

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 30 of 2008
Heard: Determined on the documents
Considered: 1 December 2008 and 17 December 2008
Coram: Mr Q. Harrington (Presiding Member)
Councillor C. Robartson (Member)
Mr J. Lyon (Member)

SP 30 of 2008

Complainant: (Cr) Alan Edwin BLENCOWE
Council member complained about: Mayor Jon KELLY
Local government concerned: City of Wanneroo
Regulations alleged breached: 4(2) and 7(1)

Findings:

The Panel finds that Mayor Kelly committed a breach of the City of Wanneroo's standing order 11.9, and thus committed a minor breach by virtue of regulation 4(2).

The Panel also finds that Mayor Kelly committed a breach of regulation 7(1)(b).

REASONS FOR FINDING

1. In these Reasons, unless otherwise indicated, a reference to a section is a reference to the corresponding section in the *Local Government Act 1995* ("the Act"), and a reference to a regulation is a reference to the corresponding regulation in the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations").
2. Mr John Love, at the time the acting complaints officer of the City of Wanneroo ("City"), has sent to the Local Government Standards Panel ("the Panel") a complaint dated 4 August 2008 ("the complaint") made by Councillor Blencowe about Mayor Kelly's conduct when he was the presiding person during the debate ("the debate") on the motion relating to Item SCS02-07/08 (in regard to the City's 2008/2009 annual budget) ("the motion") at the City's Council's Special Meeting on 25 July 2008 ("the Special Meeting").
3. The complaint consists of a 2-page Complaint of Minor Breach Form and a 1-page Complainant Details Form that has marked on it "Refer to tape of meeting". Mr Love also sent to the Panel a copy of the minutes of the Special Meeting and a CD recording of the proceedings at the Special Meeting. Subsequently, Ms Karen Caple, the City's complaints officer, sent to the Panel a typed transcript of that recording ("the transcript").

4. The Panel's Administration, on its own initiative, corresponded with Councillor Blencowe for clarification of his allegations and further information in this matter. Councillor Blencowe's response ("the complaint supplementary material") consisted of: a 5-page undated letter; a 1-page "Declaration" dated 11 September 2008 by Councillor Paul Miles ("Councillor Miles"); a 1-page "Declaration" dated 12 September 2008 by Councillor Frances Maureen Grierson ("Councillor Grierson"); copies of pages 5, 6 and 11 of the 5th August 2008 edition of the "Sun City News" newspaper; and a copy of a what purports to be a 1-page transcript of a cross-examination of Mayor Kelly in a matter unrelated to this matter.

5. Three allegations of minor breach are made by Councillor Blencowe in the complaint ("the three allegations"). They are:

- (1) That Mayor Kelly's conduct contravened standing order 11.9 ("standing order 11.9") of the *City of Wanneroo Standing Orders Local Law 2000* ("the City's standing orders") by making adverse reflections upon the character or actions of Councillor Blencowe, Councillor Miles and Councillor Grierson or by imputing a motive or motives to any one or more of such other members.
- (2) That by the conduct complained about in relation to allegation (1) Mayor Kelly committed a breach of regulation 7(1) by making improper use of his office as a Council member both, or alternately, to gain a moral advantage for himself and/or to cause detriment to the reputations of Councillors Blencowe, Miles and Grierson.
- (3) That Mayor Kelly's conduct contravened standing order 11.10 of the City's standing orders by allowing the City's Deputy Mayor, Councillor Brett Treby ("Cr Treby"), to breach standing order 11.9 by making adverse reflections upon the character or actions of Councillor Blencowe, Councillor Miles and Councillor Grierson or by imputing a motive or motives to any one or more of such other members.

6. The Panel notes that Councillor Blencowe has also complained that Mayor Kelly's conduct during the debate was a breach of regulation 3(g) and a breach of section 23 of "the Anti-Discrimination Act". Considering these claims, it may be noted that:

- (a) regulation 3(1)(g), while important, is *not* a rule of conduct and hence contravention of it is not a minor breach under section 5.105(1)(a); and
- (b) Western Australia does not have an Act by that name – however, it appears that his reference to "the Anti-Discrimination Act" is a reference to the Northern Territory's *Anti-Discrimination Act*, which is clearly not relevant in this matter.

7. On 25 September 2008 the Panel Administration, on its own initiative, sent Mayor Kelly a Panel *Notice of Complaint* together with copies of: the complaint; the transcript; the Panel Administration's file copy letter of 3 September 2008 to Councillor Blencowe; and the complaint supplementary material.

By the Panel *Notice of Complaint* the Panel Administration, inter alia, notified Mayor Kelly of the three allegations and:

(a) advised him:

- (i) the adverse reflections or imputing of motives by him consisted of statements or comments (as detailed in and expanded by the complaint and the complaint supplementary material) with the following substance, effect or implication:
 - (A) Councillors Blencowe, Miles and Grierson were opposing the matter in debate “to be mischievous or for political reasons”;
 - (B) Councillors Blencowe, Miles and Grierson did not contribute to the budget process and therefore should not oppose the motion; and
 - (C) Councillors Blencowe, Miles and Grierson had been derelict in their Council duties; and
- (ii) the adverse reflections or imputing of motives by Cr Treby were as set out in the complaint and the complaint supplementary material; and

(b) invited his response to the three allegations.

8. Mayor Kelly’s response to the three allegations, relevantly, is his 3-page letter of 6 November 2008. In his response, Mayor Kelly says, relevantly:

“Having read the Complaint and the attached ancillary information, I contend that in all the circumstances, I have behaved constantly with provisions of the Local Government (Rules of Conduct) Regulations 2007 and in the broader public interest.

My comments at Special Budget Meeting held on 25 July 2008 were consistent with the advice and recommendations of the City’s professional Officers, and in direct response to comments made by Cr Blencowe and Cr Miles, which would if unchallenged, embarrass the City and interfere with its capacity to provide good governance.

Please note the position being put by both elected members to Council was that the budget was so floored it should not be adopted. In the course of the debate their position did evolve to encouraging Council to simply adopting and unbalanced budget.

Ultimately, the position being put by Cr Blencowe and Cr Miles would have lead to Council being unable to adopt a balanced budget and resultantly be in breach of its obligations under the Local Government Act 1995.

...

The debate put by myself, Cr Treby and other elected members who made similar observation were in direct rebuttal to the issues raised by Cr Blencowe.

...

Furthermore, contrary to Cr Blencowe’s claim, neither he nor Cr Miles were named during the course of debate by either myself or Cr Treby.

Should Cr Blencowe or Cr Miles really have believed there had been any breach of the City’s Standing Orders, an immediate and proportionate remedy was available within Standing Orders in the form of a Point of Order.

