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## Local Government Standards Panel

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Complaint Number	SP 2019-050
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Councillor Maria Haynes JP</b>
<b>Respondent</b>	<b>Councillor Claire Scanlan</b>
Local Government	<b>City of Swan</b>
Regulation	Regulation 9 of the <i>Local Government (Rules of Conduct)</i> <i>Regulations 2007</i>
Panel Members	Mr Michael Connolly (Presiding Member) Ms Rebecca Aubrey (Deputy Member) Mrs Emma Power (Member)
Heard	8 October 2019 Determined on the documents
Finding	One breach of Regulation 9

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### FINDING AND REASONS FOR FINDING

Delivered 20 November 2019

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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.



## Summary of the Panel's decision

1. On 8 October 2019, the Panel found that Councillor Claire Scanlan, a councillor of the City of Swan (**"the City"**) did commit a minor breach pursuant to the Local Government Act 1995 (WA) (**"the Act"**) and regulation 9 of the Local Government (Rules of Conduct) Regulations 2007 (**"the Regulations"**) when Cr Scanlan allegedly spoke to a tenant of the City and negotiated a commercial outcome in respect to a lease between the City and such tenant, as further described in paragraph 16 below.

## The Panel's Role

2. Under section 5.110(2) of the Act the Panel is required to consider a minor breach complaint and make a finding as to whether the alleged minor breach occurred.
3. The Act provides for the circumstances in which a council member commits a minor breach.<sup>1</sup>
4. The Panel may make a finding that a councillor has committed a minor breach of the Act and Regulations based on evidence from which it may be concluded that it is more likely that the alleged breach occurred than it did not occur.<sup>2</sup>
5. In order to find a breach, it must be established that each element of the relevant Regulation is more likely than not to have been breached or met.
6. In considering whether a minor breach is established the Panel must consider:
  - a. all evidence provided and, where there are conflicting circumstances, inferences or evidence, must come to a reasonable conclusion that any circumstance, inference or evidence relied upon is more likely than not to have occurred or be accurate<sup>3</sup>; and
  - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding<sup>4</sup>.
7. The Panel does not possess investigative or supervisory powers.<sup>5</sup> The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials published by the relevant local authority's website.
8. It is the responsibility of both complainants and respondents to provide the Panel with all information they wish the Panel to consider when making its determination.
9. The Panel also must have regard to the general interests of local government in Western Australia<sup>6</sup>.
10. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

## Regulation 9

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<sup>1</sup> Section 5.105 of the Act

<sup>2</sup> Section 5.106 of the Act

<sup>3</sup> Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1

<sup>4</sup> Briginshaw v Briginshaw (1938) 60 CLR 336

<sup>5</sup> Re and Local Government Standards Panel [2015] WASC 51 (at paragraph 24)

<sup>6</sup> Section 8(6) of Schedule 5.1 of the Act

11. Regulation 9 prohibits councillors engaging in conduct that is intended to be undertaken by the administration of a local government and specifically provides as follows:

***“9. Prohibition against involvement in administration***

- (1) *A person who is a council member must not undertake a task that contributes to the administration of the local government unless authorised by the council or by the CEO to undertake that task.*
- (2) *Subregulation (1) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.”*

**Jurisdiction and Procedural Fairness**

12. On 7 June 2019 the Panel received an email on behalf of Mr Michael Foley acting as complaints officer of the City (**“the Complaints Officer”**). The same enclosed a Complaint of Minor Breach Form (with attachments) dated 29 May 2019 provided by Cr Maria Haynes.
13. In her letter of complaint Cr Haynes alleges that Cr Scanlan breached regulation 9 of the Regulations by becoming involved with an operational matter by allegedly entering into private negotiations with a tenant of the City (**“ZD”**) and agreeing a commercial outcome including documenting terms and obtaining the signature of the owner of ZD as set out in paragraph 16 (**“the Complaint”**).
14. The Panel convened on 8 October 2019 to consider the Complaint.
15. The Panel:
- a. accepted the advice of the Department of Local Government, Sport and Cultural Industries (**“the Department”**) that, based on information published on the Western Australian Electoral Commission’s website, the Cr Scanlan was:
    - i. last elected to the Council of the City in October 2017 for a term expiring in October 2021;
    - ii. a Councillor at the time of the alleged breach; and
    - iii. a Councillor when the Panel met on 8 October 2019;
  - b. was satisfied the Complaint was made within two years after the alleged breach occurred<sup>7</sup>;
  - c. was satisfied that the City’s Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of a minor breach<sup>8</sup>;
  - d. was satisfied the Department had provided procedural fairness to Cr Scanlan; and
  - e. found it had jurisdiction to consider the Complaint.

