

## LOCAL GOVERNMENT STANDARDS PANEL

<b>Panel Members</b>	Mr B. Jolly (Presiding Member) Mr P. Best (Deputy for Member, Cr C. Adams) Mr J. Lyon (Member)
<b>Considered</b>	31 January 2012 Determined on the documents
<b>COMPLAINANT</b>	(Mayor) David <b>BOOTHMAN</b>
<b>COUNCIL MEMBER COMPLAINED ABOUT</b>	<b>Cr Elizabeth RE</b>
<b>Local Govt</b>	<b>City of Stirling</b>
<b>Regulation alleged breached</b>	Regulation 7(1) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
<b>Proceeding No.</b>	Complaint No. SP 64 of 2010 (DLG 20100312)

## REASONS FOR FINDINGS

### Summary

The complainant alleged, and it was not in dispute, that at the City's Ordinary Council Meeting on 16 November 2010 when the meeting was open to members of the public, Cr Re orally submitted and gave notice of a specified written motion (being a vote of no confidence in Mayor Boothman, on 3 specified grounds) – which she intended to propose at the next Council meeting – by first reading out aloud and then tabling her intended motion.

The Panel found that, due to the *nature* of Cr Re's intended motion, and the *language* she used in the 3 specified grounds in it, her said conduct amounted to her making improper use of her office as a Council member to cause detriment to Mayor Boothman (such detriment being a tendency for others to think less favourably of him), and accordingly was a breach of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007*.

### 1. Introduction

Mayor David Boothman, the Mayor of the local government of the City of Stirling (**City**) and a member of the City's Council (**Council**), has made a Complaint of Minor Breach (**the complaint**) about alleged conduct by Cr Elizabeth Re, another member of Council.

Mayor Boothman alleges in effect that on 16 November 2010 Cr Re committed a breach of both or either of regulation 7(1)(a) and/or regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (**Conduct Regulations**).

## **2. Jurisdiction**

Cr Re was elected as a member of Council on 17 October 2009 for a term that expires on 19 October 2013. There is no evidence that since she was so elected she has resigned or been declared disqualified by the State Administrative Tribunal (**the SAT**) from being a Council member.

The allegation of breach made in the complaint is in relation to an alleged contravention by Cr Re of regulation 7(1) of the Conduct Regulations.

Regulation 7(1) of the Conduct Regulations is a rule of conduct under section 5.104(1) of the *Local Government Act 1995 (LG Act)*, and accordingly a breach of that regulation is a 'minor breach' as defined in section 5.105(1)(a) of the LG Act (**minor breach**). A breach of regulation 7(1) of the Conduct Regulations occurs if a council member commits a breach of either regulation 7(1)(a) or 7(1)(b) of the Conduct Regulations. Accordingly, the breach alleged in the complaint is an allegation that a minor breach has occurred.

The complaint was made within two years after the breach of regulation 7(1) of the Conduct Regulations alleged in the complaint occurred.

In the circumstances, the Panel has jurisdiction (or, the power) to consider the complaint and to deal with the alleged breach of regulation 7(1) of the Conduct Regulations made in it.

## **3. Complainant's allegation**

Mayor Boothman alleges that at the City's Ordinary Council Meeting on 16 November 2010 when the meeting was open to members of the public, Cr Re orally submitted and gave notice of a specified intended motion that she would propose for consideration at the next Council meeting – by first reading it out aloud and then tabling it – and that in committing that conduct she made improper use of her office as a Council member to cause detriment to his reputation, in contravention of regulation 7(1)(b) of the Conduct Regulations (**the subject Allegation**).

## **4. Submissions by Cr Re on the complainant's allegations**

The Department of Local Government (**Department**) has extended procedural fairness to Cr Re by writing to provide her with the complainant's allegations and an opportunity to provide comments and any information she desires in relation to the matter. Cr Re has responded with her letter dated 28 November 2011 (**Cr Re's submissions**), the contents of which are referred to or reproduced below where relevant or potentially relevant.

## 5. Background

The available information in this matter (**the available information**) is the information in the documents and other material described in **Attachment A**. On that information, the Panel is satisfied that it is more likely than not, and the Panel hereby finds, that the factual setting and circumstances of this matter are as follows.

During item 13 at the City's Ordinary Council Meeting on 16 November 2010 (**November 2010 OCM**) when the meeting was open to members of the public, Cr Re orally submitted and gave notice of a specified motion (**Cr Re's intended motion**) that she would propose for consideration at the next Council meeting, by first reading it out aloud and then tabling it.

The full text of Cr Re's intended motion reads:

*"That a vote of no confidence in Mayor David Boothman be put to the City of Stirling Council on the following grounds:*

- 1. The antagonistic and apparently discriminatory actions and attitudes directed at certain Councillors of the City of Stirling by Mayor Boothman.*
- 2. Apparent anomalies in the selective application by Mayor Boothman of his discretionary powers with regard to the operation issues and the acceptance and rejection of notices of motion submitted by Councillors for consideration by Council;*
- 3. The possible implications for City of Stirling ratepayers and the perceived impact on the accountability of Councillors as a consequence of the current CCC investigations."*

At 16 November 2010 the City's local law, the *City of Stirling Meeting Procedures Local Law 2009 (the City's Standing Orders)*, applied to Council members during meetings of the Council and its committees and to meetings of the City's electors.

## 6. Panel approach

The Panel acknowledges that when it is considering an allegation that a minor breach has occurred it is required to make a finding *whether the minor breach or minor breaches alleged in the relevant complaint/s occurred* [section 5.110(2)(a) of the LG Act]. However, it must not make a finding that a minor breach has occurred unless the finding is 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 of the LG Act]. Also, as is the case whenever the Panel deals with any aspect of a complaint, each of the Panel's members is to have regard to the general interests of local government in Western Australia [clause 8(6) of Schedule 5.1 to the LG Act]

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, the Panel recognises that: the seriousness of an allegation made; the inherent unlikelihood of an occurrence of a given description; and the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the Panel's reasonable satisfaction.

## **7. The issue which requires resolution**

The issue which requires resolution by the Panel is whether Cr Re's reading out aloud and then tabling of her intended motion at the November 2010 OCM was a breach of regulation 7(1)(b) of the Conduct Regulations.

### Relevant legislation

Regulation 7(1) of the Conduct Regulations reads:

*"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."*

### The Panel's Overview on regulation 7(1) of the Conduct Regulations

Before turning to consider the said issues which require resolution by the Panel, it is appropriate and necessary for the purpose of dealing with the subject complaints to refer to the Panel's overview (**Panel's Overview**) in regard to what it considers to be applicable common law and other appropriate views in regard to regulation 7(1) of the Conduct Regulations.

The Panel's Overview is set out in **Attachment B** and is adopted by the Panel for the purposes of dealing with the complaint. For a full understanding of these Reasons, the contents of the Panel's Overview should be read before proceeding.

### The elements of a breach of regulation 7(1) of the Conduct Regulations

In light of the Panel's Overview, the Panel considers that the essential legal issues (or, the elements) necessary to establish a breach of regulation 7(1) of the Conduct Regulations are, that:

- it is more likely than not that a person who is currently a council member committed conduct;
- it is more likely than not that the person's conduct was a use of his or her office as a council member;
- it is more likely than not that, viewed objectively, that use of office was an improper use of the office of council member; and

- the person's conduct was committed by him or her with his or her intent, purpose and aim being that the intended result would be:
  - *[in the case of regulation 7(1)(a) of the Conduct Regulations]* to gain directly or indirectly an advantage for the person or another person; or
  - *[in the case of regulation 7(1)(b) of the Conduct Regulations]* to cause detriment to the local government or any other person.

Unless otherwise indicated, the term 'satisfied' where used below in the context that the Panel is satisfied with something, means: in relation to a question of law, that the Panel is reasonably satisfied that the thing stated is the current state of the common law or an appropriate view of what in the Panel's view ought to be applicable common law; and, in relation to a question of fact, that the Panel is reasonably satisfied that the evidence in this matter demonstrates that the thing stated by the Panel is more likely than not to have occurred.

## **8. Panel consideration of the said issues which require resolution**

### Common ground

It is common ground between the complainant and Cr Re: that on 16 November 2010 Cr Re was a Council member; that during item 13 at the November 2010 OCM when it was open to members of the public, Cr Re orally submitted and gave notice of her intended motion by first reading it out aloud and then tabling it; and that this conduct was a use of her office as a Council member.

For present purposes, unless otherwise indicated: the term '*viewed objectively*' where used below means as judged or viewed by a reasonable person with knowledge of the duties, obligations, powers and authority of a City of Stirling councillor as at 16 November 2010; and the term 'reasonable person' is a reference to a hypothetical person with an ordinary degree of reason, prudence, care, self-control, foresight and intelligence, who knows the circumstances of the case.

The subject Allegation is now turned to.

### **The subject Allegation**

In light of the said common ground between the complainant and Cr Re, there are two outstanding issues in relation to the subject Allegation which require resolution by the Panel. They are:

- Is it more likely than not that, viewed objectively, Cr Re's reading out aloud and then tabling of her intended motion at the November 2010 OCM was an improper use of her office as a Council member.
- When Cr Re read out aloud and tabled her intended motion at the November 2010 OCM, was it her intent, purpose and aim that the intended result would be to cause detriment to Mayor Boothman.

## **Complainant's views and contentions**

In the complaint Mayor Boothman says, relevantly:

*"I believe this notice of motion reflects adversely on my character and actions, and imputes discreditable motives.*

*Cr Re did not and has not set out any specific details of the supposed antagonistic and alleged discriminatory actions and attitudes that I have allegedly displayed and as such this has caused a personal detriment to me as I have been unable to fairly answer the accusations raised in the notice of motion. ...*

*It is totally unfair to expect any person to answer a notice of motion which provides no substance or detail whatsoever.*

*In my opinion Cr Re has deliberately and with intent raised this notice of motion, and included reference to the CCC for the tainted reason to cause me a personal detriment.*

## **Cr Re's relevant response**

In Cr Re's submissions she claims that either personally, internally or through the Stirling Council process, Mayor Boothman continually provokes her with allegations that she finds harassing and claims that he uses bullying tactics. Cr Re says that this can be demonstrated through many of her notices of motions being ruled out of order or that they 'disappeared' and were often not addressed, thus not allowing any discussion of the matters. The issue of alleged rejections of motions from Cr Re as well as other City Councillors has been previously raised with the Department which has provided advice on that matter.

In the Panel's view, the statements of particular significance in Cr Re's submissions in regard to whether she made improper use of her office when she read out aloud and then tabled her intended motion at the November 2010 OCM, are as follows (with underlining added, for the purpose of considering Cr Re's motives as indicated below).