Cr Blencowe is an experienced elected member and a frequent exponent of the provisions relating to Points of Order as contained in the City's Standing Orders.

...

In summary I deny all allegations made by Cr Blencowe on the basis that:

...

- All comments made by myself were true and correct and in the public interest.*
- All comments made by myself were direct responses to issues that arose out of debate and in rebuttal to comments made by Cr Blencowe.*
- Rebuttal of Cr Blencowe and Miles was necessary to protect the reputation of Council and ensure the continuation of good governance.*
- Given the nature and manner in which Cr Blencowe sort to oppose the City's Budget, public identification of the weaknesses in his position were unavoidable.*
- Had Cr Blencowe truly believed that a breach of the City's Standing Orders had occurred, he had an immediate, appropriate and proportionate remedy at his disposal."*

9. Councillor Miles' 1-page "Declaration" dated 11 September 2008 reads, relevantly:

"... on the 25th July 2008 at the Annual Budget Meeting I witnessed Mayor Jon Kelly Victimise Cr Blencowe and me with his statements because we had opposed the budget. I also felt, in his remarks that I should have made my mine up in a council forum meeting previously. Local Government education officers have told me that we can not give a determination until we are in the council chamber, yet Mayor Kelly and Cr Roberts suggested verbally that I should be going along with them as I had only briefly made comments in the forum.

Mayor Kelly did character attack me and attempted to make my decision political, I do believe his attempt was to cause maximum damage to me in the local newspapers and to cause damage to my integrity. I also believe he was attempting to bully me and intimidate me to change my vote."

10. Councillor Grierson's 1-page "Declaration" dated 12 September 2008 reads, relevantly:

"... on the 25th July 2008 at the Annual Budget Meeting I witnessed Mayor Jon Kelly make derogatory remarks against Councillors who had spoke against the Budget. This led to the following:

1: Gain directly an advantage for him.

2: Caused Detriment to Crs. Blencowe and Miles through:

: Victimisation

: Harassment

: Character attacked

: Competencies attacked

: Integrity attacked

I felt that the remarks made adversely refelcted on their reputation, character and skill level.

: If I had not known the Councillors concerned I would have had a low opinion of them.

: They were accused of political motivation, I believe this was untrue their concern was for the people of the City.

: What I read in the newspapers was not giving the whole story of what took place.

: Crs. Blencowe and Miles both spoke up at the Budget Meetings that I attended but like myself were ignored to a large extent.

: I do feel the Mayor's verbal attack on the 25th July was victimisation and harassment.

: I don.t know if any of the other Councillors voted the way they did due to fear and reprisals but I do know that as I did speak against the Budget but when the time came I voted for it as I was just out of hospital and my heart was racing and I felt I could not take any more of the Mayor's vitriolic verbal abuse, as I have been subject to this before.

: I believe damage was done to both Councillors reputation."

11. The Panel is satisfied that: the complaint; the confirmed minutes of the Special Meeting and the other written material referred to above; and page 151 of WALGA's WA Local Government Directory 2008, are evidence from which it may be concluded, and which the Panel so concludes, that it is more likely than not that:

- (a) at all material times Mayor Kelly was the City's mayor and a member of the City's council ("Council");
- (b) during the period from February to July 2008 there were briefing meetings between the Council members and City officers in connection with the preparation of the City's proposed 2008/2009 budget ("the proposed budget");
- (c) at some of those briefing meetings Councillor Blencowe, Councillor Miles and Councillor Grierson raised objections in regard to items in or not in the proposed budget;
- (d) Mayor Kelly was the presiding person of the Special Meeting during the debate;
- (e) the debate took place when the meeting was open to members of the public;
- (f) there were 15 Council members, including Mayor Kelly, present during the debate;
- (g) section 6.2(1) required the City's 2009/2009 budget to be adopted by an absolute majority of Council member;
- (h) the number of offices (whether vacant or not) of member of the Council was 16, and accordingly an "absolute majority" for the Council's voting purposes was 9 Council members;
- (i) the Council members who spoke against the motion were Councillor Blencowe, Councillor Miles and Councillor Grierson;
- (j) clause 10 of the motion was: "That Council by an absolute majority endorses the withdrawal of the Mobile Library service and the revised format of the Podiatry Service";
- (k) at the end of his speech against the motion, Councillor Blencowe moved that the motion be amended by deleting clause 10 - however, his motion lapsed for want of a seconder;
- (l) the motion was carried 13/2, with the councillors voting against it being Councillor Blencowe and Councillor Miles;
- (m) the copy of the transcript provided by the City's complaints officer to the Panel is a true record of what was said at the Special Meeting at all material times; and
- (n) at the time of the debate:
 - (i) the City's local law relating to conduct of people at council or committee meetings was the City's standing orders; and

- (ii) the City's code of conduct for council members was the *City of Wanneroo Code of Conduct for Council Members 2008* ("the Code of Conduct").

12. The Panel now considers each of the three allegations referred to in paragraph 5 above in turn. In relation to allegation (1) it is noted that by section 5.105(1)(b) a council member commits a minor breach if he or she contravenes a local law under the Act, contravention of which the regulations specify to be a minor breach.

Regulation 4 reads:

- (1) *In this regulation —*
"local law as to conduct" means a local law relating to conduct of people at council or committee meetings.
- (2) *The contravention of a local law as to conduct is a minor breach for the purposes of section 5.105(1)(b) of the Act."*

The City's standing orders are a local law as to conduct. Standing order 11.9 reads:

"A member shall not reflect adversely upon the character or actions of another member or an officer of the City nor impute any motive to a member or an officer unless the Council resolves, without debate, that the motion then before the Council cannot otherwise be adequately considered."

13. In the Panel's view the intent and purposes of standing order 11.9 include:

- (a) the prohibition of adverse reflections by council members about the City's officers, except in appropriate circumstances;
- (b) except in rare situations, the prohibition of the use by a council member of any argument that consists of a personal attack by the council member directed against any speaker or other council member in a council debate – the term "personal attack" including replying to an argument or factual claim of another council member by attacking or appealing to a characteristic or belief of that other council member, rather than by addressing the substance of the argument or producing evidence against the claim; and
- (c) assisting the presiding person to keep of order at a meeting.

14. In the Panel's view, an adverse reflection is a remark or observation that would be perceived by a reasonable person as tending to lower a person in the estimation of his or her fellow persons by making them think less of him or her - the phrase "reasonable person" being a reference to a hypothetical person with an ordinary degree of reason, prudence, care, self-control, foresight and intelligence, who knows the relevant facts.

15. In the Panel's view:

- (1) A council member will *reflect adversely upon the character of another member* if the council member makes a remark or observation that relates to the other member's moral or mental characteristics, and the remark or observation would be perceived by a reasonable person as tending to lower a person in the estimation of his or her fellow persons by making them think less of him or her.

