

Decision-maker's Title: LOCAL GOVERNMENT STANDARDS PANEL
Jurisdiction: Complaints of minor breach by local government council members
Act: Local Government Act 1995
File Nofs: SP 31 & 40 of 2010 (DLG 20100195/20100211)
Heard: Determined on the documents
Considered: 11 May 2011
Coram: Mr B. Jolly (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)

Complaint No. SP 31 of 2010

Complainant: (Mr) Ian Craig McDOWELL

Council member complained about: Councillor Donald YATES

And

Complaint No. SP 40 of 2010

Complainant: (Ms) Michelle STUBBS

Council member complained about: Councillor Donald YATES

Local Government:

Town of Bassendean

Regulation alleged breached:

Regulation 10(3) of the *Local Government (Rules of Conduct) Regulations 2007*

FINDINGS AND REASONS FOR FINDINGS

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 found that Councillor Yates

- (a) did not commit a breach of regulation 10(3)(b) when he made the statements complained about during the debate; and
- (b) committed a breach of regulation 10(3)(a) in that during the subject debate when members of the public were present, he orally made statements implying that Mr McDowell (a Town employee at the time and the author of the officer report that was before Council on such item) was dishonest by deliberately including in that report, (i) unnecessary items of expenditure to improperly inflate the total budget for the project concerned to such an extent that Council would not approve the carrying out of the project; and (ii) pricings that were dishonest in that they were deliberately 'exaggerated'.

FINDINGS AND REASONS FOR FINDINGS

Preliminary and procedural matters

1. The matters mentioned in Attachment A are incorporated here as if set out in full. As mentioned in paragraph 10 of Attachment A, the information before the Panel in relation to this matter is the information and documents described in the table under the heading 'Available information' in that Attachment. Those documents are referred to in these Reasons, in italics within square brackets, by the relevant Doc ID in the table for the relevant document – e.g. *[Doc B2]* refers to the document that is Doc ID B2 in the table. Pages in a document described in the table are similarly referred to below by the relevant page/s number followed by the relevant Doc ID – e.g. *[pp3-4Doc B2]* refers to pages 3 - 4 of Doc ID B2.

Allegations of minor breach made in the complaints

2. There are two allegations of minor breach in this matter that have been put to Councillor Yates for his response. The allegations, as confirmed in effect by Mr McDowell and Ms Stubbs, are as follows:

- (1) *[allegation (1)]* That during the debate on item 10.9 at the Town of Bassendean's Ordinary Council Meeting held on 13 July 2010, when the meeting was open to members of the public, Councillor Yates contravened regulation 10(3)(a) in that he orally made statements implying that a local government employee – namely, Mr McDowell – is incompetent or dishonest."

Details of the said statements orally made by Councillor Yates, as alleged by Mr McDowell and/or Ms Stubbs

- (i) *"In other words it's a report at a pricing to stop the budget."*
- (ii) *". . . because so many items that are coming out now where the pricing that comes before the Council to consider appears to be exaggerated ..."*
- (iii) *"Yeah, well I guess it's just a case in point, for example ... of the exercise, but it does demonstrate it. A toilet, Point Reserve, ???? costs \$30,000 . . ."*
- (iv) *"What we have here is a budget in the order of \$50,000 to do this particular nib and slip road treatment I guess really what I'd like to see is actually what a private contractor could actually do the nib and slip road treatment for. For example there is a cost in there, I think it is for about \$5,000 for safety signage, road management related costs. Now these particular people on contract earn typically about \$100/hour. What you are suggesting with a budget of something like \$5,000 they're going to be there for a week For a week to put in a slip road and nib suggests that again that the costing has been exaggerated. So all I'm saying is, . . ."*
- (v) *"My only concern is that we look for a review of this and it would be interesting to get an estimate from contractors who actually put in slip roads and nibs as to what they believe would be the cost to put in such a treatment. Thankyou "*

(herein, allegation (1))

- (2) [allegation (2):] "That during the debate on item 10.9 at the Town of Bassendean's Ordinary Council Meeting held on 13 July 2010, when the meeting was open to members of the public, Councillor Yates contravened regulation 10(3)(b) in that he used offensive or objectionable expressions in reference to a local government employee – namely, Mr McDowell."

Details of the said offensive or objectionable expressions used by Councillor Yates, as alleged by Mr McDowell and/or Ms Stubbs

- (i) "In other words it's a report at a pricing to stop the budget."
(ii) "... so many items that are coming out now where the pricing that comes before the Council to consider appears to be exaggerated ..."
(iii) "... suggests that again that the costing has been exaggerated."

(herein, allegation (2))

The context of the subject allegations

3. On the available information the Panel is reasonably satisfied¹, and accordingly hereby finds, that the context and circumstances (herein, the Found Circumstances) relevant in relation to Complaint SP36/2010 and Complaint SP41/2010 are as follows:

- (1) On 18 December 2008 Councillor Yates was elected as a member of the Council (herein, Council, or, the Council) of the Town of Bassendean (herein, the Town) for a term expiring in October 2011. At all times relevant in relation to Complaint SP31/2010 and Complaint SP40/2010 Councillor Yates was, and is currently, an elected member of the Council.
- (2) Councillor Yates attend at the Town of Bassendean's Ordinary Council Meeting held on 13 July 2010 (herein, the July 2010 OCM) in his capacity as a Council member.
- (3) Item 10.9 at the July 2010 OCM was the consideration of a report (herein, the Officer Report) prepared by Mr McDowell, Manager Asset Services, a Town employee at the time.
- (4) The contents of the Officer Report, as it appeared in the publicly available agenda for the July 2010 OCM, reads:

"10.9 Traffic Management Morley Drive/Wicks Street Intersection (Ref: TRAF/PLANNING/3 – Ian McDowell, Manager Asset Services)

APPLICATION

The purpose of this report is to present to Council information relating to the safe movement of traffic at the Morley Drive Wicks Street intersection.

BACKGROUND

The intersection of Morley Drive and Wicks Street is on the boundary between the Town of Bassendean and the City of Bayswater. Under the Boundary Roads Memorandum of Understanding between the Town and the City of Bayswater, all capital road works are funded on a 50/50 basis.

¹ See paragraph 1(d) of Attachment A.

In 2008/09, the Town and the City received State Black Spot funding to modify the intersection of Morley Drive as a means of improving road safety and reducing accidents. The works involved the construction of a right turn slip lane in Morley Drive at the western leg of the intersection, the construction of a seagull island in the median opening on Morley Drive, the installation of a traffic island in Wicks Street at the intersection of Morley Drive, some road widening, removal of vegetation, and changing the priority of the intersection from a Stop to a Give Way.

