
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : LOCAL GOVERNMENT ACT 1995 (WA)

CITATION : AUBREY and DEPARTMENT OF LOCAL
GOVERNMENT STANDARDS [2018] WASAT 43

MEMBER : SENIOR MEMBER C WALLACE

HEARD : 28 MARCH 2018

DELIVERED : 7 JUNE 2018

FILE NO/S : DR 282 of 2017

BETWEEN : RUSSELL AUBREY
Applicant

AND

DEPARTMENT OF LOCAL GOVERNMENT
STANDARDS
Respondent

ATTORNEY GENERAL FOR THE STATE OF
WESTERN AUSTRALIA
Intervenor

Catchwords:

Local government - Rules of conduct - Minor breach - Whether email sent by councillor to ratepayer constituted improper use of office - Whether intended to cause detriment - Consideration of appropriate sanction in circumstances of mitigation - Public censure

Legislation:

Local Government (Rules of Conduct) Regulations 2007 (WA), reg 7(1), reg 7(1)(b)

Local Government Act 1995 (WA), s 5.104, s 5.105, s 5.105(1), s 5.106, s 5.107, s 5.108, s 5.109, s 5.110, s 5.110(6), s 5.110(6)(b)(i), s 5.110(6)(b)(ii), s 5.125(1)

State Administrative Tribunal Act 2004 (WA), s 27(1), s 27(2), s 29(1), s 29(3), s 37(3)

Result:

Decision under review amended in respect of penalty only

Summary of Tribunal's decision:

Mayor Aubrey (applicant) is a member of the council with the City of Melville (City). The applicant applied to the Tribunal for a review of a decision of the Local Government Standards Panel (respondent) which found that he had committed a minor breach pursuant to reg 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) and s 5.104 and s 5.105(1) of the *Local Government Act 1995* (WA) and the decision that the applicant be sanctioned by way of giving a public apology. The finding of minor breach was based on an email dated 23 October 2016 sent by the applicant to a ratepayer in the City, Mr Crawford, and which was copied to a number of other recipients. The respondent found that by sending the email in its particular terms that the applicant made improper use of his office in a way that caused detriment to Mr Crawford.

The Tribunal affirmed the respondents' decision that the applicant had committed a minor breach by sending the 23 October 2016 email. However, the Tribunal set aside the respondents' sanction decision and substituted its own decision requiring public censure, including mention of mitigating circumstances, in the *Melville Times* and *Fremantle Herald*.

Category: B

Representation:

Counsel:

Applicant : In Person
Respondent : In Person
Intervenor : Ms Anna Johnson

Solicitors:

Applicant : N/A
Respondent : N/A
Intervenor : State Solicitor's Office

Case(s) referred to in decision(s):

Treby and Local Government Standards Panel [2010] WASAT 81; (2010) 73
SR (WA) 66.

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

- 1 The applicant, Mr Russell Aubrey, is the Mayor of the City of Melville (City). On 3 May 2017 the Local Government Standards Panel (respondent) found that the applicant had breached reg 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) (Regulations) and had therefore committed a 'minor breach' pursuant to s 5.104 and s 5.105(1) of the *Local Government Act 1995* (WA) (LG Act). On 14 August 2017 the respondent ordered, pursuant to s 5.110(6)(b)(ii) of the LG Act, that the applicant apologise publicly for the minor breach. The applicant seeks a review of both the decision finding that a minor breach had occurred and the decision requiring the applicant to publicly apologise. The Attorney General of Western Australia intervened in the proceeding.

Background

- 2 On 9 November 2016 the respondent received a complaint from the complaints officer of the City alleging that the applicant had breached reg 7(1)(b) of the Regulations by sending three emails dated 21, 22 and 23 October 2016 to a number of recipients, and addressed to Mr Gary Crawford who is a ratepayer in the City and was at the relevant time the President of the City of Melville Residents and Ratepayers Association Inc. (MRRA). The email correspondence itself will be cited in detail later in these reasons but in essence arose in the context of Mr Crawford's concerns regarding building works being undertaken at a property in the suburb of Bicton.
- 3 Mr Crawford began emailing the applicant in respect to these matters in mid-October 2016 and in particular, one such email used the subject heading 'City of Melville: 37 Harris St Bicton - quite right your Worship potentially fatal bldg. non-compliances'. Mr Crawford copied the email to a number of recipients, being councillors at the City, in addition to MRRA and to the *Melville Times*.
- 4 The applicant took umbrage at the subject title of the email and its broadcast to various recipients which appeared, in his view, to imply that the applicant supported Mr Crawford's views in relation to the alleged building non-compliances at the Harris Street property.
- 5 In a number of emails dated 22 October 2016 the applicant clarified with Mr Crawford that he had no involvement in the matter and in

forthright terms requested that Mr Crawford immediately apologise by return email noting that his behaviour 'reflects very poorly on you as president of the MRRA and other body/bodies you claim to lead' (Exhibit A page 102).

- 6 Matters then appeared to escalate and the email which, in the respondent's view, constituted a minor breach was sent by the applicant on 23 October 2016 to Mr Crawford and copied to a number of recipients which now also included various recipients at the Department of Commerce, Members of State Parliament, an unnamed recipient at the Department of Local Government and an unnamed recipient at the Australian Federal Parliament. In that email the applicant made a number of statements including the following:

If you think that you can make false statements and implicate the Mayor of the City in your personal battle with your neighbours you are totally deluded. I am not a vulnerable person that you can frighten with your aggressive outbursts or threats.