- (2) A council member will *reflect adversely upon the actions of another member* if the council member makes a remark or observation that relates to any thing done by the other member, and the remark or observation would be perceived by a reasonable person as tending to lower a person in the estimation of his or her fellow persons by making them think less of him or her.
- (3) A council member will *impute a motive* to another member if the council member attributes something to the other member as the other member's goal or object for acting or not acting in the manner that the other member acted or did not act.

16. In the present case, it would appear from the complaint supplementary material, particularly Councillor Blencowes' 5-page undated letter, that the alleged adverse reflections and wrongful imputations of motive in relation to allegation (1), that Councillor Blencowe states or refers to in the complaint supplementary material, are as follows (in each case the initial quotation is taken from item 3 of the 5-page undated letter):

- (i) *"the transcript states "mischievous" in one place on page 11"* – which in the Panel's view is a reference by Councillor Blencowe to the following remark or observation attributed to Mayor Kelly on page 11 of the transcript:

"I've already spoken to Mr Paton, I'm going to ask him to do a summary, there's been a couple of issues which are raised here which a little bit on the mischievous side."

- (ii) *"the transcript states "politically motivated" on page 13"* – which in the Panel's view is a reference by Councillor Blencowe to the following remarks or observations attributed to Mayor Kelly on pages 13 and 14 of the transcript:

[on p.13] *"That is, that is the scary thing that there is a lack of professional competence in their comments."*

[on p.13] *"Now, Councillors, the other thing that I have a problem is, is, well that's one possibility, is that they simply can't add up, you know, the other thing which is a problem Councillors is it could be politically motivated."*

[on p.14] *"Sometimes, Councillors you've got to see things for what they are. It is very easy to come, you know, to go stand behind closed doors and let everybody else make the difficult decisions about the things which will help the City to survive and then come out when the media is here, when there's a few cheap headlines to be gained, and say 'oh no, I'm not supporting that', you know, because then you could run off to your next, next election and you can say 'I didn't support the rates increase' ..."*

- (iii) *"Sun City News Tuesday August 2008 article (copy attached at Appendix 1) reported that "the Mayor referred to stunts and politically motivated actions of some councillors"* – which in the Panel's view is a reference by Councillor Blencowe to the following remarks or observations attributed to Mayor Kelly on pages 14 and 13 respectively of the transcript:

[on p.14] *"The other reason Councillors you might conclude that this is all a stunt".*

[on p.13] *"Now, Councillors, the other thing that I have a problem is, is, well that's one possibility, is that they simply can't add up, you know, the other thing which is a problem Councillors is it could be politically motivated."*

- (iv) *"Sun City News Tuesday August 2008 article (copy attached at Appendix 1) reported that ... "it appears these people don't understand simple Maths" "* – which in the Panel's view is a reference by Councillor Blencowe to the following remarks or observations attributed to Mayor Kelly on pages 13 and 14 respectively of the transcript:

[on p.13] *"... and I think that's the case Councillors, is that the arguments being put against are being put by people who simply don't understand basic mathematics, you know, very simple grade 2 stuff. Now, Councillors, the other thing that I have a problem is, is, well that's one possibility, is that they simply can't add up ..."*

[on p.14] *"... so I'm not sure which one of the options is more terrifying, that they can't add up, that they can't add you know, that they can't put 5 and 2 and work out that that's 7?"*

- (v) *"Sun City News Tuesday August 2008 article (copy attached at Appendix 1) reported that ... "Mayor felt it was stunt by some councilors politically motivated and the residents and ratepayers deserve to know how these people behaved"* – which in the Panel's view is a reference by Councillor Blencowe to the following remarks or observations attributed to Mayor Kelly on pages 13, 14 and 15 respectively of the transcript:

[on p.13] *"The other reason Councillors you might conclude that this is all a stunt".*

[on p.14] *"Now, Councillors, the other thing that I have a problem is, is, well that's one possibility, is that they simply can't add up, you know, the other thing which is a problem Councillors is it could be politically motivated."*

[on p.15] *"... but I will say this Councillors, in the budget, I think you're entitled to get Administration to prepare your recommendation, prepare your amendment so you don't completely ruin the budget. What I've seen tonight is absolutely disgraceful and the public deserves better."*

- (vi) *"His further comment "If these people run the budget, there are only two things that would happen, either the city would be bankrupt or we would not provide a reasonable level of service to the community" – which in the Panel's view is a reference by Councillor Blencowe to the following remark or observation attributed to Mayor Kelly on page 14 of the transcript:*

"If these people run the budget, there is only two things that would happen, either the City would be bankrupt or we would not provide a reasonable level of service to the, to the most, you know to, to, to the community."

- (vii) *"On page 14 towards the end of the first paragraph of the transcript Jon Kelly states "I am terrified to think the financial devastation that these individuals would reap upon the community if they were in a position to actually impose their will" – which in the Panel's view is a reference by Councillor Blencowe to the following remark or observation attributed to Mayor Kelly on page 14 of the transcript:*

"I am terrified to think the financial devastation that these individuals would, would, would reap upon the community if they were in a position to actually impose their will."

- (viii) *"Jon Kelly's comments further on page 15 where he infers that the dissenting Councillors 'did not participate in a manner which is befitting of an Elected Member through the entire process'" – which in the Panel's view is a reference by Councillor Blencowe to the following remark or observation attributed to Mayor Kelly on page 15 of the transcript:*

"I noticed that a couple of you were away during the budget and I accept that, but the reality is, is its Council's responsibility to chase after you, after you or should you do your reading and catch up? Are the ratepayers reasonably expected that you're competent enough to pick up your budget papers and read it. There is a level of expectation that the community is entitled to have of you and that expectation is that you participate in a manner which is befitting of an Elected Member through the entire process. If you have something to say, then you say it throughout the entire process, and if you still don't get your way on budget night, you move a motion."

- (ix) *"On page 14 halfway through the second paragraph of the transcript Mayor Kelly stated 'I'm not sure which one of the options is more terrifying that they can't put 5 and 2 and work out that's 7?" – which in the Panel's view is a reference by Councillor Blencowe to the following remark or observation attributed to Mayor Kelly on page 14 of the transcript:*

"I'm not sure which one of the options is more terrifying, that they can't add up, that they can't add you know, that they can't put 5 and 2 and work out that that's 7?"

