celebration: a significant or noteworthy happening";

(d) the noun 'attraction' as, relevantly, "a thing or feature which attracts visitors, customers, etc"; and

(e) the verb transitive 'attract' as, relevantly, "... cause to come near ... by presenting favourable conditions or opportunities".

2. In the light of the Act and paragraphs 1(1) to 1(3) above of this Attachment, it is the Panel's view that:

(1) In regulation 10(3) the term 'organised event' includes:

- (a) any coordinated or planned happening by the local government, other than a council meeting or a committee meeting, in order for the local government to comply with any of its responsibilities under the Act or to carry out or perform any of its functions under the Act or otherwise for any lawful purpose of the local government; and
- (b) any coordinated or planned happening that is held out or represented by the person/s organising it as offering or presenting favourable conditions or opportunities, to attract spectators or participants, or to provide entertainment.

(2) This inclusive meaning is consistent with:

- (a) each council meeting and council meeting that is open to members of the public being an 'organised event' in that each of the meetings is a coordinated or planned occasion;
- (b) the context in regulation 10(3) of a council member "*attending a council meeting, committee meeting or other organised event*"; and
- (c) the popular usage and understanding, and the dictionary meaning, of the phrase "attending an organised event".

(3) A court hearing is held for the purposes of the administration of justice.

(4) Although public notice of the date, place and time of a court hearing is usually given, and although a court hearing is usually open to members of the public, the hearing is not *an occasion* and is not *held out or represented* as offering any thing or feature as an '*attraction*' to the public.

(5) Accordingly, a court hearing is not an 'organised event' for the purposes of regulation 10(3).

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 48 of 2008 (DLGRD 20090001)
Heard: Determined on the documents
Considered: 5 November 2009 & 25 March 2010
Corams: Mr B. Jolly (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)

SP 48 of 2008

Complainant: (Mr) Jason BUCKLEY

Council member complained about: Councillor Rodney BRADLEY

Local Government: Town of Cambridge

Regulations alleged breached: Regulations 7(1), 10(3)(a) and 10(3)(b)

DECISION & 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.

SUMMARY OF FINDING OF MINOR BREACH

The Panel has made a finding (the finding) that Councillor Bradley committed a breach of regulation 7(1)(b) on 23 July 2008, by voluntarily giving evidence for Mr Saliba in the Town's prosecution against Mr Saliba in PE 34738 of 2008 (Town of Cambridge v Carmelo Charles Saliba) (the court case), to cause detriment to the Town (the present breach).

SUMMARY OF DECISION

The Panel's decision on how the present breach is dealt with under section 5.110(6) of the *Local Government Act 1995* (the Act) was that, for the following reasons, pursuant to paragraph (b)(i) of that section, Councillor Bradley be publicly censured as specified in the Minute of Order attached to these Reasons.

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 *Local Government (Rules of Conduct) Regulations 2007* (the Regulations).

Procedural fairness matters

2. The Panel gave to Councillor Bradley:

- (a) notice of the finding;
- (b) a copy of the Panel's Reasons for Findings in this matter (the Reasons for Findings);
- (c) a reasonable opportunity for him to make submissions about how the present breach should be dealt with under section 5.110(6); and
- (d) a further opportunity for him to make such submissions.

Councillor Bradley's response and submissions

3. Councillor Bradley's response to the notice of the finding and the Reasons for Findings is his letter of 8 March 2010 (Councillor Bradley's response). In the Panel's view:

- (a) Councillor Bradley's response may be summarised, relevantly, as consisting of:
 - (i) irrelevant observations about other persons; and
 - (ii) his suggestion that - in the light of those observations - the Panel reconsider its findings in this matter and in relation to Complaint No. SP 50 of 2008;
- (b) the Panel accorded Councillor Bradley procedural fairness before it made its finding of the present breach;
- (c) Councillor Bradley's response does not provide any reason to cause the Panel to doubt its finding of the present breach;
- (d) the term 'submission' refers to a claim, line of reasoning or contention that is intended to persuade the Panel to reach a particular decision on the evidence before it;
- (e) Councillor Bradley's response does not contain any such submission about how the present breach should be dealt with by the Panel under section 5.110(6); and
- (f) the Panel has accorded Councillor Bradley procedural fairness before it has dealt with the present breach under section 5.110(6).