However, it has now been brought to my attention that you face court on 3rd November in a matter relating to the pursuance of a restraining order placed against you by one of your elderly neighbours in the Harris St complex.

It is my intention to investigate the relationship between your false statements and your defence in court in order to determine whether you were attempting to advantage your prospects by creating an illusion of support from the Mayor of the City of Melville.

If so, I will happily offer myself as a witness for the plaintiff on the 3rd November.

(Exhibit A page 105)

- 7 The respondent was satisfied that each of the essential elements of a contravention of reg 7(1)(b) of the Regulations had been established on the basis that:
- (a) the applicant made an improper use of his office as Mayor in that it was untenable that he needed to refer to the restraining order proceedings in order to defend his name. It was personal information which the applicant ought to have kept confidential and was irrelevant to the issue as to whether the building works, the subject of the email correspondence, were

substandard and what, if any, action the City was intending to take; and

- (b) the respondent found that Mr Crawford felt embarrassed, insulted and denigrated by the applicant's publication of the personal information which was damaging to Mr Crawford. In addition, the respondent found that any reasonable person would form the view that the applicant's statement that he was prepared to give evidence in the restraining order proceeding against Mr Crawford amounted to a threat. In the circumstances the respondent found that the only reasonable inference was that the applicant intended to attack Mr Crawford personally and to damage his reputation by sending the relevant email.

(Exhibit A page 17)

Relevant statutory provisions

- 8 Section 5.104 of the LG Act enables regulations to be made prescribing rules of conduct for council members.
- 9 Relevantly to the current proceeding, reg 7(1) of the Regulations made pursuant to s 5.104 of the LG Act provides as follows:
- (1) A person who is a council member must not make improper use of the person's office as a council member -
- (a) to gain directly or indirectly an advantage for the person or any other person; or
- (b) to cause detriment to the local government or any other person.
- 10 It is reg 7(1)(b) of the Regulations which is in issue in this proceeding.
- 11 Section 5.105(1) of the LG Act provides:
- (1) A council member commits a minor breach if he or she contravenes -
- (a) a rule of conduct under section 5.104(1); or
- (b) a local law under this Act, contravention of which the regulations specify to be a minor breach.

- 12 The standard of proof in relation to findings of a breach is that it was more likely that the breach occurred than it did not occur: s 5.106 of the LG Act. Section 5.107 to s 5.110 of the LG Act sets out the procedure for dealing with alleged minor breaches by council members including the process to be undertaken by the respondent in determining whether a minor breach has occurred.
- 13 Section 5.110(6) of the LG Act provides that the respondent may deal with a minor breach by:

The breach is to be dealt with by -

- (a) dismissing the complaint; or
 - (b) ordering that -
 - (i) the person against whom the complaint was made be publicly censured as specified in the order; or
 - (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).

History of the proceeding at the Tribunal

- 14 The applicant lodged his application pursuant to s 5.125(1) of the LG Act with the Tribunal on 7 September 2017. The proceeding was set down for directions hearings on 29 September and 8 December 2017 and was listed for final hearing on 28 March 2018. There were two additional applications made to intervene in the proceeding pursuant to s 37(3) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act) which were declined. The first application was made by Mr Crawford and determined by the Tribunal at the directions hearing on 8 December 2017. The second application to intervene was made on the morning of the hearing on 28 March 2018 by the MRRA.
- 15 The Tribunal received into evidence at the hearing the following documents:
- Exhibit A - respondent's section 24 bundle of documents

- Exhibit B - applicant's document entitled 'Additional Evidence' dated 6 November 2017
- Exhibit C - applicant's statement of issues, facts and contentions dated 4 November 2017
- Exhibit D - email chain from Russell Aubrey to Shayne Silcox dated 17 October 2016
- Exhibit E - witness statement and attachments

16 At the hearing the Tribunal also had the benefit of receiving oral evidence from the applicant. At the conclusion of the hearing the decision was reserved.

Issues to be determined by the Tribunal

- 17 The review proceeding is a hearing de novo (s 27(1) of the SAT Act) with the purpose of the review being to produce the correct and preferable decision at the time that the original decision was made (s 27(2) of the SAT Act). In dealing with this matter the Tribunal has the same functions and discretions exercisable by the original decision-maker (s 29(1) of the SAT Act). The Tribunal may either affirm the decision being reviewed; or vary the decision being reviewed; or set aside the decision being reviewed and substitute its own decision or refer the matter back to the original decision-maker for reconsideration (s 29(3) of the SAT Act).
- 18 The Tribunal therefore undertakes the same considerations as the respondent with the benefit of any new and/or additional information and the essential issue remains as it was when the complaint was originally considered by the respondent. That is, whether the applicant's conduct by sending the email dated 23 October 2016 to Mr Crawford and the other named recipients constituted a breach of reg 7(1)(b) of the Regulations.
- 19 It was not in contention between the parties that the applicant was a council member in October 2016 and that the events the subject of the complaint involved a use by the applicant of his office as Mayor. The Tribunal accepts that these facts are established and that the matters which are in dispute between the parties and therefore which are issues which require determination by this Tribunal are as follows:
1. Whether the email sent by the applicant on 23 October 2016 to Mr Crawford and other recipients constitutes

an 'improper use' of the applicant's office as a council member;

2. Whether the applicant engaged in the relevant conduct with the intent or belief that it would cause 'detriment' to Mr Crawford; and
3. If the Tribunal finds that the correspondence the subject of the complaint did constitute an improper use of the applicant's office as a council member and that the applicant engaged in the conduct with the intent or belief that it would cause detriment to Mr Crawford, what is the appropriate penalty to be imposed.