- (x) *"The comments throughout the transcript by Jon Kelly stated that both Cr Miles and I did not disagree with decisions being made in the budget meetings; and that we should not bring up issues now at the final council meeting" – which in the Panel's view is a reference by Councillor Blencowe to the following remarks or observations attributed to Mayor Kelly on pages 13-14, 14 and 14-15 respectively of the transcript:*

[on pp. 13-14] "Now, we've had our arguments about what was and what wasn't said there, and, and Councillors we were all in the meetings, we were there since February going through all of this stuff, so we all know what happened and we all know what's said. But Councillors one thing that I think we will all agree, is that at the end of every segment on the budget I went around and asked individual Councillors for their comments. Every individual Councillor and I'm watching these people nod their heads and you know, you've all seen it, 'I've got nothing to say Mr, Mr Mayor' but all of a sudden on budget night, 'I've

been saying that all along'. Now Councillors, I'll ask you this. If you believe that Cr Blencowe had said that all along, I encourage you to vote for him, I encourage you to vote with him, if you think that's the case."

...

[on p.14] "We went through every single capital works projects looking, looking for these things. Every, and I went around the table, and we spoke about every one, did I hear 'oh Mr Mayor, we've got to take that out'. As a matter of fact Councillors, I think I probably suggested more projects come out than what actually did. So there was plenty of opportunity for these, for these people to actually remove it,..."

...

[on pp.14-15] "Or the fact that they would sit down in meetings from February through to July and nod and every time you look at them, they're nodding, and every time I go to them I say do you have any comment and they're fine. Not to mention the fact that they were presented documents, not to mention the fact the summary was sent out a couple of weeks ago, was there any attempt to speak to you Councillors about the difficulties in the, in the budget? Was there any suggestion that we should take these things out?"

It is very easy to come, you know, to go stand behind closed doors and let everybody else make the difficult decisions about the things which will help the City to survive and then come out when the media is here, when there's a few cheap headlines to be gained, and say 'oh no, I'm not supporting that', you know, because then you could run off to your next, next election and you can say 'I didn't support the rates increase' but you can go behind closed doors with Councillors with a list of 27 items that you want included in the budget that add up to millions of dollars. Now, Councillors we were all there. I'm not talking to the gallery, I'm not talking to, to the public, I'm talking to the Elected Members who are here, who sat there every, every budget meeting over periods of months and saw what happened. You all know what happened, you all know the roles that these individuals played. You all know when they nodded their heads, you were all there when I said did you have any comment to make. We all know the answers to the questions Councillors and that's why Cr Roberts is upset, because she knows the answers to the questions. That's why Cr Treby is upset because he sat in every budget and he, he watched.

I noticed that a couple of you were away during the budget and I accept that, but the reality is, is its Council's responsibility to chase after you, after you or should you do your reading and catch up? Are the ratepayers reasonably expected that you're competent enough to pick up your budget papers and read it. There is a level of expectation that the community is entitled to have of you and that expectation is that you participate in a manner which is befitting of an Elected Member through the entire process."

17. The Panel notes that the Macquarie Dictionary (2nd ed) defines:

- (a) the adjective "mischievous" relevantly as "roguishly or archly teasing, as speeches, glances, etc", "maliciously or playfully annoying, as persons, actions, etc" and "harmful or injurious"; and
- (b) the noun "stunt" relevantly as "anything done to attract publicity".

18. In the Panel's view:

(1) In the light of the Panel's views in paragraph 15 above, the remarks or observations repeated in paragraphs 16(i), (ii), (iii), (iv), (v) and (ix) above:

(a) were made by Mayor Kelly with reference to:

- (i) Councillor Blencowes' earlier remark or observation during the debate that "... *we have actually raised the rate, the residential improved rate is 7.2%*"; and
- (ii) Councillor Miles' earlier remark or observation during the debate that "... *Wanneroo is built up of real hard working battlers in the back blocks and their rates are going up more than the 7%*"; and

(b) were adverse reflections by Mayor Kelly upon the respective actions of Councillor Blencowe and Councillor Miles in making those earlier remarks or observations; and

(c) were the imputing of a motive by Mayor Kelly to each of Councillor Blencowe and Councillor Miles in making those earlier remarks or observations,

and accordingly were breaches by Mayor Kelly of standing order 11.9.

(2) In the light of the Panel's views in paragraph 15 above, the remarks or observations repeated in paragraphs 16(vi), (vii), (viii) and (x) above:

(a) were made by Mayor Kelly in relation to all of the Council members who had spoken against the motion – namely, Councillors Blencowe, Miles and Grierson; and

(b) were an adverse reflection by Mayor Kelly upon the respective characters of those Councillors; and

(c) were an adverse reflection by Mayor Kelly upon the respective actions of those Councillors,

and accordingly were breaches by Mayor Kelly of standing order 11.9.

Accordingly, the Panel finds that at the Special Meeting Mayor Kelly contravened standing order 11.9, and thus committed a minor breach by virtue of regulation 4(2).

19. Turning to allegation (2) referred to in paragraph 5 above, it is noted that regulation 7 is a rule of conduct under section 5.104(1) and, in accordance with section 5.105(1)(a), a contravention of regulation 7(1)(b) is a minor breach.

Regulation 7(1)(b) reads:

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

20. In the Panel's view a breach of regulation 7(1)(b) will occur if:

- (a) at the relevant time the person complained about was a council member, and committed the alleged conduct; and
- (b) the member's conduct was a use of the member's office as a council member; and
- (c) the member's conduct constituted making improper use of the member's office as a council member; and
- (d) the relevant conduct was accompanied by the member's intention to cause detriment to the local government or any other person.

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

22. In the Panel's view the required standards of conduct of council members are in essence those flowing from the fiduciary obligations owed by a council member to his or her council (or local government) as complemented by the Act, the common law where the Act is silent, and any relevant code of conduct.

23. The fiduciary obligations owed by a council member to his or her council (or local government) include a duty to act in good faith (i.e. the council member must in his/her dealings act bona fide in what he/she considers to be the best interests of the council) and an obligation to exercise powers conferred on the council member only for the purposes for which they were conferred (i.e. for "proper purposes").

24. The Code of Conduct includes the following clauses:

"2.1 General principles

It is a requirement of this Code that members observe the general principles referred to in Regulation 3(1) of the Rules of Conduct Regulations.

2.3 Personal behaviour

A member must:

- (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 his or her duties impartially and in the best interests of the City;*
- (c) act in good faith and fidelity in the interests of the City and the community; and*
- (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 the member's role, which may cause any reasonable person unwarranted offence or embarrassment.*

2.4 Honesty and integrity

A member must:

- (a) *observe the highest standards of honesty and integrity, and avoid conduct which might suggest any departure from these standards;*

25. The Panel notes that:

(1) In the present case:

- (a) the City's standing order 11.6 is headed "Chairperson May Participate in Discussion" and reads:

"The Chairperson may discuss any motion before the meeting, provided that he/she addresses the meeting before the right of reply is exercised. The Chairperson must exercise a deliberate vote and if the votes are tied may exercise a casting vote."