Following these works, concerns were raised by members of the community that the intersection presented a risk for motorists trying to carry out a U-turn at the intersection. In response to those concerns Council passed the following resolutions:

OCM1 – 15/8/09 Moved Cr Yates, Seconded Cr Pule, that Council receives a report on the following:

1. A slip road and rounded median strip treatment being installed on the eastern median strip of Morley Drive to facilitate safe U turns; and
2. That the City of Bayswater and Main Roads WA be approached to suggest a rounded median strip treatment be reinstated on the western median strip of Morley Drive to facilitate safe u turns

In September 2009, a report was presented to Council in response to OCM1 – 15/8/09 after which Council resolved the following:

OCM2 13/9/09 – Moved Cr Yates, Seconded Cr Pule, that Council:

1. Receives the information provided in the relation to traffic movement at the Morley Drive/Wicks Street intersection as provided in the report presented to the OCM of 22 September; and
2. Notes that the Town will monitor the movement of traffic at this intersection using MRWA crash statistics, traffic data, and community reports, and if needed investigate modifications to the intersection in the future.

OCM1 – 16/8/09 Moved Cr Yates, Seconded Cr Pule, that Council:

1. Relocated entrance and information signage to the east of the pedestrian crossing of the median strip, and
2. Prunes and/or removes the ground cover and trees between the intersection to the east of the pedestrian crossing, so as to permit clear view of vehicles heading west on Morley Drive by drivers of vehicles heading east on Morley Drive and turning into Wicks Street, and for the clear view by drivers of pedestrians using the crossing point in the middle of the median strip, to the east of the intersection.

The following actions were taken in response to OCM1 – 16/8/09 after which line of sight at the intersection was significantly improved:

1. The entry statement and information signage was removed, and
2. Vegetation was pruned and/or removed from the median island east of the intersection

This report is presented to Council in response to the following Notice of Motion:
 OCM1 – 16/6/10 Moved Cr Yates, Seconded Cr Lewis:

1. That the Town negotiates with Main Roads WA to make safer, the existing U turn to the east of the Morley Drive and Wicks Street intersection treatment by:
 - a. Rounding the nib treatment to a more uniform radius;
 - b. Constructing a turn right pocket as part of the eastern median strip treatment in the middle of Morley Drive; and
 - c. If points 1a and 1B are passed, that a report is brought back to Council promptly with a timetable and budget to complete such works including other options that Council may undertake to improve the safety of the particular U turn.
2. That a report is brought back to Council on how to upgrade Morley Drive between Wicks and Lord Street with additional revised nib and turning pocket treatments

STATUTORY REQUIREMENTS

Road Traffic Code 2000 – Reg 32 (1)

- (1) A driver shall not commence a U turn unless:
 - (a) the turn can be made with safety and without interfering with the movement of other traffic; and
 - (b) the driver has a clear view of any approaching traffic.

STRATEGIC IMPLICATIONS

This project is not listed in any of Council's strategic planning documents, nor is there any funding listed in the existing budget or the Five Year Strategic Financial Management Plan.

COMMENT

Traffic Assessment – Morley/Wicks

Immediately prior to presenting a report to Council in relation to this matter in September last year, the Town conducted a traffic assessment of the southern lanes of Morley Drive that measure traffic speed and volumes. The results are as follows:

85th Percentile Speed (85% of traffic travel at this speed or lower)

The posted speed limit in Morley Drive is 70 km/h.

Location	85th Percentile Speed
120 Morley Drive	68.4 km/h
100 Morley Drive (inside lane)	70.2 km/h

Traffic Volumes

Location	Average Daily Traffic
120 Morley Drive (inside lane)	5,675 vehicles/day
100 Morley Drive (outside lane)	5,913 vehicles/day

The 85th percentile speed is the industry standard used to determine if speeding is an issue that requires immediate attention. The posted speed limit in Morley Drive is 70 km/h. The recent traffic count conducted in this area suggests that speeding is not a major issue with 85% of users travelling at the posted speed or below.

Under the Town's Functional Road Hierarchy Plan Morley Drive is classified as District Distributor "A" road. District Distributor "A" roads are designed to carry volumes of up to 8,000 vehicles per day. The current traffic volumes are well within this tolerance.

MRWA Crash Statistics – Morley/Wicks

The latest MRWA Crash Statistics indicate there have only been two reported accidents at the intersection of Morley Drive and Wicks Street for the five year period 2005 to 2009. Furthermore, the latest reported accident at the intersection was over three years ago in March 2007.

Both of the reported accidents were rear end collisions. The first occurred in Wicks Street with both vehicles waiting to turn right into Morley Drive. The likely cause of this accident is driver inattention with the geometry of the intersection playing only a minor role.

The second of the accidents was also a rear end collision where a vehicle travelling east on Morley Drive collided with another vehicle waiting to turn right into Wicks Street. Again, driver inattention was a likely cause in this accident. Since this accident a right turn slip lane has been constructed that will reduce the opportunity for this type of accident in the future.

The crash statistics and crash patterns do not support further modifications to this intersection.

MRWA Comments – Morley/Wicks

In August 2009, MRWA was asked to comment on the works proposed by Council in resolution OCM1 – 15/8/09. As the works contained in Council's latest resolution OCM1 – 16/8/10 were included in the scope of works for the August resolution, the Town contacted MRWA to determine whether or not their views had changed in this matter. In July 2010, MRWA confirmed their comments of August 2009 as follows;

"The benefit of a seagull island for Right Turn Out movements is that they place the vehicle in a high angle position that affords the driver good sight distance over their left shoulder. This will be severely jeopardised if the proposed works were carried out.

The seagull island itself could be trimmed to provide a bit more space for vehicles travelling west making a u-turn to travel eastbound. However, the size of the island must not drop below that recommended in the Australian Standards, and it must maintain the correct angle to ensure motorists maintain a high degree of vision".

MRWA has conducted a site visit at this intersection since the civil works were completed and following the significant cutting back of the vegetation. For that reason alone, they were satisfied that motorists could safely execute a u-turn in accordance with the requirements of the Road Traffic Code 2000.

Upgrade of Morley Drive Between Lord and Wicks Streets

Morley Drive provides a boundary between the Town of Bassendean and the City of Swan. Local government control of the various intersections on Morley Drive between Lord Street and Wicks Street are as follows:

- a. Northmoor Drive – Town of Bassendean;
- b. May Road – City of Swan;
- c. Ivanhoe Street – Town of Bassendean; and
- d. Gallagher Street (Korbosky Road) – City of Swan; and

Lord Street also comes under the control of the City of Swan.

Unlike our Boundary Roads Memorandum of Agreement with the City of Bayswater, the Town has no similar agreement with the City of Swan. Therefore, any cost sharing arrangements for civil works at these intersections would require negotiation between the two authorities.

In reviewing the crash statistics for the period 2005 to 2009, officers are of the opinion that "revised nib and turning pocket treatments" would have had little or no impact on the types of accidents that have occurred at these intersections. Most of the accidents appear to be the result of drivers failing to give way at a controlled intersection (Stop or Give Way control).

A copy of the MRWA Crash Statistics and diagrams showing the crash patterns for these intersections are attached to the Agenda for the 13 July 2010 OCM. Although crash statistics indicate that the intersections of Morley Drive and Northmoor Road, and Morley Drive and Ivanhoe Street are accident Black Spots (meeting the MRWA criteria of five accidents in five years) they were not listed in the MRWA list of qualifying projects for 2011/12 funding. The Town's Engineering Officer has addressed this anomaly with MRWA and will review the crash statistics for these intersections following the release of the next set of statistics for 2006 to 2010.