*"... my intentions were regarding the process and not personal ..."*

*"Moving a notice of motion with regard to the Mayor is not in itself an improper use of the office of a Councillor."*

*"I had grave concerns for the functioning of the Council at that time. I had been seeking advice for some time from colleagues, governance officers of the City and from the Department of Local Government officers (Department of Local Government and Regional Development) as to how I could raise my concerns involving the Council process and transparency of debate. One suggestion was to raise my concerns by way of a notice of motion. I had been liaising with officers from the Department of Local Government and I took this advice and tabled the motion for consideration at the next Council meeting."*

"At all times my intentions in exercising my rightful duty to move a motion of no confidence against the Mayor were to resolve my concerns regarding the conduct of Council under the Mayor, as the figure head of council."

"I can confirm that my tabling of a motion of no confidence reflected dissatisfaction in the conduct of the Council meetings and the Mayors role in constant vetoing my notice of motions in conjunction with the CEO ..... No personal detriment was intended to Mayor, but rather a wish to open debate and discussion ...."

"My intentions were one of representing the trust that the people of Stirling had placed in electing me as a Councillor and a belief that the reputation of the Council and the City needed to follow a transparent and accountable process."

"It is quite in order for a Councillor to move a motion of no confidence in a Mayor I Councillor and. as Windeyer J in Australian Consolidated Press Ltd v Uren (1966) 117 CLR 185 stated that one "who chooses to enter the arena of politics must expect to suffer hard words at times."

"... as previously stated, upon advisement from officers at DLGRD I had viewed the motion as one of process that in order to address my concerns I needed to be able to exercise my lawful right to open discussion and debate in a democratic manner"

"With regards the issue of "CCC", this was central to my concerns with the management of Council and the City. The environment of this period included a number of inquiries regarding operational issues within the City management and this was openly portrayed with the Media especially when one of the Council officers died in suspect circumstances during the CCC enquiry. Repeated request [sic] to openly advise Councillors of the issues and to discuss them was refuted. As a Councillor I had a responsibility to those who elected me to ensure that the City was being managed in an appropriate and transparent manner. I also has [sic] a personal liability as a Councillor should there have been serious issues of misconduct as it is a reflection of my and my fellow Councillors reputation and standing in the community would have been diminished. At the time of this issue I was continually being approached by residents on what was going on in Stirling, as CCC issues were constantly being reported in the media and the perception by the public has serious consequences on us all and is still on going and information with regard to the CCC investigation was only partially divulged to me as a councillor."

"In summary, I believe that I have acted on the advice received from my peers and from officers within the Department of Local Government. I believe that as a Councillor I have a responsibility to represent the people that elected me and that like all elected members of parliament have an entitlement to free speech when it involves the public good."

"I believed [sic] that I used my position as an elected Councillor on behalf of myself and other Councillors to formally raise issues in the manner of call for motions with the intent that open debate occurred on issues that were critical to the management of Council and the City and my actions were after long consultation with officers from the Department of Local Government ..."

### **Panel view**

The Panel notes that in *Treby and Local Government Standards Panel* [2009] WASAT 224 (*Treby No.1*) at paragraph [19] Senior Member D R Parry (as he was then) mentioned that "good government requires courtesy amongst those elected to govern".

### **The nature of Cr Re's intended motion**

The Panel acknowledges that:

- (a) in itself the mere giving of notice of an intended motion that relates to a local government's mayor, by a member of the council of the local government, is not of course an improper use of the member's office; and
- (b) where a council member has concerns involving his or her council's process and the transparency of debate, a legitimate means for the member to raise those concerns is by way of an appropriately worded notice of motion.

However, the Panel considers it is unlikely that any officer of the Department of Local Government would have advised or did advise Cr Re to give a notice of motion that sought a *vote of no confidence* in Mayor Boothman. In any event, Cr Re has not provided any information that would indicate that any such advice was given to her before she committed her relevant conduct in this matter.

In the Panel's view, it is a relevant and important question in the present matter, and in the general interest of local government in Western Australia, whether the mere giving in open meeting of notice of an intended motion of no confidence in a local government's mayor, by a member of the council of the local government, is an improper use of the member's office.

**Attachment C** sets out matters and some of the Panel's general views in relation to this question.

In Cr Re's submissions she seems to link this question to the comment above that she quotes from the Judgment of Windeyer J in *Australian Consolidated Press Ltd v Uren*. That case concerned a claim for exemplary damages by Mr Tom Uren for defamation by a newspaper in regard to claims made about his conduct as a member of the NSW Parliament, and is of little (if any) relevance in this matter. In any event, the operations of a local government and the proceedings of a council meeting are, of course, not an arena of Federal or State politics.



In light of the Panel's Overview and the contents of **Attachment C** it is the Panel's view that the mere giving in open meeting of notice of an intended: motion of no confidence; censure motion; or no-confidence motion; in the holder of an elected office in local government, by a member of it's council, is an improper use of the member's office.

For the reasons above, as Cr Re's intended motion was an intended motion of no confidence in the City's Mayor, it is the Panel's view that Cr Re's reading it out aloud and then tabling it at the November 2010 OCM amounts to the use by Cr Re of her position as a Council member in a way that is inconsistent with the discharge of the functions or obligations arising from that office.

### **The contents of Cr Re's proposed motion**

The Panel notes that in Cr Re's submissions she states her view that *"like all elected members of parliament [I] have an entitlement to free speech when it involves the public good"*.

The Panel disagrees strongly with this view. In the present matter there is no relevant comparison between a Member of Parliament and a member of a council of a local government

Members of Parliament have different rights and privileges that a member of a council of a local government has – e.g. broadly, a Member of Parliament has the defence of absolute privilege available to him or her should he or she be the subject of a claim for damages based on alleged or actual defamatory statements made by him or her when speaking in Parliament; whereas, broadly, a member of a council has limited defences available to him or her should he or she be the subject of a claim for damages based on alleged or actual defamatory statements made by him or her when speaking before the council.

In any event, in *Treby and Local Government Standards Panel* [2010] WASAT 81 (*Treby No.2*) at paragraphs [43] – [59] Deputy President Judge J Pritchard (as her Honour was then) has considered and commented on various aspects of the implied freedom of political communication under the Commonwealth Constitution (which, in the common language is sometimes inaccurately referred to as 'the right to free speech on political matters').

*Treby No.1* and *Treby No.2* are relevant to this matter on its facts.

The Panel notes here that in the complaint Mayor Boothman does not allege that Cr Re has committed a minor breach (as defined in section 5.105(1)(b) of the LG Act) as the result of any breach of clause 7.13 of the City's Standing Orders and by virtue of regulation 4(1) of the Conduct Regulations. Accordingly, Cr Re's obligations under clause 7.13 of the City's Standing Orders are examined only for the purpose of considering the propriety or otherwise of Cr Re's reading out aloud and then tabling of her intended motion at the November 2010 OCM.

The Panel is satisfied that Cr Re's obligations as a Council member while attending the November 2010 OCM included her obligations under clause 7.13 of the City's Standing Orders, which clause reads in relevant part:

- "(2) A member must not –
  - (a) reflect adversely on the character or actions of another member ...;
- (3) A member must not use offensive or objectionable expressions in reference to any other member ..."

In the Panel's view the critical words, phrases or expressions in the first two of the 3 specified grounds in Cr Re's intended motion to be considered are: "antagonistic", "discriminatory" and "anomalies in the selective application".

The Macquarie Dictionary (at page 65) defines the verb 'antagonise' as "to make hostile; make an antagonist of". The Shorter Oxford English Dictionary (at page 88) defines the noun 'antagonist' as "an opponent, an adversary; an opposing force".

The Macquarie Dictionary (at page 480) defines the adjective 'discriminatory' as "exhibiting prejudice; showing discrimination". The Shorter Oxford English Dictionary (at page 701) defines it as "discriminative; esp practising or evincing racial, sexual, or similar discrimination".

The Macquarie Dictionary (at page 64) defines the noun 'anomaly' as "deviation from the common rule or analogy". The Shorter Oxford English Dictionary (at page 86) defines it relevantly as "irregularity of ... behaviour".

The Macquarie Dictionary (at page 1494) defines the verb 'selective' relevantly as 'biased'. The Shorter Oxford English Dictionary (at page 2740) defines the verb transitive 'select' as "choose or pick out in preference to another or others".

The Panel is satisfied that the first ground of the 3 specified grounds in Cr Re's intended motion is, *viewed objectively*:

- (a) an *adverse reflection* on Mayor Boothman's *character*, in that:
  - (i) the wording of such ground amounts to a statement, remark or observation by Cr Re that Mayor Boothman has committed improper conduct in that as the City's Mayor he has by his attitudes treated Cr Re and some of the other City Councillors with hostility and prejudice; and
  - (ii) such statement, remark or observation is related to Mayor Boothman's *moral or mental characteristics*, and would be perceived by a reasonable person as tending to lower Mayor Boothman in the estimation of his fellow persons by making them think less of him; and
- (b) an *adverse reflection* on Mayor Boothman's *actions*, in that:
  - (i) the wording of such ground amounts to a statement, remark or observation by Cr Re that Mayor Boothman has committed improper conduct in that as the City's Mayor he has by his actions treated Cr Re and some of the other City Councillors with hostility and prejudice; and

- (ii) such statement, remark or observation is plainly related to *things allegedly done* by Mayor Boothman, and would be perceived by a reasonable person as tending to lower Mayor Boothman in the estimation of his fellow persons by making them think less of him.

The Panel is satisfied that the second ground of the 3 specified grounds in Cr Re's intended motion is, *viewed objectively*:

- (a) an *adverse reflection* on Mayor Boothman's *character*, in that:
  - (i) the wording of such ground amounts to a statement, remark or observation by Cr Re that Mayor Boothman has acted with bias in the application of his discretionary powers as the presiding person at council meetings in regard to various issues and the acceptance and rejection of notices of motion; and
  - (ii) such statement, remark or observation is related to Mayor Boothman's *moral or mental characteristics*, and would be perceived by a reasonable person as tending to lower Mayor Boothman in the estimation of his fellow persons by making them think less of him; and
- (b) an *adverse reflection* on Mayor Boothman's *actions*, in that:
  - (i) the wording of such ground amounts to a statement, remark or observation by Cr Re that Mayor Boothman has acted with bias in the application of his discretionary powers as the presiding person at council meetings in regard to various issues and the acceptance and rejection of notices of motion; and
  - (ii) such statement, remark or observation is plainly related to *things allegedly done* by Mayor Boothman, and would be perceived by a reasonable person as tending to lower Mayor Boothman in the estimation of his fellow persons by making them think less of him.