- (b) the City's standing order 11.7 is headed "Chairperson to be Heard without Interruption" and reads:

"If the Chairperson wishes to speak during a debate, all other members must be silent so that the Chairperson may be heard without interruption."

(2) The following passages from Gifford's *"The Western Australian Council Meetings Handbook"* (3rd ed) (1976 The Law Book Company Limited), at p.23, are relevant in this matter:

"The person who accepts office as chairman of a local government ... accepts a position of honour. During his term of office, he is the first citizen of his local community."

"As first citizen, the mayor or president must preside at all functions conducted by his local government authority. At council meetings, he must discharge the duties which the law places upon every chairman of a meeting."

"... the chairman must at all times retain control of his meeting. Control can only be maintained effectively if the chairman is impartial: the chairman who joins in the hurlyburly of debate forsakes the strength of his position, and loss of control of the meeting is not an unlikely result. For the chairman to remain impartial is desirable upon practical grounds, and it is also his legal duty:

"It is, of course, his duty to take care that the business ... is conducted in a proper manner, but he must be equally careful in his capacity of chairman to conduct himself impartially:(Arcus v Castle [1954] N.Z.L.R. 122, at p. 129)"

26. For regulation 7(1)(b) to be breached, it is not necessary that a detriment has been actually suffered, as it is sufficient that the council member had the intention of causing a detriment (*Chew v R* (1992) 173 CLR 626). Moreover, the test for impropriety being objective, it is not a requirement for the existence of impropriety that there be conscious wrongdoing (*Chew*, at 647; *R v Byrnes* at 514 - 5).

27. The Panel notes that, in considering the meaning of the term “detriment” in regulation 7(1)(b), the Macquarie Dictionary (2nd ed) defines:

- (a) the noun “detriment” as “loss, damage, or injury” and “a cause of loss or damage”;
- (b) the noun “loss”, relevantly, as “detriment or disadvantage from failure to keep, have or get”;
- (c) the noun “damage” as “injury or harm that impairs value or usefulness”;
- (d) the noun “harm” as “injury; damage; hurt” and “moral injury; evil; wrong”; and
- (e) the noun “disadvantage”, relevantly, as “any unfavourable circumstance or condition” and “injury to interest, reputation, credit, profit, etc”.

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

29. The Panel considers that for the purposes of regulation 7(1)(b) it may find that a council member intended by his/her conduct to cause a detriment to a person if:

- (a) the member’s admission/s is/are to that effect; or
- (b) there is a rational inference arising from the circumstantial evidence that it is more likely than not that:
 - (i) the member intended to cause the detriment; or
 - (ii) the member’s conduct was done with reckless indifference that the detriment was a probable or likely consequence of that conduct,

and it is more likely than not that such inference is the only inference open to reasonable persons upon a consideration of all the facts in evidence.

30. In the present case, it is the Panel’s view that the information in the written material mentioned above is sufficient evidence from which it may be concluded, and it so concludes, that it is more likely than not that:

- (a) Mayor Kelly made use of his office as a Council member to make the remarks and observations quoted in paragraph 16 above, when the meeting was not closed to members of the public;
- (b) in making that use of his office, Mayor Kelly committed:
 - (i) breaches of the City’s standing order 11.9;

- (ii) breaches of clause 2.1 of the Code of Conduct by failing to treat Councillors Blencowe, Miles and Grierson with respect and fairness;
 - (iii) a breach of clause 2.3(b) of the Code of Conduct by failing to perform his duties impartially and in the best interests of the City;
 - (iv) a breach of clause 2.3(c) of the Code of Conduct by failing to act in good faith and fidelity in the interests of the City and the community;
 - (v) a breach of clause 2.3(d) of the Code of Conduct by failing to refrain from any form of conduct, in the performance of the member's role, which may cause any reasonable person unwarranted offence or embarrassment;
 - (vi) a breach of clause 2.4(a) of the Code of Conduct by failing to observe the highest standards of integrity;
 - (vii) a breach of clause 2.4(a) of the Code of Conduct by failing to avoid conduct which might suggest any departure from the standards in the Code of Conduct;
 - (viii) breaches of his duty to act in good faith and his obligation to exercise powers conferred on him as a Council member only for the purposes for which they were conferred, by the breaches referred to in (i) to (vii);
- (c) Mayor Kelly's conduct constituted making improper use of the member's office as a council member;
- (d) Mayor Kelly intended by his conduct to cause detriment primarily to Councillors Blencowe and Miles, and to a lesser extent to Councillor Grierson, such detriment being a diminishing of their respective reputations and/or a tendency for others to think less favourably of each of them, as there is a rational inference arising from the circumstantial evidence that he intended to cause the detriment, and it is more likely than not that such inference is the only inference open to reasonable persons upon a consideration of all the facts in evidence; and
- (e) Mayor Kelly committed a breach of regulation 7(1)(b).

Accordingly, the Panel finds that Mayor Kelly committed a breach of regulation 7(1)(b).

31. The Panel now considers allegation (3) referred to in paragraph 5 above. In relation to allegation (3) it is noted that the City's standing order 11.10 ("standing order 11.10") is headed "Members to Apologise if Adversely Reflect" and yet reads:

"Any member who, in the opinion of the Chairperson, uses offensive language or expressions may be requested by the Chairperson to withdraw the statement and formally apologise.

If the member refuses or fails to comply, the Chairperson may refuse to hear any further comments from the member on the business currently being discussed. The Chairperson may then call upon the next speaker."

32. In relation to standing order 11.10 the Panel notes that:

- (a) its purpose is to assist the presiding person of a Council or committee meeting to keep order;
- (b) among the meanings of the word “expression” in the Macquarie Dictionary (2nd ed) is “a particular word, phrase, or form of words”;
- (c) standing order 11.10 appears to be aimed at the use of profanities or swearing (bad language) and abusive or offensive “expressions”;
- (d) regulation 10(3)(b) reads:

*“If a person, in his or her capacity as a council member, is attending a council meeting ... and members of the public are present, the person must not, either orally, in writing or by any other means — ...
(b) use offensive or objectionable expressions in reference to a local government employee.”*

- (e) by virtue of section 3.7 a local government’s local law as to a council member’s conduct at a council or committee meeting is inoperative to the extent that it is inconsistent with the rules of conduct (being regulations 6 to 12);
- (f) accordingly, standing order 11.10 is inoperative where a Council member is alleged to have used offensive or objectionable expressions in reference to a City employee; and
- (g) as it stands, standing order 11.10 confers a discretionary power on the chairperson, and does not impose any duty on the chairperson, which it would if it read (say):

“The Chairperson shall require any member who commits a breach of standing order 11.9 to withdraw the adverse reflection or imputation of motive made by the member, and to formally apologise for having made the adverse reflection or imputation of motive.