The City of Swan has advised that they have not submitted any Black Spot Funding applications for the intersections of Morley Drive and Korboski/Gallagher Streets, or Morley Drive and Lord Street. They have also advised they have no immediate plans to upgrade or improve these intersections in the foreseeable future.

FINANCIAL CONSIDERATIONS

The Town's Engineering Officer has prepared a preliminary cost estimate to modify the intersection of Morley Drive and Wicks Street in accordance with the Council resolution (rounded nib, and right turn pocket). The following is a breakdown of those costs:

Description	Unit	Qty	Rate	Estimate
Survey				
Site Survey	Each	1	\$2,800	\$2,800
Traffic Management				
Traffic Management Plan	Each	1	\$1,200	\$1,200
Traffic Control	Day	7	\$800	\$5,600
Signage & Linemarking				
MRWA Costs	Each	1	\$2,000	\$2,000
ToB Costs (removal, spotting etc)	Each	1	\$1,000	\$1,000
Removal				
Street Trees (<300 girth)	Each	2	\$1,000	\$2,000
Street Trees (>300 girth)	Each	1	\$2,000	\$2,000
Remove Kerbing	Metre	65	\$15	\$975
Remove Island Infill	m2	200	\$25	\$5,000
Earthworks				
Excavate to Waste	m3	80	\$38	\$3,040
Subgrade Preparation	m3	200	\$30	\$6,000
Roadbase				
Supply & Deliver	Tonne	162	\$40	\$6,080
Place & Compact	Tonne	162	\$35	\$5,320
Bitumen				
Hotmixed Asphalt	Tonne	14.4	\$135	\$1,944
Kerbing & Islands				
Mountable (Flush)	Metre	65	\$30	\$1,950
Footpath Construction				
Pedestrian Ramps & Refuge (TGS)	Each	2	\$2,500	\$5,000
Total Estimated Cost:				\$51,909

It should be noted that the cost estimate provided is indicative only and does not include costs associated with design work (in-house) or service relocation (if required).

As stated earlier in this report, there have only been two recorded accidents at this intersection in the five year period 2005 to 2009. On that basis this intersection does not qualify as an accident Black Spot, and therefore, any civil works carried out would not attract any external funding. Should Council decide to proceed with these works it will need to fund the entire project.

It is difficult for officers to justify the expense of these civil works when taking into account the lack of accident Black Spot status associated with the intersection. It could also be argued that the allocation of funds to a project that is difficult to justify may set a precedent in the future that may not be sustainable.

Furthermore, in 2009/10 Officers assessed Iolanthe Street against the Town's Traffic Management Policy and Guidelines and determined that, based on speed and traffic volumes, some type of traffic calming was required in the street to slow traffic and improve community safety. Due to conflicting priorities Council was unable to fund this project in the 2010/11 capital budget even although the installation of traffic calming was justified.

OFFICER RECOMMENDATION – ITEM 10.9

That Council:

1. Receives the information provided in relation to safe traffic movement at the Morley Drive/Wicks Street intersection, and the proposed modification to the intersection including a rounded nib treatment and right turn pocket; and
2. Resolves to take no further action on the basis that:
 - a. The intersection is no longer a recognised accident Black Spot,
 - b. Traffic volumes and speeds are not considered a major issue at the intersection; and
 - c. MRWA has conducted a site visit to the intersection since its upgrade in mid 2009, and since a significant amount of vegetation has been removed and they are satisfied that motorists could safely execute a u-turn at the intersection in accordance with the requirements of the Road Traffic Code 2000

- (5) During the debate (herein, the debate) on item 10.9 at the July 2010 OCM, when the meeting was open to members of the public, the following was respectively said by the persons indicated below:

"[Mayor:] Crs against? Cr Yates.

[Cr Yates:] Thank you very much. It was raised by Cr Butler about previous meeting about 2 years ago this intersection seemed quite fine. Then it was reengineered by the City of Bayswater in collaboration I guess with the Town of Bassendean and Main Roads, making the nib treatment for people heading West in Morley Drive to do a U turn at this intersection somewhat difficult. The reason for this particular motion was to address that issue so that the new treatment was actually less rounded and I guess part of that safety issue was to include a slipway in as far as the road treatment is concerned. I seriously question some of the budget figures that are coming out that are being put before Council and I question, I mention for example simple things like that sign there. We have signs put in our toilets that cost the Town \$50. You can buy that sign from Office Works for \$14.

[Mayor] Cr Yates. I'd like to if I could adhere to. ..Cr Yates adhere to...

[Cr Yates:] It's part of the issuing of the budget that has been listed in this report on pages and all the rest of it, [?] pages, arguing points about for example expenditure to spread sand. The sand could have been spread on the medium strip adjoining. Talking about removing trees. I don't know if there actually is a need to remove the trees. In other words it's a report at a pricing to stop the budget. Just a moment, please. Let me at least finish.

[CEO:] I only had my hand in the air Councillor.

[Cr Yates:] Well what I am saying is, this road was re-engineered through the City of Bayswater. It wasn't engineered for the convenience of the community of the Town of Bassendean and I guess really what I would like to foreshadow is a motion that talks for the Council seeks a review of the engineering treatment of the U turn and slip road at the intersection of Morley Drive and Wicks Street ah, and ah I guess it is for the community that I'm actually asking that situation because so many items that are coming out now where the pricing that comes before the Council to consider appears to be exaggerated, or we seem to be going for...

[Cr Brinkworth:] Point of Order.

[Mayor:] Cr Brinkworth?

[Cr Brinkworth:] I'm just getting fed up with a Councillor saying that the staff are just making up figures or putting??? And I just have a problem with that.

[Mayor:] Thank you Cr Brinkworth. Thank you Cr Yates, please consider your tone carefully.

[Cr Yates:] Yeah, well I guess it's just a case in Point, for example.. of the exercise, but it does demonstrate it. A toilet, Point Reserve, ???? costs \$30,000 ...

[Cr Stubbs:] Point of Order.

Point of Order

[Mayor] Sorry, Cr Yates, Cr Yates. Sorry.

[Cr Stubbs:] Relevance. I don't believe Mr Mayor that the toilets at Point Reserve have anything to do with the Intersection of Wicks Street.

[Mayor:] Cr Yates, Cr Yates please remain focused on the item at hand.

[Cr Yates:] What we have here is a budget in the order of \$50,000 to do this particular nib and slip road treatment. I guess really what I'd like to see is actually what a private contractor could actually do the nib and slip road treatment for. For example there is a cost in there, I think it is for about \$5,000, for safety signage, road management related costs. Now these particular people on contract earn typically about \$100/hour. What you are suggesting with a budget of something like \$5,000 they're going to be there for a week. For a week to put in a slip road and nib suggests that, again, that the costing has been exaggerated. So all I'm saying is.

[Mayor:] Cr Yates, you are on very tender ice...