For the reasons above, the Panel is satisfied that Cr Re's reading out aloud and then tabling of her intended motion at the November 2010 OCM was a *breach* of her obligations under clause 7.13(2)(a) of the City's Standing Orders.

In relation to Cr Re's obligations under clause 7.13(3) of the City's Standing Orders, the Shorter Oxford English Dictionary (6<sup>th</sup> Edition, 2007, page 1969) defines the adjective "objectionable" as "open to objection, undesirable, unpleasant, offensive, disapproved of", while it is defined in the Macquarie Dictionary (5<sup>th</sup> Edition, 2009, page 1153) as "that may be objected to; unpleasant; offensive." Relevant dictionary meanings of the word "offensive" were considered by Judge Chaney (as he then was) in *Hargreaves and Local Government Standards Panel* [2008] WASAT 300 at 18. He there observed:

"I was taken to definitions of 'offensive' in the Oxford English Dictionary online, in which it is defined as 'giving or liable to give offence; displeasing; annoying; insulting' and the Macquarie Dictionary, where it is defined as causing offence or displeasure; irritating, .... and insulting."

For present purposes it may possibly not matter much whether the Panel views the words "offensive or objectionable" (see the extract of its reasons for findings in Complaint No. SP 55 of 2010 in **Attachment D**) as disjunctive or not. It deals with the complaint on the basis that they are disjunctive.

In the Panel's view, the respective expressions in the 3 specified grounds in Cr Re's intended motion to be considered in regard to whether their use contravened Cr Re's obligations under clause 7.13(3) of the City's Standing Orders are: "*antagonistic*", "*discriminatory*" and "*anomalies in the selective application*".

In relation to the first of the 3 specified grounds in Cr Re's intended motion, it is the Panel's view, that:

- (1) In its context, the expression 'antagonistic': is plainly referring to unspecified alleged actions and attitudes that Mayor Boothman has allegedly directed at Cr Re and some of the other City Councillors; and is used by Cr Re to imply that Mayor Boothman has by such actions and attitudes treated Cr Re and some of the other City Councillors with hostility. The Panel is satisfied that, viewed objectively, such an implication: is undesirable; is unpleasant; is liable to give offence; and is insulting.
- (2) In its context, the expression 'discriminatory': is plainly referring to unspecified alleged actions and attitudes that Mayor Boothman has allegedly directed at or displayed towards Cr Re and some of the other City Councillors; and is used by Cr Re to imply that Mayor Boothman has by such actions and attitudes treated Cr Re and some of the other City Councillors with prejudice. The Panel is satisfied that, viewed objectively, such an implication: is undesirable; is unpleasant; is liable to give offence; and is insulting.

In relation to the second of the 3 specified grounds in Cr Re's intended motion, it is the Panel's view, that: in its context, the expression '*anomalies in the selective application*': is referring to unspecified alleged actions by Mayor Boothman; and is used by Cr Re to imply that by such actions Mayor Boothman has acted with bias in the application of his discretionary powers as the presiding person at council meetings in regard to various issues and the acceptance and rejection of notices of motion. The Panel is satisfied that, viewed objectively, such an implication: is undesirable; is unpleasant; is liable to give offence; and is insulting.

For the reasons above, the Panel is satisfied that both when she read out aloud her intended motion, and when she tabled it, at the November 2010 OCM, she committed a *breach* of her obligations under clause 7.13(3) of the City's Standing Orders in that she used offensive or objectionable expressions in reference to Mayor Boothman.

In the Panel's view, part of the roles and responsibilities of a local government's Chief Executive Officer (CEO) is that in preparing and making public the agenda and other papers for a council or committee meeting, he or she is required to bear in mind that his or local government is not to publish any scandalous or defamatory material, and he or she is not to publish or to consent to the publishing of any such material wherever possible.

In light of the Panel's Overview and the evidence in this matter, the Panel is satisfied that:

- (a) at 16 November 2010, by virtue of general principle (a) in regulation 3(1) of the Conduct Regulations, it was an expected and required standard of conduct of Cr Re that she should act with reasonable care and diligence; and
- (b) Cr Re's reading out aloud and then tabling of her intended motion at the November 2010 OCM *was a breach* by her of that standard of conduct, in that:
  - (i) before she attended the November 2010 OCM she did not ask the City's CEO for his view on whether the contents of her intended motion included any scandalous or defamatory material, which in the Panel's view was an enquiry that a reasonable and prudent council member would make in relation to an intended notice of motion *before* raising it in an open council meeting; and
  - (ii) accordingly, she did not act with reasonable care and diligence.

In light of the Panel's Overview, the Panel is satisfied that at 16 November 2010, by virtue of general principle (g) in regulation 3(1) of the Conduct Regulations, it was an expected and required standard of conduct of Cr Re that she should treat others with respect and fairness.

In light of the Panel's Overview, the Panel is satisfied that the circumstances where a council member will demonstrate failure to treat another person with respect include where the council member makes a defamatory statement about the other person to someone else – noting it is settled law in Australia that a defamatory statement is any representation of fact or opinion that has a tendency to damage a person's reputation (including a tendency for others to think less favourably of the person) in the opinion of reasonable people generally.

The Panel is satisfied that *viewed objectively* there is one reasonable and definite inference or imputation that arises or that can be drawn from the contents of each of the 3 specified grounds in Cr Re's intended motion, particularly in light of that motion being an intended vote of no confidence in Mayor Boothman.

Those inferences or imputations are:

- (i) in relation to the first of the 3 specified grounds in Cr Re's intended motion, that Mayor Boothman should be censured on the basis that he has by his actions and attitudes treated Cr Re and some of the other City Councillors with hostility and prejudice, and has sought to make adversaries of her and them;
- (ii) in relation to the second of the 3 specified grounds in Cr Re's intended motion, that Mayor Boothman should be censured on the basis that he has acted with bias in the application of his discretionary powers as the presiding person at council meetings in regard to various issues and the acceptance and rejection of notices of motion; and
- (iii) in relation to the third of the 3 specified grounds in Cr Re's intended motion, that Mayor Boothman should be censured on the basis that he has failed to advise and discuss with the other City Councillors what information he is aware of in relation to certain investigations into the City's affairs and

operations by the Corruption and Crime Commission (CCC), and has thus: deprived the City's ratepayers of knowledge as to the possible implications to them arising from such investigations; and deprived the other City's Councillors of knowledge as to the perceived impact on their accountability arising from such investigations.

The Panel is satisfied that each of these inferences or imputations would be perceived by a reasonable person as a representation of fact or opinion that has a tendency to damage Mayor Boothman's reputation (including a tendency for others to think less favourably of him) in the opinion of reasonable people generally, and, accordingly, that each of them is a defamatory statement.

In light of the Panel's Overview and the evidence in this matter the Panel is satisfied that:

- (a) viewed objectively, Cr Re's reading out aloud and then tabling of her intended motion at the November 2010 OCM amounts to her having made defamatory statements about Mayor Boothman; and
- (b) accordingly, Cr Re did not treat Mayor Boothman with respect for the purposes of regulation 3(1)(g) of the Conduct Regulations.

Also, in regard to inference or imputation (iii) above:

- (1) The Panel notes that the provisions of section 151 of the *Corruption and Crime Commission Act 2003 (CCC Act)* restrict the disclosure of certain information called 'restricted matter', which section 151(1) of the CCC Act defines as any of: any evidence given before the CCC; the contents of any statement of information or document, or a description of any thing, produced to the CCC; the contents of any document, or a description of any thing, seized under the CCC Act; any information that might enable a person who has been, or is about to be, examined before the CCC to be identified or located; and the fact that any person has been or may be about to be examined before the Commission.
- (2) It is the Panel's views that:
  - (a) if prior to the November 2010 OCM Mayor Boothman was aware of any information that was such restricted matter in regard to any of the CCC investigations that Cr Re refers to, by virtue of section 151 of the CCC Act he was forbidden from disclosing it to any person, let alone to any of the other City Councillors, unless and only as permitted under subsections (3) or (4) of that section;
  - (b) if prior to the November 2010 OCM Mayor Boothman had such information and, without being so permitted, disclosed it to any person in contravention of that proscription he would have committed an offence, and could have been imprisoned for up to 3 years and been fined up to \$60,000 [section 151(7) of the CCC Act]; and
  - (c) the contents of the within (a) and (b) above were known or should have been known to Cr Re prior to and immediately before the commencement of the November 2010 OCM.

In light of the Panel's Overview and the contents of Attachment C, the Panel is satisfied that:

- (a) viewed objectively, Cr Re's reading out aloud and then tabling of her intended motion at the November 2010 OCM amounts to her failing to be free of injustice towards Mayor Boothman in that she was aware that in respect to her allegations in it he had not been afforded any procedural fairness; and
- (b) accordingly, Cr Re did not treat Mayor Boothman with fairness for the purposes of regulation 3(1)(g) of the Conduct Regulations.

For the reasons above, the Panel is satisfied that when Cr Re read out aloud and then tabled her intended motion at the November 2010 OCM, she did not treat Mayor Boothman with respect and fairness, in breach of regulation 3(1)(g) of the Conduct Regulations.

**For the reasons above, the Panel is satisfied that viewed objectively Cr Re's reading out aloud and then tabling of her intended motion at the November 2010 OCM was an improper use of her office as a Council member.**

The second and other outstanding issue in relation to the subject Allegation is now turned to.

#### Cr Re's intent

A person's motive or motives is/are different than his or her belief or intent as to the intended result of an act or omission. Broadly, a person's motive or motives is/are the thing/s that prompt/s or induce/s the person to do or omit to do an act, or to form an intention .

In *De Gruchy v R* [2002] HCA 33 at paragraph [51] Kirby J said (without footnote references):

*"Distinguishing between the usually essential ingredient of a criminal intention and a person's desire, purpose or motive will sometimes be important. But, as such, motive is rarely, if ever, an element of a criminal offence. Motive must not, therefore, be confused with intention. Motive may be "the reason that nudges the will and prods the mind to indulge the criminal intent". It may be the feeling that prompts the operation of the will, the ulterior object of the person willing. It generally has two evidential aspects. These will be the emotion that is supposed to have led to the act and the external fact that is the possible exciting cause of such emotion, but not identical with it."*

In the Panel's view, Cr Re's motives for reading out aloud and then tabling her intended motion at the November 2010 OCM are as indicated by those parts of her submission that are reproduced and underlined above.

The Panel is satisfied that Cr Re's primary motive for reading out aloud and then tabling her intended motion at the November 2010 OCM was to raise her concerns involving the Council process and transparency of debate. However, she could have done this by an appropriately worded notice of motion, rather than to choose the wording she used in her intended motion.