If the member refuses or fails to comply, the Chairperson may refuse to hear any further comments from the member on the business currently being discussed. The Chairperson may then call upon the next speaker.”

33. In the present case, it is the Panel’s view that:

- (a) as standing order 11.10 confers only a discretionary power (and not a duty) on the chairperson, Mayor Kelly cannot be found to have contravened standing order 11.10 by failing to exercise his discretion to exercise that power;
- (b) accordingly, Mayor Kelly did not contravene standing order 11.10; and
- (c) by virtue of (a) and (b) it is not necessary for the Panel to consider in this matter whether Councillor Treby used any offensive language or expressions during the debate.

The Panel finds that Mayor Kelly did not contravene standing order 11.10.

34. The Panel observes that:

- (1) While the City’s standing orders provide for the presiding person to discuss any motion before a council or committee meeting, the presiding person’s role is to discharge his/her duties, to show respect for others and to conduct himself/herself impartially.
- (2) Most of the problems leading to the allegations in this matter arose from the way the Special Meeting was chaired. Mayor Kelly, by making adverse reflections and imputing motives to the relevant members, lost objectivity and did not perform the role entrusted to the presiding person.
- (3) If a Mayor/President, as the presiding person of a council or committee meeting, conducts himself/herself in a manner not in accordance with the role of a presiding person then training would be appropriate.

.....
Quentin Harrington (Presiding Member)

.....
Clive Robartson (Member)

.....
John Lyon (Member)

Decision-maker's Title: LOCAL GOVERNMENT STANDARDS PANEL
Jurisdiction: Complaints of minor breach by local government council members
Act: *Local Government Act 1995*
File Nos: SP 30 of 2008 (DLGRD 20080261)
Heard: Determined on the documents
Considered: 1 December 2008, 17 December 2008 and 4 May 2009
Corams: 4 May February 2009:
Mr Q. Harrington (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)
1 December 2008 and 17 December 2008:
Mr Q. Harrington (Presiding Member)
Councillor Clive Robartson (Member)
Mr J. Lyon (Member)

Complaint No.: SP 30 of 2008
Complainant: (Cr) Alan Edwin BLENCOWE
Council member complained about: Mayor Jon KELLY
Local government concerned: City of Wanneroo

DEFAMATION CAUTION

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

SUMMARY OF FINDINGS

The Panel has made a finding ("the first finding") that Mayor Kelly committed a breach ("the standing order breach") of standing order 11.9 of the *City of Wanneroo Standing Orders Local Law 2000*, and thus committed a minor breach by virtue of regulation 4(2) of the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations").

The Panel has also made a finding ("the second finding") that Mayor Kelly committed a breach of regulation 7(1) of the Regulations ("the regulation 7(1) breach").

CHANGE IN COMPOSITION OF PANEL SINCE FINDINGS

After the Panel made the first finding and the second finding (together, "the first and second Findings") and gave Mayor Kelly notice of them and a copy of the Panel's *Reasons for Finding* in this matter ("the Reasons for Finding"), the terms of the appointments of the then members of the Panel expired on 31 December 2008. That Panel as so composed is referred to below as "the previous Panel".

The current composition of the Panel, being the present Coram ("the Panel"), includes two members of the previous Panel.

Councillor Adams has confirmed that, prior to considering the Panel's decision in this matter under section 5.110(6) of the *Local Government Act 1995* ("the Act"), she was provided with and she has considered all information provided to the previous Panel when it made the first and second Findings.

SUMMARY OF DECISION

The Panel's decision on how the standing order breach and the regulation 7(1) breach are dealt with under section 5.110(6) of the Act was that, for the following reasons, pursuant to paragraph (c) of that section it ordered two of the sanctions described in paragraph (b) of that section, as set out in the attached Minute of Order.

DECISION & REASONS FOR DECISION

References to sections and regulations

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

Procedural fairness matters

2. The previous Panel gave to Mayor Kelly:

(a) notice of the Findings;

(b) a copy of the Reasons for Finding; and

(c) a reasonable opportunity for him to make submissions about how the Breaches should be dealt with under section 5.110(6).

3. Mayor Kelly responded to the previous Panel's notice of the Findings, with a 19-page response dated 30 January 2009 ("Mayor Kelly's submissions") which consists of: a 2-page letter; a 9-page response to the Findings; and 8 pages of a document headed "2008/09 Budget Discussion Outcomes" with its contents relating to the Elected Member Workshops of the City of Wanneroo ("City") on 22 April 2008, 13 May 2008, 10 June 2008, 17 June 2008 and 8 July 2008.

4. Before turning to Mayor Kelly's submissions the Panel notes that in the Panel Notice of Complaint sent to Mayor Kelly on 25 September 2008 he was advised, relevantly, that:

"It would assist the Panel in considering the allegations if you were to provide your response and any information that you consider to be relevant to them.

...

All responses and information that you wish to provide to the Panel should be in writing, ... and should be made within 21 days

Once the 21-day period has expired the Panel may proceed to make its findings in this matter on the documents then before it."

Mayor Kelly's submissions, generally

5. Turning to Mayor Kelly's submissions, the Panel notes that:

(1) In essence Mayor Kelly's submissions consist largely of:

- (a) what he alleges to be relevant information, and his arguments, on the allegations of minor breach made in this matter – arguments that he did not make and information that he did not provide at the time when he exercised his opportunity to respond to the allegations in his response of 6 November 2008;
- (b) what he contends to be “a number of significant and compounding errors” of the Panel's factual conclusions in paragraphs 11(c), (h), (k) and (m) of the Reasons for Finding; and
- (c) his explanations for making his various remarks and observations that are repeated in paragraph 16 of the Reasons for Finding.

(2) In his correspondence and submissions in this matter to the Panel, Mayor Kelly:

- (a) has not denied having made the various remarks and observations attributed to him in the transcript provided to the Panel (“the transcript”); and
- (b) has not made any submission of substance in relation to any of the breaches of the *City of Wanneroo Code of Conduct for Council Members 2008* (“the Code of Conduct”) and his fiduciary duties set out in paragraph 30(b) of the Reasons for Finding.

6. Mayor Kelly, in his submission, challenges the Panel's findings the subject of paragraph 11(c), (h), (k) and (m) of the Reasons for Finding. In relation to 11(c) the Panel notes the contents of the record headed “2008/09 Budget Discussion Outcome”. It is clearly only a summary concerned with the outcomes. In any event, for the purposes of this complaint the Panel revokes its finding the subject of paragraph 11(c) of the Reasons for Finding, and makes no finding on the issue of whether or not the Councillors raised objections at the briefing meetings. The Panel does not view this aspect as crucial to its decision. In relation to 11(h) the Panel concedes that it was wrong. The matter of the number of councillors and the number required for an absolute majority is of background interest only. Insofar as 11(k) is concerned the Panel concedes that it was wrong but again the point about when the motion was moved is not of great relevance. In relation to 11(m) the Panel accepts that the transcript may not incorporate all interjections.