[Mgr Asset Services:] Excuse me I am getting sick of this.

[Cr Brinkworth, interjecting] . . accused him of being dishonest.

[Mayor:] Cr Yates: Please I have asked you to..

[Cr Yates:] I'm just concerned.

[Mayor:] Please, in future, it is your belief.

[Cr Yates:] My only concern is that we look for a review of this and it would be interesting to get an estimate from contractors who actually put in slip roads and nibs as to what they believe would be the cost to put in such a treatment. Thankyou."

- (6) Accordingly, Councillor Yate's speech during the debate is as set out in paragraph 3(5) above (herein, Councillor Yate's speech), and during the debate Councillor Yates orally made the statements (i.e. the following representations of fact or opinion) that either or both of the complainants have complained about and that are set out both or either in details (i) to (v) in allegation (1) and/or in details (i) to (iii) in allegation (2) (herein, the statements complained about)
- (7) Members of the public were present during the debate.
- (8) Council's resolution in relation to item 10.9 at the at the July 2010 OCM was to adopt the Officer Recommendation in the Officer Report on a 6/2 vote (Councillors Gangell, Pule, Brinkworth, Stubbs, Collins and Benz voted in favour of the motion, and Councillors Yates and Lewis having voted against the motion).

Panel's general views on regulation 10(3)

4. Regulations 10(3) and 10(4), and the Panel's general views on regulation 10(3) are as set out in Attachment B.

Order of dealing with the subject allegations

5. The Panel deals with the subject allegations by first considering allegation (2) and then allegation (1).

PANEL'S DEALING WITH ALLEGATION (2)

Elements of a breach of regulation 10(3)(b)

6. As mentioned in paragraph 2 of Attachment B, the elements of a breach of regulation 10(3)(b) are that:

- a person, in his or her capacity as a council member, attended a council meeting, committee meeting or other organised event
- [and] in the presence of a member or members of the public
- either orally, in writing or by any other means
- used an expression
- the expression was an offensive or objectionable expression
- the expression was an offensive or objectionable expression in reference to a local government employee

7. Allegation (2) is as mentioned in paragraph 2(2) above. It is the Panel's view in relation to allegation (2) that:

- (a) the determinative issue is whether or not any of the statements complained about involves the use of an expression;
- (b) as mentioned in paragraph 12 of Attachment B, for the purposes of regulation 10(3)(b), the term 'expression' means a *particular* word, phrase, or form of words;
- (c) on the available information, while allegation (1) relates to whether some or all of the statements complained about were offensive or objectionable *inferences* or *accusations*, it is more likely than not that none of the statements complained about or their components constitute the use of an *expression* for the purposes of regulation 10(3)(b); and
- (d) therefore, for the purposes of regulation 10(3)(b), there is no need to consider whether or not any of the statements complained about were offensive or objectionable.

Panel finding on allegation (2)

8. In view of the contents of paragraph 7 above the Panel finds that Councillor Yates did not breach regulation 10(3)(b) when he made the statements complained about during the debate.

PANEL'S DEALING WITH ALLEGATION (1)

Elements of a breach of regulation 10(3)(a)

9. As mentioned in paragraph 1 of Attachment C, in the light of regulation 10(4) the elements of a breach of regulation 10(3)(a) are that:

- a council member attended a council meeting, committee meeting or other organised event in his or her capacity as a council member
- [and] in the presence of a member or members of the public
- the council member either orally, in writing or by any other means
- made a statement
- viewed objectively, that statement (or the inference from the words used) was that a local government employee was incompetent or dishonest
- the making of that statement was not unlawful under section 345 of *The Criminal Code* Chapter XXXV.

Issues arising in dealing with allegation (1)

10. Allegation (1) is as mentioned in paragraph 2(1) above. On the available information and in light of the contents of paragraph 9 above, it is the Panel's view that the issues which arise in relation to allegation (1) are:

- (a) did Councillor Yates attend at the July 2010 OCM in his capacity as a Council member?
- (b) if issue (a) is answered in the affirmative, did Councillor Yates orally make each of the statements complained about?
- (c) if issue (b) is answered in the affirmative, in relation to each of the statements complained about, is what was said by Councillor Yates a 'statement' for the purpose of regulation 10(3)(a)?

- (d) if issue (c) is answered in the affirmative, in relation to each of the statements complained about, viewed objectively, was the statement (or the inference from the words used) that Mr McDowell was incompetent or dishonest?
- (e) if issue (d) is answered in the affirmative, in relation to any of the statements complained about that, viewed objectively, was the statement (or the inference from the words used) that Mr McDowell was incompetent or dishonest, was the making of the statement unlawful under section 345 of *The Criminal Code*.

Councillor Yates' response to allegation (1)

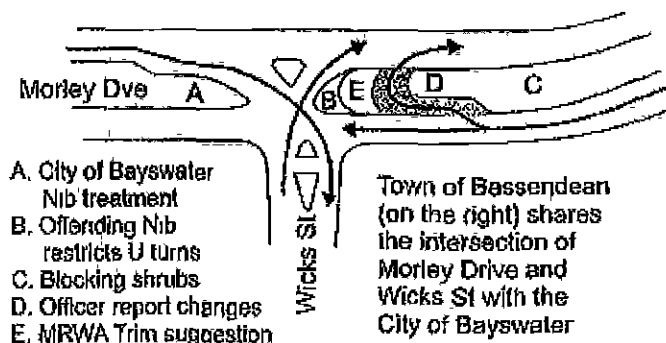
11. Councillor Yates' response to allegation (1), relevantly, consists of the first 7 pages of his 10-page document, dated 2 February 2011 [pp2-8Doc J], which can be summarised as follows:

- (1) He admits that he attended at the Town of Bassendean's Ordinary Council Meeting held on 13 July 2010 in his capacity as a Council member
- (2) He admits he orally made each of the statements complained about
- (3) He does not dispute that members of the public were present when he orally made each of the statements complained about.
- (4) He denies that any of the statements complained about are a 'statement' for the purpose of regulation 10(3)(a) on the basis that:
 - (a) the Macquarie Dictionary defines: (i) 'statement' as communication or declaration in speech or writing setting forth facts, particulars etc, and (ii) 'observation' as an utterance by way of remark or comment; and
 - (b) each of the statements complained about was his *observation of the purpose of the information presented by Mr McDowell*.
- (5) He denies that any of the statements complained about, viewed objectively, was a statement (or the inference from the words used) that Mr McDowell was incompetent or dishonest on the basis that
 - (a) the Macquarie Dictionary defines: 'incompetent' as lacking qualifications, lacking power to act with legal effectiveness; 'dishonest' as proceeding from or exhibiting a lack of sincerity or frankness; 'exaggerated' as abnormally increased or enlarged; and 'vindictive' as proceeding from or showing a revengeful spirit; and
 - (b) each of the statements complained about were his observations on a part of the Officer Report that it was exaggerated.
- (6) He denies that his making of any of the statements complained about was unlawful under section 345 of *The Criminal Code*, and states: "*The alleged claims of Mr Ian McDowell are further demonstrations of his exaggeration, tending to being vindictive, as also shown in his treatment of the 2 relevant motions considered in August 2009 and June 2010 Council meetings of the Town of Bassendean to address what was (and is still) perceived to be a safety issue at the intersection of Morley Drive and Wicks St.*"

12. In relation to Councillor Yates' position mentioned in paragraphs 11(5) and 11(6) above, in the first 7 pages of his 10-page document, dated 2 February 2011 [pp2-8Doc Jf]:

(1) He provides the following diagram and explanation of the subject intersection:

1. The intersection in question : corner Morley Drive & Wicks St



(2) Immediately after that diagram, he states the following, relevantly:

"The resulting offending Nib (B) restricts U turns when heading west in Morley Drive. The City of Bayswater Nib (A) does not have the same issues."