Relevant facts

- 20 The applicant had been a councillor at the City for a significant period of time being first elected in 1991. The applicant is therefore a councillor with significant experience and knowledge of what that role entails.
- 21 In mid-October 2016 the applicant received a number of emails from Mr Crawford raising concerns Mr Crawford had in respect to alleged potentially fatal building non-compliances at 37 Harris Street in Bicton. Those emails were sent to the applicant in his capacity as Mayor of the City and were copied to a number of councillors of the City, although the recipients to which the emails were copied increased as the exchange between the applicant and Mr Crawford progressed. At the relevant time Mr Crawford was the president of the MRRA although it appears that the emails were sent in his personal capacity.
- 22 It appears that the first email sent to the applicant by Mr Crawford in respect to this matter was on 15 October 2016. The applicant, (as Mayor), responded on 17 October 2016 replying to all recipients with the subject of the email being 'Re: 37 Harris St. - all inspected piers condemnable; lets try to avoid a fatality?' The email read as follows:

Mr Crawford,

This is an operational matter that will be responded to by the City's offices.

Best wishes,

Russell

(Exhibit A page 73)

- 23 Mr Crawford then sent an email to the applicant on 21 October 2016. However, the subject title, list of recipients and content of the email was not disclosed to the respondent and was not before the Tribunal (Exhibit A page 128). The applicant responded to this email on the same day and it was again copied to a number of recipients and the subject title of the email had changed to 'Re: 37 Harris St - quite right your Worship potentially fatal bldg. non-compliances'. The content of the applicant's email was as follows:

Mr Crawford,

In regard to your statement 'quite right your Worship potentially fatal bldg non-compliances' I refute any involvement or knowledge of the issues you have with the building compliances at 37 Harris St. In particular, I deny supporting you in this battle with the neighbours of what I assume to be your rental property.

Best wishes,

Russell

(Exhibit A page 94)

- 24 Mr Crawford then responded to the applicant on 22 October 2016 again copying in a number of councillors at the City and blind copying in a recipient at the *Fremantle Herald* and a recipient at *Melville Times*. The subject heading is modified slightly to 'City of Melville: 37 Harris St Bicton - quite right your Worship potentially fatal bldg. non-compliances'. It also attaches a number of drawings and states as follows:

Your Worship,

Whilst you were probably only aware of the lack of roof fixing and non-compliant brick piers at 37 Harris Street Bicton within the last week I understood from comments passed to me by a couple of individuals that you had previously commented about building problems at 37 Harris St was simply adding this specific aspect to what I believe you were already generally aware of. I did not provide the photos to you and the other Councillors with the intention of seeking anyone's support with regard the battle with the neighbours that you refer to.

The issue I have is with regard to the extremely poor performance of the builder of the complex and how the serious latent problems are now going to be addressed. I refer you to the attached drawings which

indicate various lengths of roof steel that vary from 4.3 to 5.6 metres with weights in the range of 62 to 80 kilograms that have not been appropriate tied down. Having seen a simple bump by a vehicle cracked and displaced one column some 10 degrees off the vertical it is clear to me that there is a real threat that a modest collision or a significant seismic or wind event can result in a fatality. This is the reason I have felt it important to inform yourself and all Councillors.

Yours faithfully

Gary Crawford
B.Eng (Hons)

(Exhibit A page 96)

- 25 The applicant then responds to Mr Crawford's email, again on 22 October 2016, stating as follows:

Mr Crawford

You say:

'I understood from comments passed to me by a couple of individuals that you had previously commented about building problems at 37 Harris St'.

You know that there were no such individuals. I can tell you I have never commented to anyone regarding this property. I expect an apology by return of email.

Best wishes

Russell

(Exhibit A pages 102-103)

- 26 It does not appear that Mr Crawford responded to the applicant's email set out above. The applicant then sent a further email in the evening on 22 October 2016, again copied to all previous recipients, stating the following:

Mr Crawford,

Your assertion that you have evidence via comments from 'a couple of individuals' that I, as Mayor of the City of Melville, acted in an operational capacity in providing opinion regarding the structural standard of buildings at 37 Harris St, I believe is both false and malicious. As you know, I always strive to be meticulous in exercising my duties as Mayor and I draw great exception to your fictitious accusation.

You have compounded your insulting behaviour by failing to immediately apologise by return of email. If I do not receive a complete apology and withdrawal of your fictitious statement by the open of business on Monday 24th October 2016 I will pursue remedial actions to restore my good name and impeccable record as Mayor and bring you to task.

Your behaviour reflects very poorly on you as President of the MRRA and other body/bodies you claim to lead.