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<sup>7</sup> Section 5.107(4) and 5.109(2) of the Act

<sup>8</sup> Section 5.107 and 5.109 of the Act



## The Specifics of the Complaint

16. The Complainant provided the following background and comments in respect to the Complaint:
  - a. ZD lease certain premises in Midland from the City of Swan and are currently in rent and outgoings arrears;
  - b. the amount has been referred to the City's independent debt collectors.
  - c. this issue as to the lease and arrears was presented and debated as a confidential item at Council on 29 August 2018 where it was deferred to allow suitable time for City staff, interested Councillors and the ZD committee time to meet and negotiate a lease arrangement, business and payment plan that would suit all parties before presenting back to Council;
  - d. a meeting was held on 12 October 2018 with the ZD committee, relevant City staff and interested Councillors (including Cr Scanlan);
  - e. at the relevant meeting Councillors were advised that they were to observe only, as lease negotiations were an operational matter and for City staff to deal with;
  - f. the matter was brought back to Council at its 10 April 2019 meeting. This meeting was then adjourned to 24 April 2019;
  - g. at the 24 April 2019 meeting, Cr Scanlan provided a proposed motion (which changed the administration's recommended motion) and during the debate of the relevant matter, Cr Scanlan indicated that she had:
    - i. spoken directly to the owner of ZD;
    - ii. agree an outcome that would be suitable to the owner and ZD; and
    - iii. documented the agreed terms and obtained the owner's signature; and
  - h. by negotiating directly with the owner of Zahara Dance Studio, Cr Scanlan became involved in an operational matter which is prohibited under the Regulations.
17. The Complainant and the City also provided the following supporting documentation:
  - a. extract from 29 August 2018 confidential Ordinary Council meeting minutes item C3.4;
  - b. extract from 13 March 2019 Ordinary Council meeting minutes item C3.1; and
  - c. extract from 10 April 2019 Ordinary Council meeting minutes item C3.1.
18. In addition to the above, it appears from the minutes and information provided by the City that:
  - a. at the 13 March 2019 Ordinary Council Meeting, Cr Scanlan proposed a motion in respect to the continuing lease obligations of ZD; and
  - b. at the 10 April 2019 Ordinary Council Meeting, the motion by Cr Scanlan was revoked and replaced with a published reason that:

*"The reason for the revocation motion is that the decision made by Council on 13 March 2019 was not in the best interests of the City investment strategies or the City ratepayers."*

## **Respondent's Response**

19. Cr Scanlan was contacted by the Department on 15 July 2019, 30 July 2019, 5 August 2019, 20 August 2019, 4 September 2019 and 12 September 2019, in order to provide a response to the Complaint, however, she did not provide any answer to the Complaint.

## **Panel's Consideration**

### **Regulation 9**

20. To make a finding of a minor breach of regulation 9 of the Regulations the Panel must be satisfied that:
- a. Cr Scanlan was a councillor at the time of the alleged breach and at the time the determination was made; and
  - b. it is more likely than not that:
    - i. Cr Scanlan took on, or was involved in, or participated in, the performance, attempted performance, or part performance of a function or responsibility under which the Act or by delegation it is for the local government's CEO to perform or direct;
    - ii. that such taking on, involvement or participation contributed something to the administration of the local government;
    - iii. that such taking on, involvement or participation was not done as part of the deliberations at a council meeting; and
    - iv. that the City or CEO did not authorise such taking on, involvement or participation<sup>9</sup>.

### **Was Cr Scanlan a Councillor at the relevant times**

21. Cr Scanlan was a councillor at the time of the alleged breach and at the time the Panel considered the Complaint.
22. This element is met.