In light of the Panel's Overview, the Panel is satisfied that there is only one reasonable and definite inference to be drawn from Cr Re's said motives and the circumstantial evidence in this matter as to Cr Re's intent when she read out aloud and then tabled her intended motion at the November 2010 OCM – which is, that her intent, purpose and aim was to embarrass, humiliate and denigrate Mayor Boothman by making statements, remarks or observations that had a tendency for others to think less favourably of him.

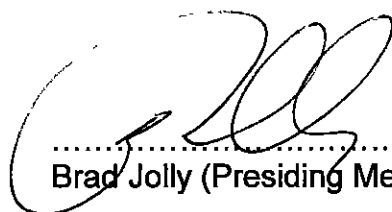
**For the reasons above, the Panel finds that when Cr Re read out aloud and then tabled her intended motion at the November 2010 OCM she believed that the intended result would be to cause detriment to Mayor Boothman – such detriment being damage or loss to Mayor Boothman's reputation.**

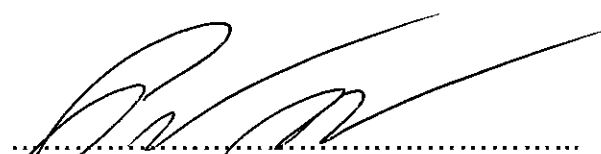
#### **Panel finding on the subject Allegation**

For the reasons above, the Panel finds that Cr Re's reading out aloud and then tabling her intended motion at the November 2010 OCM when it was open to members of the public **was a breach of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007*** in that in committing that conduct Cr Re made improper use of her office as a Council member to cause detriment to Mayor Boothman – such detriment being damage or loss to Mayor Boothman's reputation.

#### **9. What happens next?**

The Panel has made its findings required by section 5.110(2)(a) of the LG Act, including a finding that Cr Re has committed a minor breach (as defined in section 5.105(1) of the LG Act) **(the subject minor breach)**. Accordingly, the Panel is now required to give Cr Re an opportunity to make submissions about how the subject minor breach should be dealt with under section 5.110(6) of the LG Act, and she is to be given a copy of these reasons to assist her in that regard.

  
.....  
Brad Jolly (Presiding Member)

  
.....  
Peter Best (Deputy for Member, Cr C. Adams)

  
.....  
John Lyon (Member)



## Attachment A

### The available information

Doc ID	Description
	<b>Complaint SP64/2010 and its accompanying information:</b>
01.doc	Copy of (3-page) <b>Complaint of Minor Breach No. SP 64 of 2010</b> dated 9 December made by Mayor David Boothman – its attachments being 02.doc, 03.doc, 04.doc and 05.doc.
02.doc	Copy of (1-page) page 338 of the minutes of the City of Stirling's Ordinary Council Meeting held on 16 November 2010..
03.doc	Copy of (1 page) clause 4.5 of the City of Stirling's <i>Meeting and Procedures Local Law 2009</i> .
04.doc	Copy of (2 page) letter from the Department of Local Government to the City of Stirling, dated 23 November 2010.
05.doc	Copy of (4 page) letter from Kott Gunning to the City of Stirling, dated 23 November 2010
	<b>Material received from or on behalf of the Council member complained about:</b>
06.doc	Copy of (5-page) letter from Cr Re, dated 28 November 2011.
	<b>Other information:</b>
07.doc	Copy of (63 page) the City of Stirling's <i>Meeting and Procedures Local Law 2009</i> .

## **Attachment B**

### **The Panel's Overview in regard to what it considers to be applicable common law and other appropriate views in regard to regulation 7(1) of the *Local Government (Rules of Conduct) Regulations 2007***

Note: In light of the common ground between the complainants and Cr Hipkins in this matter, the following is in relation to the last two elements of a breach of regulation 7(1) of the *Local Government (Rules of Conduct) Regulations 2007 (Conduct Regulations)* – that is:

- is it more likely than not that, viewed objectively, the person's use of his or her office as a council member was an improper use of that office; and
- the person's conduct was committed by him or her with his or her intent, purpose and aim being that the intended result would be:
  - [in the case of regulation 7(1)(a) of the *Conduct Regulations*] to gain directly or indirectly an advantage for the person or another person; or
  - [in the case of regulation 7(1)(b) of the *Conduct Regulations*] to cause detriment to the local government or any other person.

### ***What amounts to an improper use of a person's office as a council member?***

In *Treby and Local Government Standards Panel* [2010] WASAT 81 (*Treby*) at paragraphs [26] – [33] Deputy President Judge Pritchard (as her Honour was then) drew conclusions from the authorities she had cited, in relation to the meaning and application of the term 'improper use of the person's office' within the context of regulation 7(1)(b) of the *Conduct Regulations*. In summary, those conclusions are that:

1. A council member's impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the council member by reasonable persons with knowledge of the duties (i.e. the obligations and responsibilities), powers and authority of his or her position as a council member and the circumstances of the case.
2. A council member's impropriety does not depend on his or her consciousness of impropriety. It is to be judged objectively and does not involve an element of intent.
3. An improper use of a person's office as a council member: 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 functions or obligations arising from that office; or will arise from the doing of an act which a councillor knows or ought to know that he or she has no authority to do.
4. In the case of a council member's impropriety that arises from an abuse of power, the council member's alleged knowledge or means of knowledge of the circumstances in which the power is exercised and his or her purpose or intention in exercising the power will be important factors in determining whether the power has been abused.
5. A council member's use of his or her office can be improper even though it is for the purpose or with the intention of benefiting his or her Council.

***Duties, obligations and responsibilities of an elected member of a local government***

An individual undertakes significant public obligations when he/she becomes a member of the council of a local government. Those obligations are inseparable from the position: he/she cannot retain the honour and divest himself/herself of the obligations. This means that he/she can not effectively divest himself/herself of the character of a council member in any of his/her dealings in or with respect to a matter that has come before him/her as a council or committee member.

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>1</sup>

In comparison to the State Government situation, the situation of a council of a local government substantially mirrors that of Cabinet. While council members are elected, in local government there is no equivalent of Parliament. The *Local Government Act 1995 (LG Act)* does not contemplate that political parties<sup>2</sup> have any part to play in local government in Western Australia.<sup>3</sup>

The LG Act does not contemplate any group of council members being or acting as a political 'Opposition' to the local government concerned. In particular, the concept of an official opposition would be contrary to the intent of the LG Act.

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 of the LG Act – and, accordingly, a local government's council is a team, and each council member is a member of the team.

The collegial status of the council's decision making is apparent from the nature of the councillor debate where:

- 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
- 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.

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<sup>1</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).

<sup>2</sup> The term 'political party' is used to refer to an organisation of like-minded people which aims to develop policies and endorse candidates to contest elections with a view to forming government

<sup>3</sup> This is unlike the LG Act's respective equivalent Acts in New South Wales and Queensland, where a person standing for the office of council member is permitted to be endorsed for the office by a registered political party.

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.*

A council member, as a member of a collegiate decision-maker and by virtue of a councillor's obligation of fidelity to council [as to which, see below], 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>4</sup>

The role and function of the council of a local government is set out in section 2.7 of the LG Act, which reads:

*"(1) The council —*

- (a) governs the local government's affairs; and*
- (b) is responsible for the performance of the local government's functions.*

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

- (a) oversee the allocation of the local government's finances and resources; and*
- (b) determine the local government's policies."*

The role and function of a councillor of a local government is set out in section 2.10 of the LG Act, which reads:

*"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."*

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<sup>4</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.)

Accordingly, by virtue of sections 2.7 and 2.10 of the LG Act, the role of a councillor is divided into two broad categories – as a member of the local government's governing body, the council, and as an elected person.

Elected members constitute a local government's council. The most basic obligation of councillors is to govern and to vote on matters. They are responsible for: observing and implementing section 2.7 of the LG Act; ensuring the needs and concerns of their community are addressed; and communicating the policies and decision of the council to their community.

Generally, a council member (which term embraces an elector mayor and an elector president) will carry out his or her role and functions under section 2.10 of the LG Act by observing and implementing section 2.7 of the LG Act and ensuring the needs and concerns of his or her community as a whole are addressed.

Generally, at a minimum there are 4 means by which a council member will carry out his or her functions under section 2.10(a), (b) and (c) of the LG Act, and in so doing will observe and implement section 2.7 of the LG Act – namely:

- (a) by reading the papers and otherwise preparing for council meetings and applicable committee meetings;
- (b) by attending at such meetings, making any required disclosure of interest, and constructively and actively participating in the local government's decision-making processes at such meetings;
- (c) representing his or her local government at organised events and on outside bodies as agreed and reporting back on their activities as appropriate; and
- (d) where appropriate, by acting as an intermediary or conduit in communications between, on the one hand, electors, ratepayers and residents of his or her local government's district, and, on the other hand, his or her council.

On the Panel's view of relevant or potentially relevant authorities<sup>5</sup>, it is arguable that at law the functions of a council member include:

- (a) the functions of a council member, as a member of the council, as set out in section 2.7 of the LG Act;
- (b) where a council member is also the mayor or president, the additional functions set out in section 2.8 of the LG Act;
- (c) the functions of a council member, as set out in section 2.10;
- (d) the things done or omitted by a council member in an official capacity;
- (e) any act or omission that is incidental to the carrying out of the functions and proper actions which the office of council member authorises;

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<sup>5</sup> *Canadian Pacific Tobacco Co. Ltd. v Stapleton* [1952] HCA 32; [1952] HCA 32; (1952) 86 CLR 1 per Dixon CJ at p 6, *Herscu v R* [1991] HCA 40; (1991) 173 CLR 276 (21 October 1991) per Mason CJ, Dawson, Toohey and Gaudron JJ at [10], and Brennan J at [5]; *State of Tasmania v Johnston* [2009] TASSC 60 per Evans J at [38] – [39]; *DPP v Zierk* [2008] VSC 184 (30 May 2008) per Warren CJ at [18] – [19].

- (f) the situation where a council member performs a function which, by virtue of the office of council member, it is his or hers to perform, whether or not it can be said that he or she is legally obliged to perform that function in a particular way or at all; and
- (g) the wielding of influence in a matter or activity that:
  - (i) by virtue of the office of council member, is a matter or activity such that the council member wields influence or is in a position to wield influence; or
  - (ii) without limiting the generality of the foregoing, cannot be undertaken without an authorisation from the council member's local government; or that is by way of a commercial dealing with that local government.

The role and functions of a mayor includes presiding at meetings in accordance with the LG Act, providing leadership and guidance to the community in the district, and speaking on behalf of the local government [section 2.8(1)(a), (b) and (d) and section 2.8(2) of the LG Act].