Yours in anticipation,

Russell Aubrey
Mayor
City of Melville

(Exhibit A Page 102)

- 27 Mr Crawford then responded to the applicant on 23 October 2016 by email which presumably was copied to a number of recipients although that is unidentified by the material provided to the respondent by Mr Crawford. The email attaches a letter from Mr Crawford the relevant parts of which are set out below:

Dear Mr Aubrey,

**37 Harris St Bicton - potentially fatal bldg non-compliance
Your email of 22 October 2016**

I was outraged on reading your email to me of 22 October 2016.

You have deliberately misrepresented what I wrote in a preceding email to you of the same date. I said that I understood from comments passed to me, by a couple of individuals, that you had previously commented about building problems at 37 Harris St. There was no specific reference to any particular building problem nor was there any suggestion that you had 'acted in an operational capacity in providing opinion regarding the structural standard of buildings at 37 Harris St'. These are your words and not mine. Your claim of a fictitious accusation relates to your own words: hardly the conduct of a Mayor who strives to be meticulous in exercising his duties.

...

The real issues here is, and has always been, the delinquent performance of the builder of the complex and how we move forward to see these serious latent non-compliances addressed.

If you, or any councillor, have any doubt about the seriousness of these latent building non-compliances I invite you and/or any councillor to contact me and I will arrange a site visit.

....

Yours faithfully

Gary Crawford
B. Eng (Hons)

Cc: various

(Exhibit A page 104)

- 28 The applicant then sent a final email to Mr Crawford on 23 October 2016 being the email on which the respondent makes its finding of minor breach. The recipients to which the email was copied changes slightly but still includes a number of City councillors, the MRRA, an individual at *Melville Times*, various named recipients at the Department of Commerce, various Members of State Parliament, an unnamed recipient at the Department of Local Government and an unnamed recipient at the Australian Federal Parliament. The subject title has also changed and is now 'Re: City of Melville - potentially fatal building non-compliances at 37 Harris St Bicton - City brushing aside public safety concerns'. The email provides as follows:

Mr Crawford,

If you think that you can make false statements and implicate the Mayor of the City in your personal battle with your neighbours you are totally deluded.

I am not a vulnerable person that you can frighten with your aggressive outbursts or threats.

I am the Mayor of the City with a responsibility to defend the good name of the Office which I hold with pride.

The statements you have made in regard to conversations I have had regarding your property in Harris St were manufactured by you for reasons that are not clear to me. The issues surrounding the building compliance at this address are operational matters which I refuse to be involved with as my role of Mayor dictates. They are of no more interest to me than anyone else you have chosen to include in your email communications.

However, it has now been brought to my attention that you face court on the 3rd November in a matter relating to the pursuance of a

restraining order placed against you by one of your elderly neighbours in the Harris St complex.

I hereby withdraw the opportunity for you to apologise by open of business tomorrow.

It is my intention to investigate the relationship between your false statements and your defence in court in order to determine whether you were attempting to advantage your prospects by creating an illusion of support from the Mayor of the City of Melville.

If so, I will happily offer myself as a witness for the plaintiff on the 3rd November.

I give notice that I do not intend corresponding with you any further on this matter.

I hope all recipients of this email enjoy the rest of the weekend.

Best wishes,

Russell

(Exhibit A pages 105-106)

- 29 The applicant does not dispute that the emails cited above were sent in his capacity as Mayor of the City (ts 72, 28 March 2018). In relation to the 23 October 2016 email the applicant conceded in evidence that there was nothing in the prior email exchange between himself and Mr Crawford that raised the issue of the upcoming restraining order application hearing (ts 75, 28 March 2018). The applicant sought to explain his introduction of that topic by giving evidence that he had met with the resident of 37 Harris Street, being a Mrs Bunyan, on or about 16 October 2016. At the meeting Mrs Bunyan informed the applicant of her concerns that Mr Crawford was going to attempt to elicit the support of the Mayor in his defence to her application for a restraining order (ts 48, 28 March 2018).
- 30 As the applicant understood it, the underlying reason for the agitation between Mr Crawford and Mrs Bunyan leading to her lodging an application seeking an order to restrain him, was the alleged building non-compliance issues at 37 Harris Street. Therefore on the applicant's evidence the two issues, that is, the issue of the alleged building non-compliances and the issue of the restraining order proceeding were interconnected. The applicant's deduction was that Mr Crawford was attempting to publicise the applicant's apparent support (particularly in the use of the subject line 'quite right your Worship potentially fatal

bldg non-compliances') for his concerns regarding building non-compliances, which would be used by Mr Crawford in his defence of Mrs Bunyan's application (ts 49-50, 28 March 2018).