(3) He reproduces parts of the Officer Report before he states:

"What was called for, to improve the safety and convenience of the intersection for Town of Bassendean and other motorists heading west in Morley Drive, was a relatively small 'trimming' of the seagull island, at point B on the drawing above.

After a delay of 11 months, and a second motion to seek an officer report, the 'solution' as proposed by Mr Ian McDowell with an indicative cost of \$51,909 was a report designed so it would be seen as an excessive un-budgeted cost, that should not be supported by Council.

The MRWA recommendation (E in red on drawing above) was not even offered as an option. Estimated cost around \$12,000.

2. Consideration of the costings - pricing seemed exaggerated

The body of work suggested seemed excessive, but at the time of the OCM, I did not have the time to seek out information on what the order of costs might be if supplied. However, I did pick one item out of the financial considerations, namely the traffic control costs. The number of days required for such a relatively small amount of works was listed as 7 days, and that seemed to be an 'exaggerated' service and related cost for such a small task.

3. Exaggeration tends to demonstrate vindictiveness

It is my contention that Mr Ian McDowell was demonstrating, with such an exaggerated 'solution' to the 2 motions (in August 2009 and June 2010), his vindictiveness because he did not agree, or was instructed/guided by others not to agree, with the wishes of the Council, as determined by 2 motions on the same issue.

At no time did I suggest that Mr Ian McDowell was incompetent and/or dishonest and for Mr McDowell to even allege this, he is again demonstrating exaggeration to be possibly vindictive."

Is each of the statements complained about are a 'statement' for the purpose of regulation 10(3)(a)?

13. The Panel does not share Councillor Yates' view mentioned in paragraph 11(4) above. Rather, as mentioned in paragraph 6 of Attachment B, it is the Panel's view that for the purposes of regulation 10(3)(a), the term 'statement' refers to any representation of fact or opinion. In the Panel's view, each of the statements in Councillor Yates' speech and each of the statements complained about were his representations of fact or opinion, and accordingly are a 'statement' for the purpose of regulation 10(3)(a)

Is any of the statements complained about, viewed objectively, a statement (or the inference from the words used) that Mr McDowell was incompetent or dishonest?

14. It is the Panel's view that when Councillor Yates orally made the statements complained about during the debate he published those statements to persons with knowledge of other facts which would reasonably enable them to identify Mr McDowell as the author of the Officers Report and as the Town employee that he was referring to.

15. In relation to the statement in Councillor Yates' speech: "*In other words it's a report at a pricing to stop the budget*" (in this paragraph 15, the subject statement), It is the Panel's view that:

- (1) The immediate context of Councillor Yates' speech in which the subject statement was made was:

"[In the Officer Report, there is] arguing points about for example expenditure to spread sand. The sand could have been spread on the medium strip adjoining. Talking about removing trees. I don't know if there actually is a need to remove the trees. In other words it's a report at a pricing to stop the budget "

- (2) Viewed objectively, in the context of the Officers Report and Councillor Yates' speech, the only reasonable inference from the subject statement that a reasonable person would infer from it was that the author of the Officers Report had deliberately included unnecessary items of expenditure to improperly inflate the total budget for the project to such an extent that Council would not approve the carrying out of the project.

- (3) The inference mentioned in paragraph 15(2) above was disparaging and defamatory of Mr McDowell as the author of the Officer Report as it had a tendency to lower him in the estimation of his fellow persons by making them think less of him.

16. In relation to the statement in Councillor Yates' speech: "... because so many items that are coming out now where the pricing that comes before the Council to consider appears to be exaggerated . ." (in this paragraph 16, the subject statement), it is the Panel's view that:

- (1) The immediate context of Councillor Yates' speech in which the subject statement was made was:

"I guess really what I would like to foreshadow is a motion that talks for the Council seeks a review of the engineering treatment of the U turn and slip road at the intersection of Morley Drive and Wicks Street ah, and ah I guess it is for the community that I'm actually asking that situation because so many items that are coming out now where the pricing that comes before the Council to consider appears to be exaggerated,"

- (2) The Shorter Oxford English Dictionary (6th ed) defines the word 'exaggerate':
 - (a) as a verb transitive and intransitive, as: "[R]epresent (a thing) as greater than it really is; overstate, indulge in overstatement"; and
 - (b) as a verb transitive, as "[E]nlarge or alter beyond normal proportions; make of abnormal size".
- (3) The Macquarie Dictionary (5th ed) defines the adjective 'exaggerated' as "*unduly magnified . . . abnormally increased or enlarged*".
- (4) Viewed objectively, in the context of the Officers Report and Councillor Yates' speech, the only reasonable inference from the subject statement that a reasonable person would infer from it was that the Officers Report, like other then recent officer reports to Council, included pricings that were deliberately unduly magnified or improperly enlarged beyond normal proportions.
- (5) The inference mentioned in paragraph 16(4) above was disparaging and defamatory of Mr McDowell as the author of the Officer Report as it had a tendency to lower him in the estimation of his fellow persons by making them think less of him.

17. In relation to the statement in Councillor Yates' speech: "*For a week to put in a slip road and nib suggests that, again, that the costing has been exaggerated.*" (in this paragraph 17, the subject statement), it is the Panel's view that:

- (1) The immediate context of Councillor Yates' speech in which the subject statement was made was:

"What we have here is a budget in the order of \$50,000 to do this particular nib and slip road treatment. I guess really what I'd like to see is actually what a private contractor could actually do the nib and slip road treatment for For example there is a cost in there, I think it is for about \$5,000, for safety signage, road management related costs. Now these particular people on contract earn

typically about \$100/hour. What you are suggesting with a budget of something like \$5,000 they're going to be there for a week. For a week to put in a slip road and nib suggests that, again, that the costing has been exaggerated."

- (2) The definitions mentioned in paragraphs 16(2) and 16(3) above are relevant.
- (3) Viewed objectively, in the context of the Officers Report and Councillor Yates' speech, the only reasonable inference from the subject statement that a reasonable person would infer from it was that the Officers Report contained pricings that were deliberately unduly magnified or improperly enlarged beyond normal proportions
- (4) The inference mentioned in paragraph 17(3) above was disparaging and defamatory of Mr McDowell as the author of the Officer Report as it had a tendency to lower him in the estimation of his fellow persons by making them think less of him.