The role and function of a deputy mayor is that he or she may (and usually does) perform the role and functions of the mayor where: the office of mayor is vacant; or the mayor is not available or is unable or unwilling to perform the functions of the mayor [section 2.9 and section 5.34 of the LG Act]

***The standards of conduct expected and required of a member of a local government***

The standards of conduct expected of a member of a local government are to be discerned from the fiduciary obligations which council members owe to their councils and in a range of statutory and non-statutory instruments, including the LG Act itself, and the code of conduct, local laws as to conduct, and regulations which the LG Act contemplates may be made to regulate the conduct of members of local governments [*Treby* at paragraphs [87] – [89]].

The mayor of a local government is subject to additional expectations in terms of standards of behaviour, some of which are reflected in section 2.8(1) of the LG Act [*Treby* at paragraphs [86; 87]].

The deputy mayor of a local government is also subject to additional expectations in terms of standards of behaviour, on the basis that in addition to being required to act as a person of sound moral principle and character (see regulation 3(1)(a) of the Conduct Regulations), he or she must be ready at all times to act as and perform the functions of the mayor where: the office of mayor is vacant; or the mayor is not available or is unable or unwilling to perform the functions of the mayor [section 5.34 of the LG Act].

### ***A council member's obligation of fidelity to council***

When a person makes the required declaration of office pursuant to section 2.29(1) of the LG Act after he or she has been elected as a council member, he or she declares that he or she takes that office upon himself or 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 or she will observe the Conduct Regulations.

The term 'duties of the office' in the said required declaration of office includes the functions, obligations and responsibilities of the office.

It is noted that: 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*; and *Loyalty* refers to a steadfast and devoted attachment that is not easily turned aside: e.g. *loyalty to an oath*.

It is a consequence of making the required declaration of office that every elected member of a local government has voluntarily taken on an obligation of fidelity or faithfulness, owed to the council as the governing body of the local government (or, more accurately, to his or her local government as a whole i.e. to the ratepayers, electors and residents of his or her local government's district, as a general body), to unfailingly and strictly adhere to the terms of the declaration (**obligation of fidelity to council**).

A council member, as a member of a collegiate decision-maker and by virtue of his or her obligation of fidelity to council, has as an obligation of loyalty to his or her local government's decisions (particularly those made by its council), irrespective whether:

- (a) the council member was a council member when the decision was made;
- (b) the decision was made at a regularly held meeting of the council or a relevant committee; or
- (c) the council member was present when the decision was made; or
- (d) the council member voted for or against the decision; or
- (e) the council member agreed or not with the decision or the reason or any of the reasons for the decision; or
- (f) the decision was made, under delegation, by his or her local government's CEO or another staff person.<sup>6</sup>

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<sup>6</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.)

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.

***The fiduciary obligations which council members owe to their councils***

The critical feature of a fiduciary relationship is that the fiduciary undertakes or agrees to act for or in the interest of another person. The fiduciary acts in a representative character.<sup>7</sup>

The essence of a fiduciary relationship is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other.<sup>8</sup>

Within the scope of the fiduciary relationship the fiduciary must give undivided loyalty to the person to whom the obligation is owed.<sup>9</sup> Within that scope, fiduciaries must subordinate their own interests to the interests of the other person to whom they stand in a fiduciary relationship.<sup>10</sup>

By virtue of a person's election to council and his or her declaration of office pursuant to section 2.29(1) of the LG Act, a fiduciary relationship exists between that person as a council member and their local government as a whole – i.e. the ratepayers, electors and residents of the local government's district, as a general body. The fiduciary obligations arising from that relationship (**fiduciary obligations**) 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.

The essential features of the fiduciary obligations owed by a council member to his or her local government can be summarised as:

- An obligation to act in good faith<sup>11</sup> for the benefit of the local government as a whole – i.e. the council member must in his or her dealings act in good faith in what he or she considers to be in the interest of the local government as a whole.

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<sup>7</sup> *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41, 96 - 97.

<sup>8</sup> *Pilmer v The Duke Group Ltd (in liq)* [2001] HCA 31; (2001) 207 CLR 165, 196 - 197 [71].

<sup>9</sup> *Breen v Williams* [1996] HCA 57; (1996) 186 CLR 71, 93, 108; *Maguire v Makaronis* [1997] HCA 23; (1997) 188 CLR 449, 465

<sup>10</sup> *Furs Ltd v Tomkies* [1936] HCA 3, (1936) 54 CLR 583, 590 (Latham CJ).

<sup>11</sup> The term 'in good faith' is not defined in the LG Act. However, it is noted that by virtue of section 9.56(2) of the LG Act, an action in tort does not lie against a council member, or certain other persons, for anything that he or she has, *in good faith*, done in the performance or purported performance of a function under the LG Act or under any other written law.



- An obligation to exercise the powers, duties, functions, obligations and responsibilities conferred or imposed on the council member only for the purposes for which they were conferred or imposed – i.e. to further the interests of the local government as a whole and its operations.
- Subject to any applicable statutory provisions on the subject or to the contrary (in particular, those in the LG Act and those in the Conduct Regulations), the no conflict rule – i.e. a council member cannot have a personal interest (whether pecuniary or non-pecuniary, direct or indirect) or an inconsistent engagement with a third party where there is a real and sensible possibility of conflict.
- Subject to any applicable statutory provisions on the subject or to the contrary (in particular, those in the LG Act and those in the Conduct Regulations), 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 or her position.

In regard to the said fiduciary obligation to act in good faith for the benefit of the local government as a whole – i.e. the fiduciary obligation of a council member that he or she must in his or her dealings act in good faith in what he or she considers to be in the interest of the local government as a whole – it is Panel's view that:

- (a) the phrase '*in good faith*' refers to a state of mind that embraces: an honest and conscientious approach<sup>12</sup>; an absence of intent to seek unconscionable advantage<sup>13</sup>; and a belief that all is being regularly and properly done<sup>14</sup>;
- (b) in regard to the phrase '*in what he or she considers to be*', the views of Owen J in *The Bell Group Ltd (In Liq) v Westpac Banking Corporation (No 9)*<sup>15</sup> at paragraphs [4574] – [4575], [4466] – [4467] and [4618] – [4619] are apposite by analogy;
- (c) in regard to the phrase '*in the interest of the local government as a whole*': there is no material difference between the phrases 'for the benefit of the local government', 'in the best interests of the local government' and 'in the interests of the local government'; as they are all to the same broad effect; and the phrase refers to a position, result or effect that is beneficial or of advantage to the local government as a whole; and
- (d) the phrase '*the local government as a whole*' refers to the ratepayers, electors and residents of the local government's district, as a general body.

The Panel considers that the breach by a council member of any of his or her fiduciary obligations to his or her local government as a whole, is a breach that goes to the root of the fiduciary relationship between a council member and his or her local government, and so is properly regarded as a fundamental breach of his or her obligations as a council member.

<sup>12</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 was then) at [90] – [91]

<sup>13</sup> *ibid*

<sup>14</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]

<sup>15</sup> [2008] WASC 239

In the Panel's view, there are two limbs to the issue of what is the proper basis for determining whether a council member in his or her dealings has committed a breach of his or her fiduciary obligation to act in good faith in what he or she considers to be in the interest of the local government as a whole:

- What is the proper basis for determining whether a council member in his or her dealings has *acted in good faith*?
- What is the proper basis for determining whether a council member in his or her dealings *has acted in what he or she considers to be in the interest of the local government as a whole*?

In regard to the first limb, in *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16, French J (as he was then) at paragraph [97] of his Reasons for Judgment, said the following

"Constructional choices between subjective and objective approaches to good faith have been considered in a number of different statutory contexts. *Cannane v J Cannane Pty Ltd*, was a case arising under s 121 of the *Bankruptcy Act 1966* (Cth) involving a disposition with intent to defraud creditors, not being for valuable consideration, in favour of a person who acted in good faith. Kirby J in a part of his dissenting judgment which did not conflict with the majority judgments, said (at 596):

*'The words "good faith" and "acted in good faith" appear in many statutes in virtually all countries of the common law. It would be erroneous to suggest that a single meaning could be adopted, indifferent to the particular statutory context. It has been remarked that, putting it broadly, the words "good faith", or their Latin equivalents, have received "two divergent meanings"... The first is a broad or subjective view which requires inquiry into the actual state of mind of the person concerned, irrespective of the causes which produce it. The second involves the objective construction of the words by the introduction of such concepts as an absence of reasonable caution and diligence. The particular interpretation apt to the use of the words in a given legislative context will depend on the decision-maker's elucidation of the purpose of the legislature.'*

In the Panel's view, whether a council member in his or her dealings has *acted in good faith* is to be considered by both:

- (a) a subjective approach, which requires inquiry into the council member's actual state of mind of the council member concerned person concerned, irrespective of the causes which produce it – noting that the absence of subjective good faith, e.g. dishonesty or the knowing pursuit of an improper purpose, will usually be sufficient to establish want of good faith in the present context; and
- (b) an objective approach – i.e. judged objectively would a reasonable person view the evidence as demonstrating that it is more likely than not that when the council member committed the conduct under consideration his or her state of mind embraced: an honest and conscientious approach; an absence of intent to seek unconscionable advantage; and a belief that all

things concerned had been or were being regularly and properly done (noting that the term 'reasonable person' is a reference to a hypothetical person with an ordinary degree of reason, prudence, care, self-control, foresight and intelligence, who knows the circumstances of the case).

In regard to the second limb, it is the Panel's view that whether a council member in his or her dealings *has acted in what he or she considers to be a position, result or effect that is or is likely to be beneficial or of advantage to the local government as a whole*, is largely (though by no means entirely) subjective. It is a factual question that also focuses on the state of mind of the council member.