- 31 Although it appears an illogical stance for the applicant to take, the Tribunal accepts his evidence as credible in this regard and finds that he did honestly hold the view that Mr Crawford was attempting to elicit his support in regard to his concerns relating to the alleged building non-compliances at Harris Street and therefore his support in defending the restraining order application. Other than Mrs Bunyan's concerns, however, there was no concrete evidence to link the two matters. Nevertheless it was a view that the applicant appeared to hold at the time and certainly acted in accordance with when sending the email to Mr Crawford on 23 October 2016.
- 32 The respondent appeared to be concerned regarding the presentation of some of the email correspondence provided by Mr Crawford in that in a number of emails sent from himself to the applicant the content, subject line and recipients to which the email was copied was missing. The respondent commented that it was 'disingenuous' of Mr Crawford to provide the material in that fashion and raised a question as to whether the applicant himself created the particular subject lines and list of recipients (Exhibit A page 16). In the Tribunal's view it appears very clear that the list of recipients was chosen by Mr Crawford as was the subject title in each of the emails sent by the applicant and that the applicant simply 'replied all' in his responses to Mr Crawford.
- 33 The complaint of minor breach the subject of this proceeding was made on 2 November 2016 and the complaint raised concerns in respect to each of the emails sent by the applicant to Mr Crawford on 21, 22 and 23 October 2016.
- 34 The decision of the respondent was given on 3 May 2017 and the sanction decision was made on 14 August 2017. As previously noted, the sanction imposed was that the applicant publicly apologise to Mr Crawford and his fellow councillors at an ordinary council meeting of the City and provided specific terms of the apology including a requirement that the applicant state that the respondent found his email of 23 October 2016 contained 'personal information about Mr Crawford relating to Court proceedings' and a statement that the applicant 'was prepared to give evidence' against Mr Crawford.

Meaning of 'improper use' in reg 7(1)(b) of the Regulations

35 In *Treby and Local Government Standards Panel* [2010] WASAT 81; (2010) 73 SR (WA) 66 (*Treby*), Pritchard DCJ (as her Honour then was) set out a useful discussion as to the meaning of 'improper' in the context of reg 7(1) of the Regulations at [26]-[33]. Her Honour referred to the *Shorter Oxford English Dictionary* meaning of 'improper' and noted that it includes 'unsuitable' and 'inappropriate'. Her Honour then went on to summarise, at [29]-[33], what the case law suggested as to the meaning of 'improper' in this particular context. It is useful to set out that analysis below:

First, impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the [councillor] by reasonable persons with knowledge of the duties, powers and authority of his position as a councillor and the circumstances of the case.

Secondly, impropriety does not depend on a councillor's consciousness of impropriety. It is to be judged objectively and does not involve an element of intent.

Thirdly, impropriety may arise in a number of ways. It may consist of an abuse of power, that is, if a councillor uses his or her position in a way that is inconsistent with the discharge of the duties arising from that office or employment. Alternatively, impropriety will arise from the doing of an act which a councillor knows or ought to know that he has no authority to do.

Fourthly, in the case of impropriety arising from an abuse of power, a councillor's alleged knowledge or means of knowledge of the circumstances in which the power is exercised and his purpose or intention in exercising the power will be important factors in determining whether the power has been abused.

Fifthly, a councillor's use of his or her office can be improper even though it is for the purpose or with the intention of benefiting the Council.

36 In *Treby*, it was emphasised that what will be deemed as improper in any particular case will be context-driven, requiring consideration not only of the statutory and formal context of a local government councillor's duties and responsibilities, but also requiring a full consideration of the particular relevant surrounding factual matrix.

Did the email sent by the applicant to Mr Crawford on 23 October 2016 constitute the applicant making improper use of his office as a council member?

37 The *City of Melville Code of Conduct* (Code of Conduct) (Exhibit A pages 28-57) at page 5 sets out the following:

1.3 GENERAL PRICIPALS AND ETHICAL STANDARDS

1.3.1 The local community and the public in general are entitled to expect that the following general principles will be used to guide Elected Members in their behaviors -

- 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*

...

1.4 KEY PRINCIPLES SPECIFIC TO THE CITY

Within the context of the above general principles, the following key principles, underpinned by the values as set out In Annexure 5 also apply to City of Melville Elected Members:

1.4.1 Selflessness and Honesty

To act with care and diligence and make decisions that place the responsibility for the welfare, health and safety of the community before your own and/or sectional interests.

1.4.2 Justice

Treat others fairly and equitably and make decisions for the common good of the community, whilst avoiding discrimination, abuse or exploitation of others.

...

1.4.6 Respect

To treat people with respect, courtesy and sensitivity and recognise their interests, rights, safety and welfare.

38 Then further at pages 8-9 of the Code of Conduct it sets out the following:

2. CONDUCT OF ELECTED MEMBERS

2.1 PERSONAL BEHAVIOUR

Elected Members will:

- (a) act, and be seen to act, properly and in accordance with the requirements of the law and the terms of this Code;
- (b) perform their duties impartially and in the best interests of the City of Melville uninfluenced by political persuasion, fear or favour;
- (c) act in good faith (i.e. honestly, for the proper purpose, and without exceeding their powers) in the interests of the City of Melville and the community;
- (d) make no allegations which are improper or derogatory (unless true and in the public interest) and refrain from any form of conduct, in the performance of their official or professional duties, which may cause any reasonable person unwarranted offence or embarrassment; and
- (e) always act in accordance with their obligation of fidelity to the City of Melville; and
- (f) act in observance of the General and Key Principles (Sections 1.3 and 1.4 of this Code).

39 Also of relevance in this matter is cl 3.5 of the Code of Conduct in respect to behaviour of members which provides at subparagraph (d) the following:

Elected Members should make no allegations which are improper or derogatory. In the performance of their official duties they should refrain from any form of conduct which may cause any reasonable person unwarranted offence or embarrassment.