18. In relation to Councillor Yates' speech, itself, it is the Panel's view that:

- (1) Councillor Yates' view, that the statements complained about were made by him as his *observations* of the purpose of the information presented by Mr McDowell, omits and does not take into account the issue of what a reasonable person who was present at the July 2010 OCM would *infer* from Councillor Yates implications in making those 'observations' (which were 'statements' for the purposes of regulation 10(3)(a)).
- (2) The only reasonable inferences that a reasonable person who was present at the July 2010 OCM would infer from Councillor Yates' speech and his implications in it were that:
 - (a) Councillor Yates was criticising Mr McDowell for what Councillor Yates perceived to be Mr McDowell's lack of honesty and integrity in his preparation of the Officer Report; and
 - (b) Councillor Yates speech contained criticisms in reference to, and reflections on, Mr McDowell's ability as a Town employee to present an accurate and unbiased report for Council's consideration

Was Councillor Yate's conduct unlawful under *The Criminal Code* Chapter XXXV?

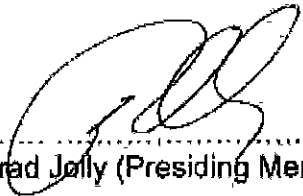
19. On the available information it is the Panel's view that:
- (a) Viewed objectively, when Councillor Yates' speech was delivered his specific intent (motive or purpose) in making it was not to cause:
 - (i) significant financial injury or harm to Mr McDowell; or
 - (ii) significant mental or psychological injury or harm to Mr McDowell that was, or was likely to be, significant and longstanding; and
 - (b) in light of the contents of paragraph 19(a) above, Councillor Yates' speech was not conduct that is unlawful under *The Criminal Code* Chapter XXXV.

Panel finding on allegation (1)

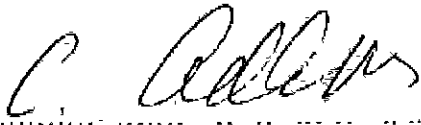
20. In view of the contents of paragraphs 3 and 4 and 9 to 19 above, the Panel finds that on 13 July 2010 Donald Yates, a member of the Council of the Town of Bassendean, committed a breach of regulation 10(3)(a) of the *Local Government (Rules of Conduct) Regulations 2007* during the debate on item 10.9 at the Town's Ordinary Council Meeting when members of the public were present, in that he orally made statements implying that Mr Ian Craig McDowell (a Town employee at that date and the author of the officer report that was before Council on such Item) was dishonest by deliberately including in that report: (a) unnecessary items of expenditure to improperly inflate the total budget for the project concerned to such an extent that Council would not approve the carrying out of the project; and (b) pricings that were dishonest in that they were deliberately 'exaggerated'.

Concluding observation

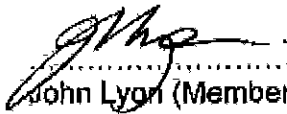
21. The Panel concludes these Reasons by making the observation that a Council member may question the accuracy of the contents of an officer report, but in doing so he/she needs to adhere to and observe the expected and required standards of conduct of a Council member.



.....
Brad Jolly (Presiding Member)



.....
Carol Adams (Member)



.....
John Lyon (Member)

Attachment A

PRELIMINARY AND PROCEDURAL MATTERS

References and definitions

1. In these Reasons (which include each of the Attachments to them), unless otherwise indicated:

- (a) a reference to a **regulation** is a reference to the corresponding regulation of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations), and a reference to a **section** is a reference to the corresponding section of the *Local Government Act 1995* (the Act);
- (b) the term '**Briginshaw principles**' refers to the considerations which must affect the answer to the question whether the issue has been proved to the Panel's reasonable satisfaction – namely, the seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, and the gravity of the consequences flowing from a particular finding²;
- (c) the term '**reasonable person**' refers to a hypothetical natural person with an ordinary degree of reason, prudence, care, self-control, foresight and intelligence, who knows the relevant facts;
- (d) the term '**reasonably satisfied**' means satisfied to the degree required by the Briginshaw principles;
- (e) the word '**statement**' means a representation of fact or opinion; and
- (f) the term '**viewed objectively**' means as viewed by a reasonable person.

Details of the complaints

2. Mr Bob Jarvis (herein, the Town's CEO), the Chief Executive Officer of the Town of Bassendean (herein, the Town), in his capacity as the Town's Complaints Officer (herein, the Complaints Officer), has sent to the Panel two formal complaints (herein, the complaints) made respectively by Mr Ian Craig McDowell (herein, Mr McDowell) and Ms Michelle Stubbs when she was a Council member (herein, Ms Stubbs) about alleged conduct of Councillor Donald Yates (herein, Councillor Yates), a current member of the Town's Council (herein, the Council).

3. The complaints are

- (a) Mr McDowell's Complaint No. SP 31 of 2010 (herein, Complaint SP31/2010) which consists of a 2-page *Complaint of Minor Breach* dated 21 July 2010 [Doc B1] and its attachments [Doc B2] and [Doc B3]; and
- (b) Ms Stubbs' Complaint No. SP 40 of 2010 (herein, Complaint SP40/2010) which consists of a 2-page *Complaint of Minor Breach* dated 30 July 2010 [Doc F]

Panel to afford procedural fairness to the council member complained about

4. The Panel is required by the common law to afford procedural fairness (or, natural justice) to the council member complained about in a complaint before it, according to the circumstances of the matter. The importance of procedural fairness has been explained as follows:

² *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J in at 362

*"It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious', they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."*³

Procedural fairness and respect for parties to complaints

5. The Panel aims to make accurate findings and decisions in its dealing with the complaints that come before it, on the basis that:

- (a) treating a person in accordance with legal standards is itself an important aspect of according respect for the person; and
- (b) accurate decisions are not merely a step towards respect for persons: *'accurate decisions themselves constitute an important element of fair treatment, which in turn constitutes an important element of respect for persons'*.⁴

Identifying / clarifying allegations of minor breach

Mr McDowell's allegations on the face of Complaint SP31/2010

6. The Panel notes that:

- (1) On the face of Complaint SP31/2010, Mr McDowell's two allegations of minor breach are:
 - (a) that by committing the alleged conduct, Councillor Yates committed a breach of the *Town of Bassendean Standing Orders Local Law 2006* (the Town's standing orders) in that he created an adverse reflection on Mr McDowell as a Town employee by suggesting that costs provided by officers were "exaggerated" and submitted so as to "stop the budget"; and
 - (b) that by committing the alleged conduct, Councillor Yates committed a breach of regulation 10(3) of the Regulations in that he made the comments in the public arena with regards [to] estimates provided by Mr McDowell, and that he was casting aspersions on Mr McDowell's professional competence and credibility.
- (2) In regard to the allegations mentioned in paragraph 6(1) above:
 - (a) in Complaint SP31/2010 Mr McDowell does not specify the actual clause or standing order of the Town's standing orders that he alleges Councillor Yates breached;
 - (b) while standing order 38 of the publicly available Town's standing orders is headed "No adverse reflection", it is standing order 38(2) that is breached if a Council member uses an objectionable expression in reference to any employee of the Council;