Affirmation of previous Panel's findings

7. After reconsidering all information provided to the previous Panel when it made the Findings, and after carefully considering Mayor Kelly's submissions, it is the Panel's view that:

- (1) Although there were a number of remarks or observations that the previous Panel found under paragraph 18 of the Reasons for Finding to have been made by Mayor Kelly in breach of standing order 11.9, it was appropriate for the previous Panel to have made only one finding of minor breach in relation to those breaches – because the breaches occurred in a relatively short period in relation to the same matter before Council.
- (2) It was also appropriate for the previous Panel to conclude in this matter that there is sufficient evidence from which it may be concluded, and from which it so concluded, that it is more likely than not that those breaches, and Mayor Kelly's breaches of the Code of Conduct and his fiduciary duties set out in paragraph 30(b) of the Reasons for Finding, occurred.
- (3) At the time of signing these *Reasons for Decision* there is no information before the Panel that suggests any miscarriage in this matter or provides any valid reason, on the balance of probabilities, to doubt the correctness of the first and second Findings.

Accordingly, the Panel affirms the first and second Findings.

Mayor Kelly's submissions re section 5.110(6)

8. The Panel notes that:

- (1) Subject to (3), in relation to the standing orders breach and specifically how that breach should be dealt with under section 5.110(6), in Mayor Kelly's submissions he says:

"I seek that the Panel note that it considers that I have contravened standing order 11.9 of the City's Standing Order, but takes no further action on the basis:

In the context of the debate the comments were relatively minor; and

That my comments were true and correct; and

That my comments were intended to protect the City's reputation; and

That my comments were intended to protect the City from unnecessary financial loss (\$10000 a day)

The claims made by Councillor Miles, Councillor Blencowe and Councillor Grierson that they had raised concern in the Budget Briefing meetings are false and misleading; and

They would have reasonably known at the time of providing the information that their comments were false and misleading."

- (2) Subject to (3), in relation to the regulation 7(1) breach and specifically how that breach should be dealt with under section 5.110(6), in Mayor Kelly's submissions he says:

"I seek a finding that I did not breach regulation 7(1) of the Regulations on the basis that:

The Panel has made a number of significant and compounding errors which have resulted in it coming to conclusions that would not been open to it had it not erred; and

Had the Panel properly weighted the independent evidence available to it and/or taken the reasonable steps to verify the events of the budget briefing meeting a

*reasonable person would not be able to draw the same conclusions as the Panel;
and
Based on the existing weight of evidence it is open for a reasonable person to
conclude that I was seeking to protect the City's reputation and financial position
by supporting the professional officers recommendation and seeking to ensure
the passage of budget; and
Consequently, it is more likely than not that the inference drawn by the Panel is
not the only inference that a reasonable person may draw and therefore no
breach of regulation 7(1) of the regulations has occurred."*

- (3) As set out in paragraph 6 above, the Panel revokes its finding that at the briefing meeting the Councillors concerned raised objections in regard to items in or not in the proposed budget. However, the Panel observes that even if Mayor Kelly's comments were true and correct and intended to protect the City's reputation and financial position, they nonetheless were made in breach of standing order 11.9 and regulation 7(1).

9. The Panel repeats the observations made by the previous Panel in paragraph 34 of the Reasons for Finding, that:

- (1) While the City's standing orders provide for the presiding person to discuss any motion before a council or committee meeting, the presiding person's role is to discharge his/her duties, to show respect for others and to conduct himself/herself impartially.
- (2) Most of the problems leading to the allegations in this matter arose from the way the Special Meeting was chaired. Mayor Kelly, by making adverse reflections and imputing motives to the relevant members, lost objectivity and did not perform the role entrusted to the presiding person.
- (3) If a Mayor/President, as the presiding person of a council or committee meeting, conducts himself/herself in a manner not in accordance with the role of a presiding person then training would be appropriate.

10. In the Panel's view, Mayor Kelly's submissions indicate that his views on this matter can be reduced in effect to him:

- (a) not regarding this matter as one of considerable seriousness;
- (b) denying virtually any (if not all) wrongdoing in this matter; and
- (c) being justified in his actions.

11. In determining an appropriate sanction or sanctions in this matter:

- (1) The Panel's views are that:

- (a) the actions of a council member, at a council meeting when members of the public are present, in reflecting adversely upon the character and actions of other council members, and in imputing motives to other council members, is inappropriate conduct and deserving of public censure; and
 - (b) any improper use by a council member of his/her office of council member for the purpose of causing a detriment to another member is a very serious matter and deserving of public censure – particularly so when the improper use is made by the presiding person.
- (2) The Panel notes that:
- (a) Mayor Kelly has not previously been found under Part 5 Division 9 of the Act to have committed any minor breach; and
 - (b) on the basis of Mayor Kelly’s submissions, he has failed to appreciate that his targeted comments during the debate were and are unacceptable, and thus the Panel should consider the possibility that the breaches should be dealt with by the Panel by making an order that includes Mayor Kelly undertaking training in his role as a mayor of a local government.
- (3) The Panel has not made an order that includes such training, in the hope that Mayor Kelly digests these Reasons, and that after he duly reflects upon the Reasons for Finding and these Reasons, he will ensure his conduct accords with the relevant standards.

Panel decision

12. Having regard to the Reasons for Finding, the matters mentioned in paragraph 11 above, and the general interests of local government in Western Australia, the Panel’s decision in this matter is that pursuant to paragraph (c) of section 5.110(6) it orders two of the sanctions described in paragraph (b) of that section, as set out in the attached Minute of Order.

Two sanctions are ordered due to the seriousness of the breach of regulation 7(1). Mayor Kelly ought to be admonished by the Panel for his offending conduct when he was the presiding person at a Council meeting, and also ordered to publicly apologise to Councillors Blencowe, Miles and Grierson for his conduct during the debate when he improperly used his office as a Council member to cause detriment to them by, among other things, reflecting adversely upon their characters or actions and by imputing motives to them.

Panel’s concluding observations

13. The Panel notes that in Mayor Kelly’s submissions he says in relevant part in relation to the first and second Findings:

“... The Panel clearly demonstrates that it has little or no respect for the truth or the public interest. It is a fundamental principal of all liberal democracies that persons who tell the truth in the public interest should be protected from the narrow minded bureaucratic approach taken by the Panel.”