### **Did Cr Scanlan take on the performance of an administrative function of the City**

23. The Act distinguishes between the roles of council and the staff employed by the local government, or the "administration". Local governments are bodies corporate<sup>10</sup> of which the council is the governing body.<sup>11</sup>
24. The role of council includes making local laws, overseeing the allocation of the local government's finances and resources and determining its policies.<sup>12</sup> The role of councillors is to represent the interests of electors, ratepayers and residents of the district.<sup>13</sup> The administration advises councillors to assist in their decision-making and implements policies determined by council and council's other decisions.
25. It is a clear function of the administration to negotiate the terms of, and enter into, agreements and contracts (including leases) between the City and third parties.

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<sup>9</sup> Yates and Local Government Standards Panel [2012] WASAT

<sup>10</sup> Section 2.5(2) of the Act

<sup>11</sup> Section 2.6(1) of the Act

<sup>12</sup> Sections 3.51 and 2.7(2) of the Act

<sup>13</sup> Section 2.10(a) of the Act



26. It is alleged that Cr Scanlan took on an administrative role when she spoke to the owner of ZD and then agreed and documented a commercial outcome and that Cr Scanlan directly admitted in debate undertaking such tasks.
27. Despite Cr Scanlan's lack of response to the Complaint, on the basis of the original motion put by Cr Scanlan, the Panel is satisfied that it is more likely than not that Cr Scanlan did meet with and discuss a resolution with ZD, which was taking on the performance of an administrative function of the City.
28. In particular obtaining a signature of a party to an agreement with the City indicates that any discussions were intended to reach and implement a commercial agreement and were not informal in nature.
29. This element is met.

Did any taking on, involvement or participation contribute to the administration of the City

30. In order to "contribute" the action must "play a part in the achievement of a result"<sup>14</sup>.
31. In this case, from the evidence provided, it is unclear whether Cr Scanlan moved the motion that was duly passed regarding the ZD lease at the Ordinary Council Meeting of 13 March 2019. However, this is asserted by the City and, in the absence of contrary evidence, the Panel is prepared to accept such assertion.
32. In addition, although it is not directly asserted that Cr Scanlan's actions in contacting and negotiating with ZD led directly to the composition of the relevant motion at the Council meeting of 13 March 2019, the Panel finds it more likely than not that Cr Scanlan's involvement with ZD would have directly influenced any proposed motion by her in respect to ZD.
33. The Panel considers that the passing of such motion would have achieved an administrative outcome required to be implemented by the City, irrespective of the fact that this motion/decision was later revoked and replaced at the Ordinary Council meeting of 10 April 2019.
34. The Panel finds to the required standard that Cr Scanlan did contribute to the administration of the City by meeting with, negotiating with and coming to an agreement with ZD, which agreement in turn was reflected in a motion moved by her and then duly passed by Council.
35. This element is met.

Was the taking on, involvement or participation undertaken as part of the deliberations at a council meeting AND was the taking on, involvement or participation authorised by the City or the CEO

36. The private meeting with ZD and the further negotiation and documentation of an agreement with ZD were not part of deliberations at a council meeting, but independent actions undertaken by Cr Scanlan.
37. Due to the asserted facts that:
  - a. City staff had met with ZD in 2018 and that the ZD lease was a matter that was already under consideration by the administration of the City; and
  - b. Councillors had previously been notified that the matter was administrative; and
  - c. the motion proposed by Cr Scanlan was not in accordance with the staff/administration recommendations in relation to the ZD lease,

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<sup>14</sup> Yates and Local Government Standards Panel [2012] WASAT at 56



the Panel finds it is more likely than not that Cr Scanlan's personal involvement with ZD was not authorised by the Chief Executive Officer or the City.

