

## LOCAL GOVERNMENT STANDARDS PANEL

Established under section 5.122 of the *Local Government Act 1995* (WA)

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| Complaint Number            | SP 30 of 2015<br>DLG 20150133  |
| Legislation                 | <i>Local Government Act 1995</i> (WA)  |
| <b>Complainant</b>          | <b>Margaret Shorter</b>  |
| <b>Subject of complaint</b> | <b>Mayor Sue Doherty</b>   |
| Local Government            | City of South Perth  |
| Regulation                  | Regulations 9(1) and 10(1)(a) of the <i>Local Government (Rules of Conduct) Regulations 2007</i> |
| Panel Members               | Mr B Jolly (Presiding Member)<br>Councillor P Kelly (Member)<br>Mr P Doherty (Member)            |
| Heard                       | 10 August 2015<br>(Determined on the documents)  |
| Outcome                     | Two minor breaches established   |

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### FINDINGS AND REASONS FOR FINDING

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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**

## 1. Summary of the Panel's Findings

- 1.1 The Panel found that Mayor Doherty breached regulations 9(1) and 10(1)(a) of the *Local Government (Rules of Conduct) Regulations 2007 (Regulations)* by performance managing her Executive Assistant and requiring her to respond to a Memorandum outlining issues that Mayor Doherty had with her performance.

## 2. Jurisdiction

- 2.1 On 21 May 2015 the Panel received from the City's Complaints Officer a complaint submitted by Ms Margaret Shorter, Mayor Doherty's Executive Assistant (**Complaint**), in which it was alleged that Mayor Doherty sent to her the Memo and the Email defined in paragraph 5.1 below and thereby breached each of regulations 9(1) and 10(1)(a) of the *Regulations (Alleged Breaches)*.
- 2.2 A breach of either of regulation 9(1) or 10(1)(a) is a "minor breach"<sup>1</sup> and the Panel is required to make a finding as to whether the breach occurred or to send the Complaint to the Chief Executive Officer of the Department of Local Government and Communities (**CEO**) under section 5.111 of the *Local Government Act 1995 (LG Act)*.
- 2.3 The Panel finds that the Complaint was made and has been dealt with in accordance with the requirements of Part Division 9 of the *LG Act*, that the Complaint is not one that should be dealt with under section 5.111 and that the Panel has jurisdiction to determine whether the Alleged Breaches occurred.

## 3. The Panel's Role

- 3.1 The Panel observes that its members are required to have regard to the general interests of local government in Western Australia<sup>2</sup>; it is not an investigative body and determines complaints solely upon the evidence presented to it; a finding of a minor breach may affect an individual both personally and professionally and that in order for the Panel to make a finding that a minor breach has been committed by a Councillor, the finding is to be "based on evidence from which it may be concluded that it is more likely that the breach occurred than that it did not occur"<sup>3</sup> (**Required Standard**).
- 3.2 When assessing whether it is satisfied to the Required Standard:
- (a) the Panel considers, amongst other things, the seriousness of the allegations made in the Complaint, the likelihood of an occurrence of the given description and the gravity of the consequences flowing from a particular finding; and

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<sup>1</sup> *LG Act*, s 5.101A and s 5.105(1).

<sup>2</sup> Clause 8(6) of Schedule 5.1 of the *LG Act*

<sup>3</sup> *LG Act*, s 5.106.

- (b) where direct proof is not available, the Panel considers that it must be satisfied that the circumstances appearing in evidence give rise to a reasonable and definite inference of a breach, not just to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture.

#### **4. Documents**

- 4.1 The Documents considered by the Panel (**Documents**) are set out in Attachment “A”.