³ *John v Rees* [1970] Ch 346 per Megarry J at 402

⁴ D J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford Clarendon Press, 1996) at 78

- (c) by virtue of the fact of section 3.7 of the Act and the definitions in section 5 of the *Interpretation Act 1984*, the Town's standing orders, being a local law made under the Act, are inoperative to the extent that they are inconsistent with the Act or the Regulations (being other written law);
 - (d) Standing order 38(2) is inconsistent with regulation 10(3)(b), and is thus inoperative, where a council member is attending a council meeting and, when members of the public are present, orally, in writing or by any other means uses offensive or objectionable expressions in reference to a local government employee
- (3) In the circumstances mentioned in paragraphs 6(1) and 6(2) above, Mr McDowell's allegations of minor breach in this matter appeared to be such that they could be expressed in a reasonably concise form (without particulars of the alleged statement/s or expressions) as follows:
- (a) he alleges that during the debate on item 10.9 at the Town's Ordinary Council Meeting held on 13 July 2010, when the meeting was open to members of the public, Councillor Yates contravened regulation 10(3)(a) in that he orally made statements implying that a local government employee – namely, Mr McDowell – is incompetent or dishonest, and
 - (b) he alleges that during the debate on item 10.9 at the Town's Ordinary Council Meeting held on 13 July 2010, when the meeting was open to members of the public, Councillor Yates contravened regulation 10(3)(b) of the Regulations in that he used offensive or objectionable expressions in reference to a local government employee – namely, Mr McDowell.
- (4) By a letter dated 29 September 2010 [Doc C] to Mr McDowell the substance of the matters mentioned in paragraphs 6(1), 6(2) and 6(3) above were advised to him and he was requested, among other things, to clarify his respective allegations in Complaint SP31/2010. Mr McDowell responded with his letter of 5 October 2010 [Doc D1] and its attachments [Doc D2] and [Doc D3].

7. The Panel also notes that:

- (1) On the face of Complaint SP40/2010, Ms Stubbs' two allegations of minor breach are:
- (a) that by committing the alleged conduct, Councillor Yates committed a breach of standing order 38(2) of the Town's standing orders in that he created an adverse reflection on Mr McDowell as a Town employee by suggesting that costs provided by officers were "exaggerated" and submitted so as to "stop the budget"; and
 - (b) that by committing the alleged conduct, Councillor Yates committed a breach of regulation 10(3) of the Regulations in that he made the comments in the public arena with regards [to] estimates provided by Mr McDowell, and that he was casting aspersions on Mr McDowell's professional competence and credibility.
- (2) The comments made in paragraphs 6(2)(b), (c) and (d) and 6(3) above, with the necessary changes, apply in regard to the allegations mentioned in paragraph 7(1) above

- (3) By a letter dated 5 October 2010 [Doc G] to Ms Stubbs the substance of the matters mentioned in paragraphs 6(1), 6(2) and 6(3) above were advised to her and she was requested, among other things, to clarify her respective allegations in Complaint SP40/2010. Ms Stubbs responded with her letter of 16 November 2010 [Doc H1] and its attachment [Doc H2].

Councillor Yates' formal response to allegations sought

8. On or about 20 December 2010 the Presiding Member sent a *Notice of Complaints* to Councillor Yates; advising him, among other things, of the allegations of minor breach that the Panel will consider in relation to Complaint SP31/2010 and Complaint SP40/2010 respectively; and inviting him to respond to such allegations. [Doc I1] and [Doc I2] are copies of the Presiding Member's letter and the first 11 pages of bundle # 07 sent with it

Councillor Yates' formal response to allegations received

9. Councillor Yates' has responded to the subject allegations of minor breach. His response consists of: his email of 3 February 2011 and its attachment being a (10-page) document, dated 2 February 2011 [Doc J], and his email of 4 February 2011 [Doc K].

Available information

10. The information before the Panel in relation to this matter (the available information) is described in the following table:

Doc ID	Description
	[Documents re Complaint 31/2010:]
A1	Copy of a (1-page) letter from Mr Bob Jarvis, the Complaints Officer (the Complaints Officer) and Chief Executive Officer (the CEO) of the Town of Bassendean (the Town), dated 27 July 2010 - its relevant attachments being [Doc A2], [Doc A3] and [Doc B1] and its attachments
A2	Copy of a CD recording of events, including the relevant events during the debate on item 10.9 (from 36'06" to 51' 47"), at the Town of Bassendean's Ordinary Council Meeting held on 13 July 2010.
A3	Copy of a (9-page) transcript of a portion of [Doc A2], the first 6 pages being a transcript of the relevant events during the debate on item 10.9 (from 36'06" to 51' 47"), at the Town of Bassendean's Ordinary Council Meeting held on 13 July 2010 (the Transcript)
B1	Copy of (2-page) <i>Complaint of Minor Breach</i> No. SP 31 of 2010, dated 21 July 2010 made by Mr Ian Craig McDowell (Mr McDowell) - its attachments being [Doc B2] and [Doc B3]
B2	Copy of a (13-page) printout or collation of emails.
C	Copy of (5-page) letter and attachment from the Presiding Member to Mr McDowell, dated 29 September 2010.
D1	Copy of (1-page) letter from Mr McDowell, dated 5 October 2010 - its attachments being [Doc D2] and [Doc D3].
D2	Copy of (6-page) pages 1 to 6 of the Transcript, under the heading "Alleged Statements Implying that Ian Craig McDowell is incompetent or dishonest", with the underlining therein made by Mr McDowell.

D3	Copy of (6-page) pages 1 to 6 of the Transcript, under the heading "Alleged Offensive or Objectionable Expressions Used in Reference to Ian Craig McDowell", with the underlining therein made by Mr McDowell.
	[Documents re Complaint 40/2010:]
E	Copy of a (1-page) letter from the Complaints Officer, dated 4 August 2010 - its relevant attachments being a further copy of [Doc A2], and [Doc F].
F	Copy of (2-page) <i>Complaint of Minor Breach No. SP 40 of 2010</i> , dated 30 July 2010 made by Councillor Michelle Stubbs, as she then was (Cr Stubbs).
G	Copy of (10-pages) 2-paged letter, and its Attachments A, B and I, from the Presiding Member to Cr Stubbs, dated 5 October 2010 – such Attachment I being the particular relevant Attachment to this letter in relation to Complaint SP 40/2010.
H1	Copy of (3-pages) pages 1 and 9-10 of an 11-page letter from Cr Stubbs, dated 16 November 2010 – such pages being the particular relevant parts of this letter in relation to Complaint SP 40/2010.
H2	Copy of (3-page) pages 1 to 3 of the Transcript, under the heading "Alleged Offensive or Objectionable Expressions Used in Reference to Ian Craig McDowell", with the underlining therein made by Cr Stubbs.
	[Documents re Complaint 31/2010 & Complaint 40/2010:]
I1	Copy of (4-page) Presiding Member's Notice of Complaints to Cr Yates, dated 20 December 2010 [N.B The bundle of documents numbered 07 attached to this Notice is the bundle relevant to Complaint 31/2010 & Complaint 40/2010.]
I2	Copy of (10-page) cover page, and pages 1 to 9 (both inclusive) of the bundle of documents numbered 07 attached to [Doc I1]. The remainder of the documents that are part of this bundle are copies of [Doc A1] to [Doc H2]
J	Copy of (11-page) response of 3 February 2011 from Cr Yates – being copies of: a (1-page) printout of his email of that date; and a (10-page) document signed by Cr Yates, dated 2 February 2011.
K	Copy of (3-page) printout of an email of 4 February 2011 from Cr Yates [Publicly available information obtained via accessing the Town's website at http://www.bassendean.wa.gov.au :]
L1	Copy of (7-page) printout of page 1 and pages 20-25 of the agenda for the Town of Bassendean's Ordinary Council Meeting held on 13 July 2010, as accessed on 6 May 2011.
L2	Copy of (3-page) printout of pages 1-3 of the confirmed minutes of the Town of Bassendean's Ordinary Council Meeting held on 13 July 2010, as accessed on 6 May 2011.