(Exhibit A page 40)

40 The intervenor submitted that the applicant's conduct in sending the email to Mr Crawford on 23 October 2016 in its terms was conduct which was improper and which did not conform to the standards of

conduct that can be reasonably expected of a councillor in the applicant's position. Further, the intervenor submitted that the conduct of the applicant contravened cl 2.1(d) and cl 3.5(d) of the Code of Conduct referred to above. The intervenor contended that the words used by the applicant in his email to Mr Crawford would cause any reasonable person unwarranted offence or embarrassment by:

- (a) asserting that Mr Crawford had made aggressive outbursts or threats; that he may be totally deluded; that his elderly neighbour had sought a restraining order against him, that he had made false statements and that the applicant intended to investigate the relationship between the false statements and Mr Crawford's defence in Court in order to determine whether he was attempting to advantage his prospects by creating an illusion of support from the Mayor of the City (ts 99, 28 March 2018); and
- (b) by disclosing confidential information in respect to the restraining order proceedings to a group of people who may or may not have been aware of the matter and which was a matter of a private nature (ts 99-100, 28 March 2018).

41 The intervenor also submitted that there could be no justification for the use of the words adopted by the applicant in his 23 October 2016 email even if the Tribunal accepts that in using those words the applicant was simply defending the office of the City and Mrs Bunyan (ts 100, 28 March 2018).

42 In the Tribunal's view the applicant did make improper use of his office for the purposes of reg 7(1)(b) of the Regulations. The applicant acted in a way which may cause any reasonable person unwarranted offence or embarrassment particularly by making the following statements in his 23 October 2016 email which was copied to a number of recipients:

- (a) asserting that Mr Crawford made 'false statements' in order to 'implicate the Mayor of the City' in a battle he had with Mrs Bunyan and that he thought Mr Crawford was 'totally deluded';
- (b) by implying that Mr Crawford frightened vulnerable people with his 'aggressive outbursts or threats';

- (c) informing Mr Crawford that the applicant intended to investigate the matter in relation to Mr Crawford's 'false statements' and his defence in Court in order to determine whether Mr Crawford was 'attempting to advantage' his prospects 'by creating an illusion of support from the Mayor of the City of Melville'; and
- (d) by the applicant offering himself as a witness for Mrs Bunyan in the restraining order matter as against Mr Crawford.

43 At the time that the applicant sent the email he had no clear basis on which to assert that Mr Crawford had made false statements. He also had no proper basis on which to form a view that Mr Crawford intended to involve the City in the restraining order proceeding brought by Mrs Bunyan. Although the Tribunal accepts that Mrs Bunyan held that view and convinced the applicant of its veracity, it was nevertheless an illogical conclusion to draw and a precarious leap to make. As the applicant conceded in his evidence at the final hearing, he had no direct knowledge of the matters in contention in the restraining order proceeding such that he could offer no input whatsoever and certainly could not and was not called as a witness of fact (ts 88-89, 28 March 2018). Raising these matters with Mr Crawford in the context of Mr Crawford raising with the applicant his concerns about alleged building non-compliances was improper as was the applicant's threat to be a witness against Mr Crawford in the restraining order proceeding. It was a matter which did not and could not involve the City or the applicant.

44 In summary, the Tribunal finds that the applicant's conduct constitutes a breach of the standard of conduct that would be expected of a person in the applicant's position by reasonable persons with knowledge of the duties, powers and authority of his position as Mayor of the City and knowing the full circumstances of the case.

Meaning of 'detriment' in reg 7(1)(b) of the Regulations

45 In *Treby* at [94] - [96] the Tribunal discussed the meaning of the word 'detriment'. The Tribunal found that the word 'detriment' is loss or damage done or cause to, or sustained by, any person or thing. The Tribunal went on to note that the *Shorter Oxford English Dictionary* sets out the meaning of 'loss' as the 'diminution of one's possessions or advantages; detriment or disadvantage involved in being deprived of something, or resulting from a change of conditions', while

'damage' means 'loss or detriment to one's property, reputation etc' and 'harm done to a thing or person'. Her Honour also noted that a contravention of reg 7(1)(b) does not depend on actual detriment being suffered by a person but it must be established that the councillor believed that the intended result of their conduct would be that the other person would suffer detriment.

- 46 In relation to whether the applicant believed that the intended result of his conduct would be that Mr Crawford would suffer detriment, in his oral evidence the applicant refuted that he was intending to cause such detriment (ts 82, 28 March 2018). In the Tribunal's view this evidence lacked credibility and it appeared to the Tribunal that the applicant was simply attempting to defend his position, rather than concede the point. This is illustrated by the following extract from the transcript:

MS JOHNSON: But by referring to the restraining order proceedings in the context of aggressive outbursts or threats ... you were intending to cause detriment?

MR AUBREY: Not at all. No - detriment was not on my mind. It was only about bringing closure to the outrageous statements he was making in his email which were getting worse and worse, and - and we're talking about safety and negligence by the City of Melville in the last one. Let's bring this to a close. Mr Crawford, I called him to task. I know what's happening. You're trying to accumulate information to use in your court proceedings. I will attend court to make sure that that doesn't happen. I think that was a good outcome. ...

MS JOHNSON: You say you felt you had to respond and then raise the restraining order proceedings to defend your name and the City and the public?

MR AUBREY: Yes.

MS JOHNSON: So in order to do that, you had to discredit Mr Crawford?

MR AUBREY: No. No. I didn't. No.

(ts 82, 28 March 2018)

SENIOR MEMBER WALLACE: ... Can I just ask you about the framing of the email, and I want to put something to you, that when you refer to somebody in correspondence in terms that they are totally deluded, and in the next sentence refer ...?