#### **5. The Complaint**

- 5.1 The essence of the Complaint is that:

- (a) on 6 May 2015 Mayor Doherty sent a memorandum to the Complainant entitled “Issues – Executive Assistant” which outlined issues which Mayor Doherty had with the Complainant’s performance as her Executive Assistant and which concluded with “I would appreciate your comments on the above, including how you will respond to these issues moving forward by COB Tuesday 12 May 2015” (**Memo**);
- (b) the Complainant responded to Memo by an email dated 8 May 2015 advising “I will respond to it by COB next Thursday 14 May 2015”;
- (c) on 12 May 2015 Mayor Doherty responded to this email by an email sent at 2:30pm saying “I require a response by COB today, 12<sup>th</sup> May 2015 as formally requested” (**Email**); and
- (d) by sending the Memo and the Email Cr Doherty breached:
- (i) regulation 9(1) in that she undertook a task that contributes to the administration of the City in that she had “undertaken the task of performance managing me without the involvement or authorisation of the administration, i.e. my Team Leader or CEO”; and
- (ii) regulation 10(1)(a) in that she directed the Complainant, who is a local government employee, to (among other things) respond to the Memo and to keep her informed of “what other Elected Members are doing; and
- (iii) various provisions of the City’s Code of Conduct<sup>4</sup>.

#### **6. The Response**

- 6.1 By letter dated 19 June 2015, the Department sent a copy of the Complaint (together with a Complaint Summary) to Mayor Doherty.
- 6.2 In her Response to the Panel<sup>5</sup>, Mayor Doherty:
- (a) admitted having sent Memo and the Email to the Complainant;

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<sup>4</sup> The Panel does not have jurisdiction to entertain this aspect of the Complaint because a breach of a provision of a City’s code of conduct is not of itself a “minor breach”.

<sup>5</sup> Attachment “A”, documents 5, 6 and 7.

- (b) advised that she had:
  - (i) since 23 September 2014 raised the Complainant’s performance with the City’s Chief Executive Officer (**CEO**) and the Complainant’s Line Manager (**Manager**);
  - (ii) met on 12 November 2014 with the Manager;
  - (iii) received a memorandum dated 20 November 2014 from the Manager reporting on the outcomes of the 12 November 2014 meeting;
  - (iv) during February 2015 been informed by the Manager that the Complainant’s most recent performance review indicated that her performance “meets and exceeds requirements”, which (in view of her above concerns) came as a surprise to Mayor Doherty;
  - (v) been advised at or about that time that a further performance review of the Complainant would be undertaken in “the next few months”;
- (c) acknowledged that her Memo may have caused her to “unintentionally” breach regulation 9(1); and
- (d) did not accept having breached regulation 10(1)(a).

**7. Essential elements of a contravention of regulation 9(1)**

7.1 In the Panel’s view, the following elements must be established, to the Required Standard, before a contravention of regulation 9(1) of the *Regulations* is established:

- (a) firstly, that the person the subject of the Complaint engaged in the alleged conduct (**Conduct**);
- (b) secondly, that the person the subject of the Complaint was a council member both at the time of the Conduct and the time when the Panel makes its determination;
- (c) thirdly, that the Conduct involved the person participating in the performance, attempted performance, or part-performance, of a function or responsibility which under the *LG Act* or by delegation it is for the local government’s CEO to perform or direct<sup>6</sup> (**Function**);
- (d) fourthly, that by so acting the person contributed to that Function (in the sense of played a part in its achievement<sup>7</sup>); and
- (e) fifthly, that the Conduct was not authorised by the Council or the CEO or undertaken as part of the persons deliberations at a council or committee meeting.

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<sup>6</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59 at paragraphs [48] – [49] and [53]–[54].

<sup>7</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59 at [56].

## **8. Findings – regulation 9(1)**

8.1 The Panel is satisfied to the Required Standard that each element of regulation 9(1) has been established and in particular finds that:

- (a) pursuant to s 5.41 of the *LG Act* the CEO’s functions include being “responsible for the employment, management supervision, direction and dismissal of other employees (subject to section 5.37(2) in relation to senior employees)”;
- (b) by sending the Memo and the Email to the Complainant, Mayor Doherty involved herself in the management supervision and direction of the Complainant, an employee of the City, and thereby contributed to the administration of the City; and
- (c) Mayor Doherty was not authorised by the Council or the CEO to do this and did not do so as part of her deliberations at a council or committee meeting;