Accordingly, in regard to the said second limb, it is the Panel's view that:

1. Statements by a council member about his or her subjective intention or belief are relevant but not conclusive of his or her 'bona fides'.
2. In ascertaining the state of mind of a council member, the Panel can look at the surrounding circumstances and other materials that genuinely throw light upon the council member's state of mind so as to show: whether he or she was honestly acting in the exercise of his or her powers or the discharge of his or her obligations and responsibilities as a council member; and the real purpose primarily motivating his or her actions or conduct.
3. **Prior to committing any action or conduct as a council member, a person who is a council member must give real and actual consideration to whether the result of the action is or is likely to be a result, position or effect that is beneficial or of advantage to the ratepayers, electors and residents of his or her local government's district, as a general body. The degree of consideration that must be given will depend on the individual circumstances. But the consideration must be more than a mere token: it must actually occur.**
4. The Panel can look objectively at the surrounding circumstances and at the conduct, action or exercise of power under consideration, to assist the Panel in deciding whether to accept or discount the assertions that a council member has made or makes about his or her subjective intention and belief.
5. If the surrounding circumstances prior to a council member committing an action are viewed objectively by the Panel, and the conclusion is that it is more likely than not that he or she has given real and actual consideration to the interests of the local government as a whole, the Panel may nonetheless make a finding that he or she has committed a breach of his or her fiduciary obligation to act in good faith for the benefit of his or her local government as a whole *where the Panel considers the member's conduct or action is such that no reasonable council member could think that the result of the conduct or action would or would likely be a position or effect that was beneficial or of advantage to the ratepayers, electors and residents of his or her local government's district, as a general body.*

The Panel considers that similar principles apply in ascertaining the real purpose for which a councillor's power, duty, function, obligation or responsibility has been exercised or has played a part.

### **Regulation 3(1) of the Conduct Regulations**

Although it is not a rule of conduct that the general principles referred to in regulation 3(1) of the Conduct Regulations be observed by council members, those principles provide an indication of some of the standards which can reasonably be expected of council members.<sup>16</sup> See below for views on some aspects of regulation 3(1).

### **Relevant code of conduct**

The obligations of a council member include those in the code of conduct to be observed by council members, committee members and employees, prepared or adopted by his or her local government pursuant to section 5.103(1) of the LG Act, that was applicable at the date of the incident or conduct complained about in the complaint under consideration.

### **'to'**

The word 'to' in regulations 7(1)(a) and 7(1)(b) of the Conduct Regulations is construed in various synonymous terms, being: "in order to", "for the purpose of" and "with the intent, purpose and aim".

### **'advantage'**

The term 'advantage' in regulation 7(1)(a) of the Conduct Regulations is to be construed widely, and includes a financial or a non-financial benefit, gain or profit, or any state, circumstance, opportunity or means specially favourable.

### **'detriment'**

In relation to the term 'detriment' in regulation 7(1)(b) of the Conduct Regulations:

- (1) In *Ryan and Local Government Standards Panel* [2009] WASAT 154 (*Ryan*), a SAT review matter decided before Treby, the President, Mr Justice Chaney, at paragraph [32] agreed with certain of the Panel's observations on the matter, such observations being part of paragraph [31] of *Ryan* as follows:

*"In the Panel's view, the term "detriment" is to be constructed widely, and includes a financial or a non-financial loss, damage, or injury, of any state, circumstance, opportunity or means specially unfavourable. Accordingly, "detriment" may include a tendency for others to think less favourably of a person, humiliation, denigration, intimidation, harassment, discrimination, disadvantage, adverse treatment, and dismissal from, or prejudice in, employment."*

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<sup>16</sup> Treby at paragraph [91]

- (2) In *Treby* at paragraph [103] Judge Pritchard expressed her view that the word 'detriment' in regulation 7(1)(b) of the Conduct Regulations should be given its ordinary and natural meaning. Also in *Treby*, at paragraphs [94] – [95], Judge Pritchard said:

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

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

### ***Determining a council member's intent, purpose and aim***

In the Panel's view, 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):

- (a) for a breach of regulation 7(1)(a) of the Conduct Regulations, is whether the evidence demonstrates that in committing the relevant conduct the member believed that the intended result of such conduct would be (i.e. the member's intent, purpose and aim was) to gain directly or indirectly an advantage for the member or any other person; and
- (b) for a breach of regulation 7(1)(b) of the Conduct Regulations, is whether the evidence demonstrates that in committing the relevant conduct the member believed that the intended result of such conduct would be (i.e. the member's intent, purpose and aim was) to cause detriment to the local government or any other person.

The member's belief (or his/her intent, purpose and aim) 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>17</sup>.

The following passage (omitting authorities and footnotes) from the High Court's decision in *Bradshaw v McEwans Pty Ltd*<sup>18</sup> is also relevant:

*"[In the civil standard of proof in its application to circumstantial evidence] .... 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*

<sup>17</sup> *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5.

<sup>18</sup> *Ibid.*

*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."*

### **Some aspects of regulation 3(1) of the Conduct Regulations**

Regulation 3(1) of the Conduct Regulations reads:

*"General principles to guide the behaviour of council members include that a person in his or her capacity as a council member should —*

- (a) act with reasonable care and diligence; and*
- (b) act with honesty and integrity; and*
- (c) act lawfully; and*
- (d) avoid damage to the reputation of the local government; and*
- (e) be open and accountable to the public; and*
- (f) base decisions on relevant and factually correct information; and*
- (g) treat others with respect and fairness; and*
- (h) not be impaired by mind affecting substances."*

#### **Regulation 3(1)(a) of the Conduct Regulations**

On its face, in paragraph (a) in regulation 3(1) of the Conduct Regulations, the ethical requirement to 'act with reasonable care and diligence' refers to a council member, before acting, not acting in wilful blindness, but making such inquiries as a reasonable and prudent council member would make – the phrase 'wilful blindness' being a reference to deliberately refraining from making inquiries, the result of which the council member concerned does not care to have.

#### **Regulation 3(1)(b) of the Conduct Regulations**

In respect of *integrity*, the word appears to have a wider meaning than *honesty*, although it may countenance honesty. The Macquarie Dictionary (5<sup>th</sup> ed, 2009, page 867) relevantly defines 'integrity' as "soundness of moral principle and character; uprightness; honesty", and (at page 804) relevantly defines honesty as "1. the quality ... of being honest; uprightness, probity, or integrity 2. truthfulness, sincerity, or frankness 3. freedom from deceit or fraud". The Shorter Oxford English Dictionary (6<sup>th</sup> edition, page 1402), in defining "integrity" when it is used in the moral sense, states: "a. Freedom from moral corruption; innocence, sinlessness. b. Soundness of moral principle; the character of uncorrupted virtue; uprightness, honesty, sincerity."

Accordingly, on its face, the ethical requirement in paragraph (b) in regulation 3(1) of the Conduct Regulations to '*act with honesty and integrity*' requires a council member to act as a person of sound moral principle and character.

In this context, it is to be noted that, generally, a consequence of the roles of a councillor set out in section 2.10(a), (b) and (c) of the LG Act and his/her obligation of fidelity to the council, is that where a council member takes it on himself/herself to make public statements, comments or remarks about both or either of the affairs of his/her local government and/or any acts or omissions of

another council member, the council member has an obligation to ensure that any statement of fact he/she mentions or relies on is substantially true, and that his/her comments or remarks are not made or delivered with malice.

In this context, the term 'malice' "embraces ill-will, spite and improper motive"<sup>19</sup> and the term 'spite' refers to an intention to annoy, hurt, or upset.

#### Regulation 3(1)(c) of the Conduct Regulations

On its face, in paragraph (c) in regulation 3(1) of the Conduct Regulations, the ethical requirement to 'act lawfully' refers to a council member acting in accordance with: any applicable Federal statutory law; any applicable State statutory law or regulation; any applicable local law made by his or her local government; and any applicable part of the common law or equity.

#### Regulation 3(1)(d) of the Conduct Regulations

In regard to the ethical obligation to 'avoid damage to the reputation of the local government', in paragraph (d) in regulation 3(1) of the Conduct Regulations:

- (a) the meaning of the word 'damage' appears to be as Judge Pritchard noted in *Treby* at paragraph [95]: "... 'damage' means 'loss or detriment to one's property, reputation etc' and 'harm done to a thing or person': *Shorter Oxford English Dictionary*.";
- (b) it is to be noted that a local government has a general reputation – which includes, at the least, a trading reputation and an operational reputation – even though a local government has no cause of action for defamation in relation to the publication of defamatory matter about it [section 9 of the *Defamation Act 2005*];
- (c) there is a recognised distinction between "reputation", which at law is generally considered as general reputation, and the view which a particular individual may take of a person; and
- (d) the following passage (omitting authorities and footnotes) from the joint judgment of Beazley JA, Giles JA and Santow JA in *Amalgamated Television Services Pty Ltd v Marsden*<sup>20</sup> appears relevant:

"A person's reputation is the character which he bears in public estimation, that is, what other people think of the person. Evidence may be called to prove good reputation, but must be evidence of general reputation, "*the esteem in which he is held by others who know him and are in a position to judge his worth*", not evidence of specific events going to make up the general reputation."

<sup>19</sup> *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 137

<sup>20</sup> [2002] NSWCA 419 at paragraph [1371]

Regulation 3(1)(e) of the Conduct Regulations

In regard to the ethical obligation to '*be open and accountable to the public*', in paragraph (e) in regulation 3(1) of the Conduct Regulations:

The Macquarie Dictionary: (at page 1171) defines the adjective 'open' relevantly as: "[22.] unreserved, candid, or frank, as persons or their speech, aspect, etc"; (at page 10) defines the noun 'account' relevantly as "a statement of reasons, causes, etc., explaining some event"; and (at page 11) defines the adjective 'accountable' relevantly as: "liable to be called to account".

Accordingly, on its face this obligation, subject to a council member's obligation of fidelity to council, requires a council member to make from time to time in an appropriate forum statements, that are candid and unreserved, of his or her reasons explaining his or her acts or omissions when acting as or otherwise using his or her office as a council member.

Regulation 3(1)(f) of the Conduct Regulations

On its face, and in the context of the LG Act, in regard to the ethical obligation to '*base decisions on relevant and factually correct information*', in paragraph (f) in regulation 3(1) of the Conduct Regulations, the word 'decisions' refers to council or committee decisions.

Regulation 3(1)(g) of the Conduct Regulations

In regard to the ethical obligation to '*treat others with respect and fairness*', in paragraph (g) in regulation 3(1) of the Conduct Regulations:

1. The Macquarie Dictionary (at page 1753) relevantly defines the verb 'treat' as:

"1. to act or behave towards in some specified way: *to treat someone with respect*. 2. to look upon, consider, or regard in a specified aspect, and deal with accordingly: *to treat a matter as unimportant*."

Accordingly, on these definitions, the term 'treat others' in regulation 3(1)(g) of the Conduct Regulations refers to both the mental attitude and the physical behaviour that a council member should have and display respectively, when interacting with or acting towards other persons, and in dealing with issues of concern to them.

2. The Macquarie Dictionary (at page 594) defines the adjective 'fairness' in its primary sense as: "free from bias, dishonesty, or injustice".