38. This element is met.

Conclusion

39. Given the above, the elements required to find a breach of regulation 9 of the Regulations have been met.

**Panel's Finding**

40. Cr Scanlan did commit one breach of Regulation 9 and therefore did commit a minor breach.

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Mick Connolly (Presiding Member)

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Rebecca Aubrey (Deputy Member)

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Emma Power (Member)



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## Local Government Standards Panel

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Complaint Number	SP 2019-050
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Councillor Maria Haynes</b>
<b>Respondent</b>	<b>Councillor Claire Scanlan</b>
<b>Local Government</b>	<b>City of Swan</b>
Regulation	Regulation 9 of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mr Michael Connolly (Presiding Member) Ms Elanor Rowe (Deputy Member) Ms Rebecca Aubrey (Deputy Member)
Heard	16 December 2019 Determined on the documents
Outcome	Training

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### SANCTION DECISION AND REASONS FOR DECISION

Published 29 January 2020

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#### DEFAMATION CAUTION

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## Introduction

1. On 8 October 2019 the Panel found that Councillor Claire Scanlan (“Cr Scanlan”), a member of the City of Swan (“City”), committed one breach of regulation 9 of the *Local Government (Rules of Conduct) Regulations 2007* (“the Regulations”) when she allegedly spoke to a tenant of the City and negotiated a commercial outcome in respect to a lease between the City and such tenant.
2. On 20 November 2019 the Panel published its Finding and Reasons for Finding (“Findings”) that Cr Scanlan had breached Regulation 9. The Panel reviewed all the evidence presented to it and said:

“27. *Despite Cr Scanlan’s lack of response to the Complaint, on the basis of the original motion put by Cr Scanlan, the Panel is satisfied that it is more likely than not that Cr Scanlan did meet with and discuss a resolution with ZD, which was taking on the performance of an administrative function of the City.*

28. *In particular obtaining a signature of a party to an agreement with the City indicates that any discussions were intended to reach and implement a commercial agreement and were not informal in nature.*

.....

32. *.....the Panel finds it more likely than not that Cr Scanlan’s involvement with ZD would have directly influenced any proposed motion by her in respect to ZD.*

33. *The Panel considers that the passing of such motion would have achieved an administrative outcome required to be implemented by the City, irrespective of the fact that this motion/decision was later revoked and replaced at the Ordinary Council meeting of 10 April 2019.*

34. *The Panel finds to the required standard that Cr Scanlan did contribute to the administration of the City by meeting with, negotiating with and coming to an agreement with ZD, which agreement in turn was reflected in a motion moved by her and then duly passed by Council.*

.....

36. *The private meeting with ZD and the further negotiation and documentation of an agreement with ZD were not part of deliberations at a council meeting, but independent actions undertaken by Cr Scanlan.”*

## Jurisdiction

3. The Panel convened on 16 December 2019 to consider how it should deal with the breach. The Panel accepted the Department’s advice that on this date there was no available information to indicate that Cr Scanlan had ceased to be or was disqualified from being a councillor.

## Possible sanctions

4. Section 5.110(6) of the Act provides that the Panel is to deal with a minor breach 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)."*

5. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach. The Panel may dismiss a complaint under section 5.110(6)(a), not to reverse the Panel's finding of a breach, but to indicate that in all the circumstances the councillor should not be penalised, and the breach should not be recorded against the councillor's name.

### **Cr Scanlan's submissions**

6. If the Panel finds that a councillor has committed a minor breach it must give the councillor an opportunity to make submissions to the Panel about how it should deal with the breach under section 5.110(6).<sup>1</sup>
7. In a letter dated 21 November 2019, Cr Scanlan was notified of the Panel's Findings and provided with a copy, and she was invited to make submissions as to how the Panel should deal with the breach under section 5.110(6).
8. Cr Scanlan sent her submissions to the Department by email on 28 November 2019, in which she submitted that the Complaint should be dismissed on the following basis:
  - she understood that she was involved in an operational matter but was following advice and direction from the then Mayor and members of the executive team, who were very experienced in local government;
  - she spoke to the City's Governance Officer to check what she was doing was correct, and she was told to go ahead;
  - she believed she was acting within the constraints of the Act; and
  - she is an inexperienced councillor.

### **Panel's consideration**

9. Cr Scanlan has not previously been found to have committed any minor breaches.
10. In her response as to how the Panel should deal with the breach, Cr Scanlan takes the opportunity to defend and explain her conduct. However, the Panel does not have the power to review any finding of a breach.

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<sup>1</sup> Section 5.110(5) of the Act.