Should the Panel continue to take its narrow minded approach to this matter I fear that it will only serve to undermine the principals of good governance. The fact that you have singled me out for special attention for an incident of such a minor nature and seek to censure me for not adhering to a standard which is unattainable within Local Government dose (sic) little to enhance the reputation of the Panel.

The only remarkable aspect of my behavior is that it was focused upon a member of the Government who was clearly seeking to raise his profile in the lead up to his State Election campaign.

Surely taking punitive action against elected officials who exercise their democratic right to challenge the behaviour of Government members is a practice more at home in a dictatorship than a liberal democracy.”

14. The Panel concludes its dealing with Complaint SP30 of 2008 by making the following observations about Mayor Kelly’s views reproduced in paragraph 13 above:

- (1) The Panel’s primary role in relation to each such complaint is:
 - (a) to fairly and objectively make a determination on the complaint; and
 - (b) to advise the Panel’s determination and reasons for it to the parties to the complaint and the complaints officer of the local government concerned.
- (2) 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. Such a finding has the capacity to affect relations between the council member concerned and his/her family, friends and acquaintances. Accordingly, the Panel observes procedural fairness and exercises care in making its findings as to the occurrence of misconduct. Additionally, when dealing with a complaint, each of the Panel members has regard to the general interests of local government in Western Australia [as required by clause 8(6) of Schedule 5.1 to the Act].
- (3) The previous Panel had a copy of the transcript before it when it made the Findings. The Panel has a copy of the transcript before it now. Neither the previous Panel nor this Panel has had any difficulty in determining when and what was said at the Special Meeting by Mayor Kelly and the other councillors who spoke to the motion during the debate.
- (4) An effective Council governance system demonstrates accountability by means that include ensuring Council and staff act ethically and lawfully. In the case of City Councillors, this includes observing the provisions of the City’s standing orders when at a Council meeting.
- (5) In the Panel’s view, it is lawful for a provision of a local government’s local law (relating to conduct of people at council or committee meetings) to control speech or conduct so long as the provision is reasonably appropriate, adapted to or proportional to the purpose to be achieved, when viewed against its incursion on freedom of communication.
- (6) Standing order 11.9 reads:

“A member shall not reflect adversely upon the character or actions of another member or an officer of the City nor impute any motive to a member or an officer unless the Council resolves, without debate, that the motion then before the Council cannot otherwise be adequately considered.”

- (7) The Panel repeats paragraph 13 of the Reasons for Finding, in that in the Panel's view the intent and purposes of standing order 11.9 include:
- (a) the prohibition of adverse reflections by council members about the City's officers, except in appropriate circumstances;
 - (b) except in rare situations, the prohibition of the use by a council member of any argument that consists of a personal attack by the council member directed against any speaker or other council member in a council debate – the term “personal attack” including replying to an argument or factual claim of another council member by attacking or appealing to a characteristic or belief of that other council member, rather than by addressing the substance of the argument or producing evidence against the claim; and
 - (c) assisting the presiding person to keep order at a meeting.
- (8) In the Panel's view, standing order 11.9, when viewed against its incursion on freedom of communication, is reasonably appropriate, adapted to or proportional to that intent and those purposes, and does not infringe the requirement of freedom of communication imposed by sections 7, 24, 64 or 128 of the Australian *Constitution*. Accordingly, it is the Panel's view that:
- (a) standing order 11.9 is a valid written law; and
 - (b) in the context of the Panel being required by law to deal with a complaint alleging that a City Council member has committed a breach of standing order 11.9 (or a breach of regulation 7(1)), the conditional freedom of communications on political and governmental matters implied by the Australian *Constitution* is not relevant to the determination of any alleged relevant fact in dispute.
- (9) A member of the Federal or State houses of Parliament is immune from liability under the law of defamation for any defamatory statement or imputation made when speaking on a motion – i.e. the member has the common law defence of *absolute privilege*. That position is confirmed and reinforced by section 27 of the *Defamation Act 2005*.
- (10) By contrast, if a member of the council of a local government makes a defamatory statement or imputation before Council when speaking on a motion (whether in open meeting mode or when the meeting is closed to members of the public), and a civil law action or a criminal law proceeding is taken against the member in relation to the defamatory statement or imputation, the member *may* have available to him or her the common law defence of *qualified privilege* (as expanded by the High Court of Australia in *Lange v Australian Broadcasting Corporation* [1997] HCA 25), or the defence of qualified privilege under section 28 of the *Defamation Act 2005*, or another defence available under Part 4 Division 2 of that Act.

- (11) The standard to which Mayor Kelly refers as “unattainable within Local Government”, in the case of a member of the City’s Council present at a Council meeting (or at a relevant committee’s meeting), consists of the standards that flow from the fiduciary obligations owed by a council member to his or her council (or local government) as complemented by the Act, the Regulations, the common law where the Act is silent, and (at the time of the Special Meeting) the *City of Wanneroo Standing Orders Local Law 2000* and the Code of Conduct.
- (12) Those standards do not prevent a City Councillor from engaging in debate that is robust, strong, vigorous or impassioned.
- (13) The Panel does not agree with Mayor Kelly’s assertion that his conduct in this matter was “an incident of such a minor nature”. As the City’s Mayor, Mayor Kelly is the City’s “first citizen” and the City’s leader. When Council is sitting, the City’s Mayor is “the first among equals”, and is expected to lead by example in observing required standards.
- (14) Mayor Kelly’s remarks and observations that are repeated in paragraph 16 of the Reasons for Finding were made by him in relation to *all* Councillors who spoke against the relevant motion. Thus, it is disingenuous for him to state in his response of 30 January 2009:

“The only remarkable aspect of my behavior is that it was focused upon a member of the Government who was clearly seeking to raise his profile in the lead up to his State Election campaign.”

The person to whom he is referring is clearly Councillor Miles (as he was at the Special Meeting) who was not an elected member of the Legislative Assembly or the Legislative Council at the time of the Special Meeting.

- (15) The passages, cited in the Reasons for Finding, from Gifford’s “*The Western Australian Council Meetings Handbook*” (3rd ed) (1976 The Law Book Company Limited) remain of relevance in Western Australia to all presiding persons of meetings.
- (16) At common law the duties of a presiding person at a Council meeting (or a relevant committee meeting) are:
 - (a) to keep order if he or she can;
 - (b) to see that the proceedings are properly conducted;
 - (c) to conduct himself or herself impartially; and
 - (d) to see that the opinion of the meeting is properly ascertained upon any question which is regularly before the meeting.

.....
Quentin Harrington (Presiding Member)

.....
Carol Adams (Member)

.....
John Lyon (Member)

NOTICE TO THE PARTIES TO THE COMPLAINT/S

RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

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

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