3. In the Macquarie Dictionary (at page 1408) the entry for the noun 'respect' reads, relevantly:

"1. esteem or deferential regard felt or shown. 2. the condition of being esteemed or honoured. 3. (*plural*) deferential, respectful, or friendly compliments, as paid by making a call on a person or otherwise: *to pay one's respects*. ... 6. *Archaic* consideration. —verb (t) 7. to hold in esteem or honour: *to respect ones elders*. 8. to show esteem, regard, or consideration for: *to respect someone's wishes*. 9. to treat with consideration; refrain from interfering with: *to respect a person's privacy*. ..."

The Shorter Oxford English Dictionary (at page 2549) defines the verb transitive 'respect' relevantly as:

"[T]reat or regard with deferential esteem, feel or show respect for, admire deeply ... [P]rize, value, (a thing) ... [R]efrain from harming, insulting, or interfering with; recognize and abide by (a legal requirement)".

The Shorter Oxford English Dictionary (at page 628) defines the noun 'deference' relevantly as:

"[C]ourteous regard; the manifestation of a disposition to yield to the claims or wishes of another".

In light of these definitions, it appears that while it may be acceptable in common usage to say that to treat a person with respect is to have 'esteem' for or to be 'considerate' of that person, it is suggested that a dictionary approach to an understanding of the phrase 'treat others with respect' for the purposes of regulation 3(1)(g) of the Conduct Regulations, does not encompass the roles and responsibilities of council members in the context of the expected and required standards of conduct of a council member.

4. Having regard to those roles and responsibilities in the context of those standards of conduct and to the diverse and multi-cultural nature of Western Australian society:

- (1) Generally, a person who is a council member will fail to be respectful of another person (the other person), and will fail to treat the other person with respect, if the council member fails to keep his/her ego and own sense of self-esteem and self-worth in sufficient check so as: to give recognition of the value and worth of the other person as a fellow human being on an equal footing with the council member, irrespective of any difference between them;
- (2) Generally, the circumstances where a council member will demonstrate failure to be respectful of another person, and failure to treat another person with respect, include:
  - (a) where the council member shows contempt for the other person (because to do so denies that the other person has any worth) – noting that the term 'contempt' in this context generally refers to the feeling or attitude with which one regards another person as worthless; and

- (b) where the council member treats the other person with arrogance (because to do so is a demand that the other person value the council member more highly than the other person values himself or herself) – noting that the term ‘arrogance’ in this context generally refers to an offensive exhibition of assumed or real authority; and
- (c) where the council member makes a defamatory statement about the other person to someone else – noting that it is settled law in Australia that a defamatory statement is any representation of fact or opinion that has a tendency to damage a person's reputation (including a tendency for others to think less favourably of the person) in the opinion of reasonable people generally; and
- (d) where the council member ridicules or mocks the other person – noting that: the term ‘ridicule’ in this context generally refers to two cases: when a third person is or third persons are present or in the vicinity, the saying of words or the display of any action or gesture for the purpose or intent of causing contemptuous laughter at the other person; and to deride or make fun of the other person; and the term ‘mock’ in this context also generally refers to two cases: ridiculing the other person by mimicry of action or speech; and scoffing or jeering at the other person's action or speech.

## Attachment C

**Matters and the Panel's views in relation to whether the mere giving in open meeting of notice of a proposed motion of no confidence in a local government's mayor, by a member of the council of the local government, is an improper use of the member's office**

The Panel notes that in *Re Judith Frazer v Erica Cervini et al* <sup>21</sup> Gray J said: "A vote of no confidence ... is normally expressed in relation to an elected person and indicates the desire of the meeting concerned to be rid of that person from an elected office."

However, in the Panel's view, a vote of "no confidence" in any person who has been elected to an office is meaningless unless a lawful means or process is available and is implemented at the same time to have the elected person under consideration removed from his or her office.

Broadly, in the Westminster system of government used in the United Kingdom, Australia and Western Australia a motion of no confidence (alternatively vote of no confidence, censure motion, or no-confidence motion) is a parliamentary motion whose passing would demonstrate to the head of state that the elected parliament no longer has confidence in the appointed government.

The relevance of a motion of "no confidence" in a Parliamentary setting plainly has meaning and a practical effect. For example, in Australia if the Prime Minister has lost the confidence of the popularly elected House of the Parliament, and that were recorded in a vote of no confidence, then responsible government requires the Prime Minister to advise the Governor-General to withdraw the Prime Minister's commission. Generally, this meaning and practical effect also applies to Western Australia's Premier and it's Governor.

However, while council members are elected, in local government there is no equivalent of Parliament. The Panel is satisfied that the LG Act does not contemplate any group of council members being or acting as a political 'Opposition' to the local government concerned. In particular, in its view, the concept of an official opposition would be contrary to the intent of the LG Act.

Furthermore, in the case of an elected office of a local government in Western Australia, the Panel is satisfied that if a motion of "no confidence" in the holder of that office is passed by the council:

- (a) there is no lawful means or process available under the LG Act or otherwise to have the elected person under consideration removed from his or her office; and
- (b) the passed motion would simply express a meaningless opinion, as the council is not being asked to "do" or "not do" anything.

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<sup>21</sup> [1992] FCA 355 at paragraph [5].

Also, where a member of the council of the local government in Western Australia gives in open meeting notice of a proposed motion of no confidence in the local government's mayor, it is the Panel's view that the notice denies the implication of the principles of natural justice which require procedural fairness to be afforded to the mayor in such a case.

Accordingly, in the Panel's view, the only time that a vote of no confidence, a censure motion or a no-confidence motion in an elected member of a local government could otherwise be permissible is after the elected member has been afforded the amount of procedural fairness that the circumstances require.

In this regard, aspects of the 'hearing rule' (which is a part of procedural fairness) that should be observed by a local government's council when an elected member is facing potential criticism or a punitive sanction by it, include those set out in the following propositions – namely, *before* the council votes on the matter:

1. Matters adverse to the member should be put to him or her for comment or evidence<sup>22</sup>, and the member should be given a reasonable opportunity to respond to each such matter.
2. The council should not make any adverse finding, statement or comment against the member having had regard to undisclosed material being adverse information that was credible, relevant and significant to the finding, statement or comment to be made, without: first putting that material to the member;<sup>23</sup> and giving the member a reasonable opportunity to respond to that material.
3. The council should bring the attention of the member to any critical issue or factor on which an adverse finding, statement or comment is likely to turn so that the member may have a reasonable opportunity to deal with it.<sup>24</sup>
4. The council should not actively or impliedly mislead the member as to the importance of a factor to it.<sup>25</sup>

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<sup>22</sup> *Kioa v West* (1985) 159 CLR 550.

<sup>23</sup> *Kioa*, *ibid*, at 629.3 per Brennan J; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; and *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966

<sup>24</sup> For example, *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6 at [81].

<sup>25</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966

## Attachment D

### Extract from the Panel's Findings and Reasons for Finding (pages 5 – 6) in SP 55 of 2010

"When dealing with previous unrelated complaints in regard to regulation 10(3)(b) of the Regulations which refers to the use of 'offensive or objectionable expressions', or a standing order that refers to the use of 'objectionable expressions', the Panel has expressed general views that can be summarised as follows:

In the term 'offensive or objectionable expression' in regulation 10(3)(b), it appears that the word 'or' is properly construed to be used in the disjunctive so that separate meanings may be determined for each of the terms 'offensive expression' and 'objectionable expression'.

For the purposes of regulation 10(3)(b) the term '*offensive expression*' means '*a word, phrase, or form of words that is likely to cause offence or displeasure and is insulting*'.<sup>26</sup>

The term 'objectionable' has no fixed meaning, but rather takes its "colour" from the context in which it is to be found. It is neither a technical term, nor a term of art. That is not to say that the term 'objectionable' lacks a central core of settled or accepted meaning, or an "essential character". Dictionary meanings may provide assistance in describing, if not defining, the primary characteristics of 'objectionable'.

It appears that, to an ordinary person, an 'offensive expression' will always be an 'objectionable expression' – however, an expression may be an 'objectionable expression' and not also an 'offensive expression' if, viewed objectively, the expression is a particular word, phrase, or form of words that is distasteful or unacceptable.

Accordingly, it appears that the term 'objectionable expression' means 'a word, phrase, or form of words that viewed objectively is distasteful or unacceptable'.

However, it now appears to the Panel that its previous general view of the meaning of the term 'objectionable expression' just set out could possibly require varying to have sufficient and appropriate regard to the circumstance that among the meanings of the word 'objectionable' in common in the Shorter Oxford English Dictionary and in the Macquarie Dictionary is "offensive".

It is arguable that the Panel should view the terms 'offensive expression', 'objectionable expression' and 'offensive or objectionable expression', at least until there is judicial authority to the contrary, to be synonymous, and that each of them appears to refer to "a word, phrase, or form of words that is likely to cause offence or displeasure and is insulting". In any event for present purposes the Panel considers that the term 'objectionable expression' in standing order 4.9(2) refers to a word, phrase, or form of words that is likely to cause offence or displeasure and is insulting."

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<sup>26</sup> *Hargreaves and Local Government Standards Panel* [2008] WASAT 300, per Judge J Chaney (as his Honour then was) at [20].

**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 64 of 2010 (DLG 20100312)  
**Heard:** Determined on the documents  
**Considered:** 6 November 2012  
**Coram:** Mr B. Jolly (Presiding Member)  
Councillor P. Kelly (Member)  
Mr G. Cridland (Member)

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**Complaint:** SP 64 of 2010  
**Complainant:** Mayor David Boothman  
**Council member complained about:** Councillor Elizabeth RE  
**Local Government:** City of Stirling  
**Regulation found breached:** Regulation 7(1)(b)

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## DECISION AND REASONS FOR DECISION

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### DEFAMATION CAUTION

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

### FINDING OF MINOR BREACH

1. The Panel has made a finding of minor breach against Councillor Re in relation to Complaint No. SP 64 of 2010.

### Relevant Conduct

2. The Panel found that Councillor Re's relevant conduct was:

That the City of Stirling ordinary council meeting of 16 November 2010 when the meeting was open to members of the public, Councillor Re orally submitted and gave notice of a specified written motion (being a vote of no confidence in Mayor Boothman on 3 specified grounds) – which Councillor Re intended to propose at the next Council meeting – by first reading out aloud and then tabling such intended motion.

### Finding

3. The Panel has made a finding of minor breach against Councillor Re to the following effect:



That by carrying out the said relevant conduct you committed a breach of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* in that you made improper use of your office as a Council member to cause detriment to Mayor Boothman – such detriment being damage or loss to Mayor Boothman's reputation.

## SUMMARY OF DECISION

4. The Panel's decision on how the said minor breach (the Minor Breach) was to be dealt with under section 5.110(6) of the *Local Government Act 1995* (the Act) was that, for the following reasons, the sanction to be applied was as described in subsection (b)(ii) of that section specifically that

***Councillor Re be ordered to apologise publicly to Mayor Boothman at a Council meeting or by apology published in the Stirling Times newspaper,***

as specified in the attached Minute of Order.