**and therefore finds that by sending the Memo and the Email Mayor Doherty breached regulation 9(1) of the Regulations.**

## **9. Essential elements of a contravention of regulation 10(1)(a)**

9.1 In the Panel’s view, the following elements must be established, to the Required Standard, before a contravention of regulation 10(1)(a) of the *Regulations* is established:

- (a) firstly, that the person the subject of the Complaint engaged in the Conduct;
- (b) secondly, that the person the subject of the Complaint was a council member both at the time of the Conduct and the time when the Panel makes its determination;
- (c) thirdly, that the person gave or tried or made an effort to give a direction or an order or command (**Direction**);
- (d) fourthly, that the Direction was given to another person, who was an employee of his or her local government;
- (e) fifthly, the Direction was to do or not to do something in the other person’s capacity as a local government employee; and
- (f) the direction or attempted direction was not part of anything that the person did as part of the deliberations at a council or committee meeting (which may include something he or she did as part of his or her preparation for any such deliberation).

## **10. Findings – regulation 10**

10.1 The Panel is satisfied to the Required Standard that each element of regulation 10(1)(a) has been established and in particular finds that:

- (a) the Email, by itself, was not a Direction for the purposes of regulation 10, because it only requested that the Complainant respond to it;
- (b) the Email (when read with the Memo) was a Direction for the purposes of regulation 10, because:

- (i) the Complainant was Mayor Doherty's Executive Assistant and there was, accordingly, an imbalance of power between them;
- (ii) the Complainant had advised Mayor Doherty that she would respond to the Memo by 14 May; and
- (iii) by the Email, Mayor Doherty told the Complainant "I require a response by COB today, 12<sup>th</sup> May 2015 as formally requested" (*emphasis added*), which (when viewed objectively) required, rather than requested, a response.

10.2 **For these reasons the Panel finds that Mayor Doherty committed the breach of regulation 10(1)(a) alleged in the Complaint.**



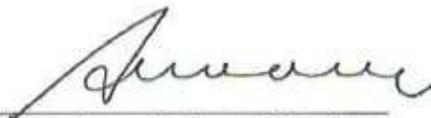
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Brad Jolly (Presiding Member)



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Paul/Kelly (Member)



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Peter Doherty (Member)

### Attachment "A"

| Doc ID              | Description   | Page #    |
|---------------------|---|-----------|
| <b>Attachment B</b> | Statement of Facts  | <b>14</b> |
|                     | <b>Complaints Officer originating correspondence:</b>   |           |
| <b>01.doc</b>       | Copy of (1-page) correspondence from Mr Cliff Frewing, the CEO and Complaints Officer of the City of South Perth dated 19 May 2015      | <b>15</b> |
| <b>02.doc</b>       | Copy of (1-page) completed Council Member Details form dated 7 May 2015.  | <b>16</b> |
|                     | <b>Complaint and accompanying information:</b>  |           |
| <b>03.doc</b>       | Copy of (10-page) <b>Complaint of Minor Breach No. SP 30 of 2015</b> dated 6 May 2015 made by Ms Margaret Shorter, and its attachments. | <b>17</b> |
|                     | <b>Correspondence with the Complainant:</b>   |           |
|                     | Nil   |           |
|                     | <b>Correspondence with the Cr complained about:</b>   |           |
| <b>04.doc</b>       | Copy of (4-page) Request for Comments letter and attachment to Mayor Sue Doherty dated 19 June 2015.                                    | <b>27</b> |
| <b>05.doc</b>       | Copy of (1-page) correspondence from Mayor Doherty dated 7 July 2015.   | <b>31</b> |
| <b>06.doc</b>       | Copy of (6-page) completed Form A   | <b>32</b> |
| <b>07.doc</b>       | Copy of (4-page) attachment to Mayor Doherty's Form A   | <b>38</b> |

|               |   |           |
|---------------|---|-----------|
|               | <b>Information provided by the CEO, not sent with the said Request for Comments letter to Mayor Doherty</b> |           |
| <b>08.doc</b> | Copy of (17-page) emails with attachments provided to the Department.                                       | <b>42</b> |