MR AUBREY: No.

SENIOR MEMBER WALLACE: Let me just finish?

MR AUBREY: Sure.

SENIOR MEMBER WALLACE: And the next sentence refers to alleged aggressive outbursts and threatening behaviour on their behalf, do you accept the proposition that that may cause them some embarrassment when you copied that correspondence to other people? And I'm just talking about the words that you've?

MR AUBREY: Sure. Yes.

(ts 84, 28 March 2018)

- 47 Although the applicant appeared to concede that the use of his words may have caused embarrassment to Mr Crawford, he stood by his evidence that it was not his intention to cause detriment. In the Tribunal's view it was more likely than not that the applicant did intend to cause detriment to Mr Crawford. The only reasonable conclusion that the Tribunal can draw is that the applicant intended to discredit Mr Crawford, firstly, in any implication that he or the City supported Mr Crawford in relation to his allegations of building non-compliances at 37 Harris Street in Bicton. Secondly, the applicant also clearly intended to support Mrs Bunyan in the restraining order proceedings by implying that Mr Crawford was aggressive and threatening to vulnerable people and by threatening to investigate the matter. The applicant went further and offered to be a witness in support of Mrs Bunyan's restraining order proceeding against Mr Crawford. Making those statements and replying all to the various recipients to the

correspondence could only have been done with the intent to be detrimental to Mr Crawford.

- 48 The terminology used was derogatory in respect of Mr Crawford and implied that the applicant, as the Mayor of the City, believed there was proper foundation in a private dispute between Mrs Bunyan and Mr Crawford whereby she needed protection by way of a restraining order. It is inconceivable to the Tribunal that in sending such a communication that the applicant did not intend any detriment. It may be that in doing so the applicant had what he believed was good intentions in protecting the City and Mrs Bunyan, but irrespective of the justification for sending the correspondence, the intention must have been, on a balance of probability, to disadvantage or cause detriment to Mr Crawford.
- 49 It should be noted, however, that the Tribunal does not find that the applicant intended to cause detriment by making known to the recipients of the 23 October 2016 email of the mere existence of the application made by Mrs Bunyan seeking a restraining order against Mr Crawford. In this regard the Tribunal accepts the applicant's evidence that as far as he was aware Mr Crawford himself was making a number of individuals aware of the upcoming proceeding and in addition the proceeding was the subject of an article in the *Fremantle Herald* published on 29 July 2016 (Exhibit B and E).

How should the minor breach be dealt with?

- 50 Section 5.110(6) of the LG Act states as follows:

The breach is to be dealt with by -

- (a) dismissing the complaint; or
 - (b) ordering that -
 - (i) the person against whom the complaint was made be publicly censured as specified in the order; or
 - (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).

- 51 The respondent took into account that the applicant had not committed any minor breaches since the Regulations commenced, however found him to be an experienced councillor who should have known that by sending the 23 October 2016 email in the terms that he did amounted to a threat and circulating the email to the variety of recipients was inappropriate and unprofessional. The respondent took into account that the applicant took time to compose the email and therefore was able to reflect on the effect it would have and that he also had opportunities to disengage with Mr Crawford rather than allowing the email exchange to escalate. Further, the respondent took into account that the applicant continued to seek to justify the use of the offending words in the email and had shown no contrition. The respondent noted in their consideration that as Mayor, the applicant has a special duty to uphold the standards of conduct expected of all councillors in order to protect the reputation of the local government and give the community confidence in the way they perform their public duties. Therefore they found it was not appropriate to dismiss the complaint which would trivialise the breach and send a message that the conduct was not serious enough to warrant a penalty. The respondent also found that training was not appropriate. Ultimately the respondent found that as Mr Crawford was the person who had suffered the damage it was appropriate that he receive an apology and that it was also appropriate that the applicant apologise to his fellow councillors.
- 52 The intervenor in the proceeding adopted the position of the respondent and submitted that the applicant ought to provide a public apology in the terms as set out by the respondent in the sanction decision. Unfortunately the applicant did not provide any submissions in respect to an appropriate sanction. His position was simply that he had not engaged in conduct which constituted a minor breach and therefore no sanction ought to be imposed. The applicant had an opportunity to make submissions in this regard but made an informed choice not to do so.
- 53 The decision in respect to the appropriate sanction is a difficult one for the Tribunal. Whilst the Tribunal agrees with the views of the respondent and the intervenor that it is not appropriate to dismiss the complaint and that to do so would send the wrong message to the community and to other councillors, there is also little scope in the LG Act as far as sanctions which are available. In particular, often there are mitigating circumstances when minor breaches occur which may result in the Tribunal forming a view that a lesser sanction ought to be imposed along the lines that is available in disciplinary matters

arising in the Tribunal's vocational regulation jurisdiction, including that a person simply be reprimanded for their behaviour. However, that option is not available under the LG Act.