4. The Panel also observes in relation to Councillor Bradley's response, that:

- (1) When an individual becomes a member of a council of a local government, he or she undertakes high public duties. Those duties are inseparable from the position: the individual cannot retain the honour and divest him/her of the duties.¹
- (2) Councillor Bradley fails to accept that he has committed any wrongdoing in his conduct that, in the Panel's view, resulted in the present breach.
- (3) It is noteworthy that Councillor Bradley's response pays scant attention to but does not disagree with the Panel's general views on regulation 7(1), particularly in relation to the role, responsibilities, empowerment and limitations of a council member, as set out in Annexure B to the present Reasons for Finding, which include the following:
 - (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; and
 - (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.

Panel views on appropriate sanction/s for the present breach

5. In considering an appropriate sanction or sanctions for the present breach the Panel notes that:

Relevant antecedent

(1) In relation to Complaint No. SP 47 of 2008:

- (a) Councillor Bradley was found under Part 5 Division 9 of the Act to have committed a minor breach (the first found breach) – namely, that at the Town of Cambridge's Ordinary Council Meeting held on 16 December 2008 Councillor Bradley contravened regulation 11(2) by having and failing to

¹ By analogy from *Horne v Barber* ([1920] HCA 33; (1920) 27 CLR 494) per Isaacs J.

disclose the nature of his “interest” (as defined by regulation 11(1)) in item DV08.178 – that interest being that Councillor Bradley had appeared as a witness for Mr Saliba in the court case defending him against the Town’s action; and

- (b) the Panel dealt with the first found breach pursuant to paragraph (b)(i) of section 5.110(6) by ordering that Councillor Bradley be publicly censured as specified in the Panel’s order.

Is a public censure appropriate in this matter?

- (2) 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.² A breach of regulation 7(1) is a serious matter and will in almost all occasions deserve the sanction of a publicly censure. The Panel does not see any reason in this matter as to why this position should differ when considering the present breach. Accordingly the Panel considers an order that Councillor Bradley be publicly censured is an appropriate sanction in this matter.

Is a public apology appropriate in this matter?

- (3) Where a councillor is found by the Panel to have breached regulation 7(1)(b) by committing an act deliberately done to bring about a result which can be characterised as a detriment to a named or identifiable natural person, the breach will in almost all occasions deserve the sanction of a public apology to that person. However, in this matter, there is no such natural person. Accordingly the Panel does not consider an order requiring Councillor Bradley to apologise publicly is an appropriate sanction in this matter.

Is training appropriate in this matter?

- (4) It is the Panel’s view that what is required of Councillor Bradley is not formal training – rather it is for him:
 - (a) to take on board the Panel’s general views on regulation 7(1), particularly in relation to the role, responsibilities, empowerment and limitations of a council member, as set out in Annexure B to the present Reasons for Finding;
 - (b) to accept that whenever he is acting in his capacity as a Council member he is required to steadfastly adhere to and actively observe and carry out all of the legal duties and ethical duties that he has as a Council member; and
 - (c) to act accordingly.;

and thus the Panel does not consider that an order for Councillor Bradley to undertake training is an appropriate sanction in this matter.

² *Mazza and Local Government Standards Panel* [2009] WASAT 165 per Judge J Pritchard (Deputy President) at [107].

Panel decision

6. Having regard to the Reasons for Findings, the matters mentioned in paragraph 5 above, and the general interests of local government in Western Australia, the Panel's decision on how the present breach is dealt with under section 5.110(6) is that pursuant to paragraph (b)(i) of that section Councillor Bradley be publicly censured as specified in the Minute of Order attached to these Reasons.

.....
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 (“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 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).**