11. The Panel does not consider that dismissal of the Complaint as requested by Cr Scanlan is appropriate because this would indicate that her conduct was so minor that no penalty is warranted. The Panel found that Cr Scanlan took on the performance of an administrative function of the City with the intention of reaching and implementing a commercial agreement on behalf of it, which is a serious matter.
12. However, the Panel also does not consider it is appropriate to make an order for censure for Cr Scanlan's actions in this matter, as they are not so serious to justify such an order. When the Panel makes an order that a Notice of Public Censure be published, that Notice is to be published by the local government's CEO; the expense is borne by the local government and such expense is significant where the Notice is to be published in a newspaper or newspapers.
13. The Panel has therefore considered the options of ordering training or a public apology (or both).
14. In her response, Cr Scanlan states that she believed she was acting within the constraints of the Act but also refers to her lack of experience as a councillor. Cr Scanlan showed a lack of judgement and understanding when it came to the correct processes and procedures of Local Government. In the circumstances, the Panel decides that training in the area of understanding the relationship between council and the local government administration and the importance of the separation of powers, is appropriate, in order to give Cr Scanlan the confidence and knowledge to perform her role as a councillor.

#### **Panel's decision**

15. Having regard to the Findings, the matters set out herein, and the general interests of local government in Western Australia, the Panel's decision on how the Minor Breach is to be dealt with under s5.110(6) of the Act, is that pursuant to subsection (b)(iii) of that section, Cr Scanlan is ordered to undertake training.

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Mick Connolly (Presiding Member)

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Elanor Rowe (Deputy Member)

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Rebecca Aubrey (Deputy Member)



## ATTACHMENT

Complaint Number	SP 2019-050
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Councillor Maria Haynes</b>
<b>Respondent</b>	<b>Councillor Claire Scanlan</b>
<b>Local Government</b>	<b>City of Swan</b>
Regulation	Regulation 9 of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mr Michael Connolly (Presiding Member) Ms Elanor Rowe (Deputy Member) Ms Rebecca Aubrey (Deputy Member)
Heard	16 December 2019 Determined on the documents
Outcome	Training

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### ORDER FOR TRAINING

Published 29 January 2020

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#### DEFAMATION CAUTION

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

1. By 15 May 2020, Councillor Claire Scanlan, a member of the City of Swan, shall undertake:
  - (a) the training course for Elected Members “Serving on Council” provided by WA Local Government Association (WALGA) for a period of 15 hours; or
  - (b) a training course with substantially similar learning outcomes provided by an alternative registered training organisation for a similar duration, but at least 10 hours.

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Mick Connolly (Presiding Member)

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Elanor Rowe (Deputy Member)

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Rebecca Aubrey (Deputy Member)



## NOTICE TO THE PARTIES TO THE COMPLAINT

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

The Local Government Standards Panel (the Panel) advises:

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

**Note:**

- (1) This document may be given to a person in any of the ways provided for by sections 75 and 76 of the *Interpretation Act 1984*. [see s. 9.50 of the *Local Government Act 1995*]
- (2) Subsections 75(1) and (2) of the *Interpretation Act 1984* read:
  - "(1) Where a written law authorises or requires a document to be served by post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, **service shall be deemed** to be effected by properly addressing and posting (by pre-paid post) the document as a letter to the last known address of the person to be served, and, **unless the contrary is proved, to have been effected at the time when the letter would have been delivered in the ordinary course of post.** [Bold emphases added]
  - (2) Where a written law authorises or requires a document to be served by registered post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, then, if the document is eligible and acceptable for transmission as certified mail, the service of the document may be effected either by registered post or by certified mail."
- (3) Section 76 of the *Interpretation Act 1984* reads:

"Where a written law authorises or requires a document to be served, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, without directing it to be served in a particular manner, service of that document may be effected on the person to be served —

  - (a) by delivering the document to him personally; or
  - (b) by post in accordance with section 75(1); or
  - (c) by leaving it for him at his usual or last known place of abode, or if he is a principal of a business, at his usual or last known place of business; or
  - (d) in the case of a corporation or of an association of persons (whether incorporated or not), by delivering or leaving the document or posting it as a letter, addressed in each case to the corporation or association, at its principal place of business or principal office in the State."