54 In the Tribunal's view the following factors are relevant and ought to be acknowledged in considering an appropriate sanction:

- (a) The applicant has been a councillor for a significant period of time, approximately 24 years, with an unblemished record. This is the first occasion on which he has been found to have engaged in conduct constituting a minor breach;
- (b) Whilst the Tribunal accepts that the words used in the 23 October 2016 email to Mr Crawford constituted an improper use of the applicant's office, the Tribunal accepts that at the time the applicant did so on the basis of an incorrect assumption he had made that he needed to be robust with Mr Crawford in order to protect the reputation of the City and an elderly constituent of the City, being Mrs Bunyan. Although that did not justify the conduct, it merely explains the context in which it arose;
- (c) There was some justification for the applicant's view that Mr Crawford was attempting to elicit his support by utilising the email subject heading 'City of Melville: 37 Harris St Bicton - quite right your Worship potentially fatal bldg non-compliances' and by circulating such an email to a variety of recipients including a number of councillors of the City and unbeknown to the applicant also two individuals of the media;
- (d) The findings of the respondent and the sanction imposed has already received media attention including an article printed in the *Fremantle Herald* on 2 September 2017 entitled 'Crawford wins apology' as well as an article on 17 October 2017 also in the *Fremantle Herald* entitled 'Mayor Russell Aubrey's apology to Mr Crawford and councillors' and a press release placed on the website of MRRA (Exhibit B);

- (e) There is significant animosity from Mr Crawford (and the MMRA to which he was President and remains a member), towards the applicant. That was evident to the Tribunal by submissions made at the December 2017 directions hearing by Mr Crawford. Also documents provided to the Tribunal on 26 March 2018 by the MRRA included copies of printouts from various websites with annotations such as: 'Mayor Aubrey's staged questions and responses at 20 March 2018 council meeting, a 'cheap trick' in an effort in continue to denigrate the City of Melville Residents and Ratepayers Association (Inc.)'; 'More of Mayor Aubrey's staged questions and responses at 20 March 2018 council meeting'; and 'Mayor Aubrey's ongoing refusal to properly deal with issues - even on 26 March 2018'.

55 The above is relevant in the Tribunal's view in respect to the appropriate sanction to be imposed because it highlights that there were some mitigating circumstances surrounding the occurrence of the minor breach; there has already been publicity in respect to the findings of the respondent and the sanction it determined should be imposed; and there appears to be significant animosity from Mr Crawford and the MRRA towards the applicant which raises questions in the Tribunal's mind as to whether any form of public apology would hold any meaning for Mr Crawford. The Tribunal is also concerned that if the applicant were required to provide a public apology at a meeting of the council open to the public that the meeting could potentially be derailed or those attending become disruptive, certainly if the audience included members of the MRRA given what seems to be their adverse views of the applicant.

56 However, a sanction ought to be imposed and the Tribunal agrees with the respondent and the intervenor that training is not an appropriate sanction in the circumstances of this matter. However, the Tribunal does not accept that a public apology is the appropriate sanction. It is doubtful that an apology would be viewed by Mr Crawford as genuine. It may also provide an opportunity at any council meeting for animosity and unhelpful interactions to occur as between the applicant and various members of the MRRA.

57 Thus the Tribunal is left with the option of public censure. A public censure also affords the opportunity, in the Tribunal's view, to give

scope to include mention of mitigating circumstances. Indeed the LG Act provides for the public censure to be 'as specified' by either the respondent or the Tribunal. The danger of a clinical citation of the bare facts constituting a minor breach is that it provides the audience with no real insight into the fuller context and surrounding circumstances. In appropriate cases, such as this, providing a brief contextual elaboration, achieves an important element of balance in the terms of the censure. The wording of s 5.110(6)(b)(i) of the LG Act clearly provides the scope for this type of approach.

- 58 The Tribunal is of the view that the censure ought to be published in the *Melville Times* and in the *Fremantle Herald*, particularly given that both organisations were recipients to one or more of the relevant emails. The Tribunal does not believe that the minor breach justifies publication of the censure beyond the local newspaper publications circulated to the community within the City.

Orders

- 59 The Tribunal makes the following orders:
1. The application for review of the decision of minor breach is dismissed.
 2. The decision of the respondent that, by sending an email on 23 October 2016 to a number of recipients, the applicant committed a minor breach under s 5.105(1)(a) of the *Local Government Act 1995* (WA) by contravening reg 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA), is affirmed.
 3. The application for review of the decision imposing a sanction of public apology is allowed.
 4. The decision of the respondent requiring the applicant to publicly apologise is set aside and substituted with the decision set out in Order 5 below.
 5. Within the period of 29 days to 43 days from the date of this order, the Chief Executive Officer of the City of Melville must arrange for the following Notice of Public Censure to be published, in no less than 10 point print:

- (a) as a one-column or a two-column display advertisement in the first 15 pages of the *Melville Times* newspaper; and
- (b) as a one-column or a two-column display advertisement in the first 15 pages of the *Fremantle Herald* newspaper.

Annexure to order - Notice of Public Censure

**NOTICE OF PUBLIC
CENSURE**

The State Administrative Tribunal (SAT) has found that the Mayor of the City of Melville (City) has breached regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* by sending an email on 23 October 2016 to Mr Crawford and a number of other recipients. It was found that sending the email constituted a minor breach by the Mayor making improper use of his office causing detriment to Mr Crawford. SAT therefore censures the Mayor for this breach.

However, SAT found relevant mitigating circumstances, including that the Mayor has been a councillor for many years with a previously unblemished record, and although he committed a minor breach, his motivation was influenced by his desire to protect the City and a constituent of the City.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MS C WALLACE, SENIOR MEMBER

7 JUNE 2018