## DECISION & REASONS FOR DECISION

### References to sections and regulations

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

### Jurisdiction

6. At the time this report is signed there is no information before the Panel which indicates that Cr Re has ceased to be or is disqualified from being a sitting member of the Council of the City of Stirling.

### Applicable legislation

7. The relevant legislative provision is S5.110(6) which is -

*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)."*

## Procedural fairness matters

8. Councillor Re was given:

- (a) notice of the finding dated 27 April 2012;
- (b) a copy of the Panel's *Finding and Reasons for Finding* in this matter ("the Reasons for Finding"); and
- (c) a reasonable opportunity for her to make submissions about how the Minor Breach should be dealt with under section 5.110(6).

## Councillor Re's response

9. Councillor Re responded to the notice of finding and the Reasons for Finding by her correspondence dated 15 June 2012 ("Councillor Re's response").

## Panel's views on Councillor Re's response

10. The Panel notes that:

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

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

- (1) Councillor Re does not agree with the Panel's finding of minor breach and attempts to re-argue the finding by raising a "*defence*";
- (2) Councillor Re's response demonstrates she has no remorse or contrition and is devoid of insight into or understanding of her breach and wrongdoing;
- (3) Councillor Re suggests that the breach should be dealt with by dismissing the complaint or allowing her further training "*to deal with aggressive and harassing Mayors*";

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<sup>1</sup> *Washer v Western Australia* (2007) 234 CLR 492 at [5], n 4.



- (4) Councillor Re's response makes adverse comment about Mayor Boothman (notably in respect of whom the finding was that she had acted with intent to cause detriment);
  - (5) Councillor Re seeks to minimise and justify her actions including by alleging that "*my notice of motion ... was not in the minutes*";
  - (6) The publicly available minutes of the subject ordinary council meeting include, contrary to Councillor Re's response, the relevant notice of motion (ie vote of no confidence in Mayor Boothman);
  - (7) Other parts of Councillor Re's response consist of allegations of conduct by others, where such conduct – even if it were shown to have occurred – does not appear to have relevance to:
    - (a) the relevant issues involved in the determination of whether or not it is more likely that not that the Minor Breach occurred; or
    - (b) how the Minor Breach should be dealt with under section 5.110(6).
12. In the Panel's view, Councillor Re's response does not establish any ground or reason why the Panel should doubt or reconsider the validity of the finding of minor breach. No "*defence*" is raised by any of the matters set out in Councillor Re's response.

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

13. The Panel notes that Councillor Re has been found under Part 5 Division 9 of the Act to have committed a previous minor breach - the details of which are set out below:-

<b>Matter details</b>	<b>Description of minor breach the Panel found has occurred</b>	<b>Details of action taken</b>
<p>Matter #01: (1 minor breach)</p> <p><u>Complaint No.:</u> SP 15 of 2010</p> <p><u>Complainant:</u> Cr S. Proud</p>	<p>That on or about 5 February 2010 Cr Re made improper use of her office, and committed a breach of regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>, by publishing and circulating her electronic newsletter with an article in it headed 'Martino service station – Ampol – Scarborough Beach Road Innaloo' with the intent to cause detriment to each of Cr Giovanni Italiano JP and Cr Stephanie Proud, such detriment being that: that at least some of the people in the City of Stirling's district would think less favourably of each of them; denigration for having voted for the redevelopment; and adverse treatment from those readers of the newsletter who took up Cr Re's invitation in the article to contact either of them.</p>	<p>The Panel dealt with the minor breach by making an order under section 5.110(6)(b)(ii) of the Act that Cr Re apologise publicly on specified terms to each of Cr Italiano and Cr Proud.</p> <p><u>The Panel's notice to Cr Re of this decision was dated 24 December 2010.</u></p> <p>Cr Re applied to the SAT for a review, which was held. The SAT affirmed that Cr Re had committed a breach of reg 7(1)(b); and affirmed the Panel's sanction. Cr Re made the</p>

		required public apology at the Ordinary Meeting of the City's Council held on 2 August 2011.
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14. When dealing with unrelated complaints, the Panel has previously expressed the views that:

- (a) a breach of regulation 7(1) is a serious matter and will in almost all occasions deserve the sanction of a publicly censure – not only as a reprimand aimed at reformation of the offending council member and prevention of further offending acts, but also as a measure in support of the institution of local government and those council members who properly observe the standards of conduct expected of them; and
- (b) a breach of regulation 7(1) to cause detriment to another person – whether or not the other person is a council member – is a very serious matter and will in almost all occasions deserve the sanction of a public apology to the other person/member, in addition to a public censure.

15. A public censure is a significant sanction and involves a high degree of public admonition of the conduct of the council member concerned.<sup>2</sup>

16. Councillor Re's response indicates that:

- (a) she rejects the Panel's finding of minor breach and its reasons in the Reasons for Finding; and
- (b) notwithstanding the Panel's reasons in the Reasons for Finding:
  - (i) she does not express any remorse or contrition for her conduct that the Panel has found was her offending conduct in this matter; and
  - (ii) her approach in these proceedings has at all times been to seek to justify and minimise her own conduct and make allegations against others;
  - (iii) she has no insight into her offending.

### **Appropriate sanctions for the minor breach**

17. It is the Panel's view that:

- (1) The Panel's finding that the minor breach occurred constitutes the second finding that the Panel has made that Councillor Re has committed any minor breach.
- (2) Notwithstanding Councillor Re's response, the Panel has formed the view, with significant hesitation that, on balance, Councillor Re's offending conduct in this matter, while serious, is not so serious as to warrant the sanction of a public censure as well as being required to publicly apologise to Mayor Boothman,

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



- (3) Taking into account Councillor Re's submissions and the reasoning and matters mentioned in this Decision and Reasons for Decision, it is appropriate and proportionate to the gravity of the minor breach that Councillor Re should apologise publicly to Mayor Boothman, as specified in the attached Minute of Order, as that sanction:
  - (a) is an appropriate reflection of the seriousness of the minor breach; and
  - (b) is an appropriate reflection of the fact that Mayor Boothman was the subject of the offending conduct by Councillor Re.

### **Form of the public apology**

18. The Panel notes that:

- (1) When it has dealt with a minor breach by ordering that a council member publicly apologise, the form of the apology specified by the Panel has often been a concise description of the found minor breach/es and a statement by the council member that he or she apologises to the person/s concerned for the offending conduct and for any embarrassment or distress that such conduct caused to such person/s.
- (2) In the context of Part 5 Division 9 of the Act and the Regulations, the components of a full apology (or, a good apology) appear to consist of an acknowledgment of the offending conduct, acceptance of responsibility, expression of remorse or regret, and a promise or undertaking not to repeat the offending conduct.
- (3) However, a forced public apology in the form described in paragraph 12(1) above will often be sufficient to publicise the relevant council member's conduct in such a way that his/her unacceptable conduct is identified to the public and he/she is effectively sanctioned.
- (4) Where it thinks appropriate, the Panel may order that the person against whom the complaint was made make a full public apology in terms that consist of all of the components mentioned in paragraph 12(2) above.

## Panel decision

19. Having regard to the Reasons for Findings, the response of Councillor Re, the matters mentioned in these Reasons, the notice of motion in the minutes of the relevant ordinary council meeting and the general interests of local government in Western Australia, the Panel's decision on how the minor breach is dealt with under section 5.110(6) is that it orders the sanction described in subsection (b)(ii) of that section – namely that Councillor Re apologise publicly to Mayor Boothman as specified in the attached Minute of Order.



.....  
Brad Jolly (Presiding Member)



.....  
Cr Paul Kelly (Member)



.....  
Glenn Cridland (Member)



## NOTICE TO THE PARTIES TO THE COMPLAINT/S

### RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

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

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



**Attachment A**

**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 64 of 2010 (DLG: 20100312)  
**Heard:** Determined on the documents  
**Considered:**  
**Coram:** Mr B. Jolly (Presiding Member)  
Councillor P. Kelly (Member)  
Mr G. Cridland (Member)

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**Complaint No.** SP 64 of 2010  
**Complainant:** (Mayor) David BOOTHMAN  
**Council member complained about:** Cr Elizabeth RE

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**ORDER****THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:**

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

*"I advise this meeting that:*

- (1) *A complaint has been made to the Local Government Standards Panel about certain conduct by me as a member of this Council, at its meeting held on 16 November 2010 when the meeting was open to members of the public, I orally submitted and gave notice of a specified written motion being*

*a vote of no confidence in Mayor Boothman, on 3 specified grounds and which I intended to propose at the next Council meeting by first reading out aloud and then tabling such intended motion; and*

- (2) *The Local Government Standards Panel has considered the complaint, and has made a finding of minor breach, namely that at the 16 November 2010 Council meeting I committed a breach of regulation 7(1)(b) of the Local Government (Rules of Conduct) Regulations 2007 in that I made an improper use of my office as a Council member to cause detriment to Mayor Boothman – such detriment being damage or loss to Mayor Boothman's reputation.*
- (3) *I apologise to Mayor David Boothman for my said conduct, and regret any hurt, inconvenience or unpleasantness I have caused to him."*

3. If the said Councillor Elizabeth Re:

fails or is unable to comply with the requirements of paragraph 2 above within 14 days after the next City of Stirling Ordinary Council Meeting immediately following the date of service of this Order on her, the said Councillor Elizabeth Re shall cause the following Notice of Public Apology to be published, in no less than 10 point print, as a one-column or a two-column display advertisement in the first 20 pages of the *Stirling Times* newspaper.

**PUBLIC APOLOGY**

A complaint has been made to the Local Government Standards Panel (the Panel) about **my conduct as a member of the Council of the City of Stirling** at its meeting held on 16 November 2010. When the meeting was open to members of the public, I orally submitted and gave notice of a specified written motion being a vote of no confidence in Mayor Boothman, on 3 specified grounds and which I intended to propose at the next Council meeting by first reading out aloud and then tabling such intended motion,

The Panel has considered the complaint and made a finding of minor breach – namely, that at the 16 November 2010 Council meeting I committed a breach of regulation 7(1)(b) of the Local Government (Rules of Conduct) Regulations 2007 in that I made an improper use of my office as a Council member to cause detriment to Mayor Boothman – such detriment being damage or loss to Mayor Boothman's reputation.

I apologise to Mayor David Boothman for my said conduct, and regret any hurt, inconvenience or unpleasantness I have caused to him.

**Councillor Elizabeth Re**