Standing of the subject allegations

11. The Panel notes that:

- (1) Each of the complaints is in the form approved by the Minister for Local Government and was made within time.
- (2) There is an allegation made in each of the complaints that Councillor Yates, a member of the Council at the time of the respective alleged incidents, has committed a minor breach as defined under section 5.105(1)(a).

- (3) Each of the two subject allegations is that a breach of regulation 10(3) has occurred. Regulation 10 is a rule of conduct under section 5.104(1) and, in accordance with section 5.105(1)(a), a contravention of regulation 10(3) is a minor breach. Regulation 10(3) is contravened by a breach of either of regulation 10(3)(a) or 10(3)(b).

Panel's role - duty to make finding - required standard of proof

12. The Panel notes that:

- (1) Broadly, the Panel is a statutory decision-maker that is required to adjudicate on complaints made in writing, in a form approved by the Minister, that give certain details including the details of the contravention that is alleged to have resulted in the breach.
- (2) Under the Act and the common law the Panel has no power or duty to carry out any investigation in relation to any complaint before it; and has no power to compel any information to be provided to it.
- (3) Clause 8 of Schedule 5.1 of the Act requires the Panel's members to have regard to the general interests of local government in Western Australia.
- (4) The Panel is required to make a finding as to whether the breach alleged in the complaint occurred [section 5.110(2)]. In order for the Panel to make any finding that any minor breach has been committed by a council member, the finding is to be based on evidence from which it may be concluded that it is more likely that the breach occurred than that it did not occur [section 5.106].

This level or standard of proof is the same as in ordinary civil legal proceedings where it is referred to as being a preponderance of probabilities (or, the balance of probabilities).

- (5) The Panel is aware that when it makes a finding of a minor breach, the finding is a serious matter as it may affect individuals personally and professionally.

Accordingly, in determining whether on the evidence the standard of proof - on the balance of probabilities - has been satisfied, the Panel recognises that each of the *Briginshaw* principles applies in complaint proceedings against a council member.

- (6) As the High Court of Australia has expressed the position, the significance of *Briginshaw*⁵ is that the seriousness of the matter and of its consequences does not affect the standard of proof but goes to the strength of the evidence necessary to establish a fact required to meet that standard. So much reflects a conventional perception that (relevantly) local government council members do not ordinarily engage in improper conduct generally and in circumstances where to do so is likely to render them liable to a punitive sanction.⁶

⁵ *ibid*

⁶ *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 87 ALJR 170.

- (7) The following passage (without the authorities) from the High Court's decision in *Bradshaw v McEwans Pty Ltd*⁷ is also relevant in complaint proceedings against a council member:

"The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture. But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise." [Underlining added]

Consolidation of complaints

13. Due to the common nature of the complaints, it is convenient that they be dealt with together so that the relevant issues can be examined and determined and for that reason the Panel decided that a consolidation, or a joint examination, of the complaints is appropriate.

⁷ (1951) 217 ALR 1 at 5

Attachment B

PANEL'S GENERAL VIEWS ON REGULATION 10(3)

Regulation 10(3) and 10(4)

Regulation 10(3) and 10(4) read:

- "(3) If a person, in his or her capacity as a council member, is attending a council meeting, committee meeting or other organised event and members of the public are present, the person must not, either orally, in writing or by any other means —*
- (a) make a statement that a local government employee is incompetent or dishonest; or*
 - (b) use offensive or objectionable expressions in reference to a local government employee.*
- (4) Subregulation (3)(a) does not apply to conduct that is unlawful under The Criminal Code Chapter XXXV."*

Elements

Regulation 10(3)(a)

1. In the light of regulation 10(4) the elements of a breach of regulation 10(3)(a) are that
- a council member attended a council meeting, committee meeting or other organised event in his or her capacity as a council member
 - [and] in the presence of a member or members of the public
 - the council member either orally, in writing or by any other means
 - made a statement
 - viewed objectively, that statement (or the inference from the words used) was that a local government employee was incompetent or dishonest
 - the making of that statement was not unlawful under section 345 of *The Criminal Code Chapter XXXV*

Regulation 10(3)(b)

2. The elements of a breach of regulation 10(3)(b) are that:
- a person, in his or her capacity as a council member, attended a council meeting, committee meeting or other organised event
 - [and] in the presence of a member or members of the public
 - either orally, in writing or by any other means
 - used an expression
 - the expression was an offensive or objectionable expression
 - the expression was an offensive or objectionable expression in reference to a local government employee

What is an "organised event"?

3. In regulation 10(3) the term 'organised event' includes:
- (a) any coordinated or planned happening by the local government, other than a council meeting or a committee meeting, in order for the local government to comply with any of its responsibilities under the Act or to carry out or perform any of its functions under the Act or otherwise for any lawful purpose of the local government, and
 - (b) any coordinated or planned happening that is held out or represented by the person/s organising it as offering or presenting favourable conditions or opportunities, to attract spectators or participants or provide entertainment.
4. This inclusive meaning of the term 'organised event' appears consistent with:
- (a) each council meeting and council meeting that is open to members of the public being an 'organised event' in that each of the meetings is a coordinated or planned occasion;
 - (b) the context in regulation 10(3) of a council member "*attending a council meeting, committee meeting or other organised event*"; and
 - (c) the popular usage and understanding, and the dictionary meaning, of the phrase "attending an organised event"

5. A court hearing is held for the purposes of the administration of justice. Although public notice of the date, place and time of a court hearing is usually given, and although a court hearing is usually open to members of the public, the hearing is not an occasion and is not held out or represented as offering any thing or feature as an 'attraction' to the public. Accordingly, a court hearing is not an 'organised event' for the purposes of regulation 10(3).

Regulation 10(3)(a)

What is a 'statement'?

6. For the purposes of regulation 10(3)(a), the term 'statement' refers to any representation of fact or opinion.

What conduct is unlawful under *The Criminal Code* Chapter XXXV?

7. By virtue of regulation 10(4), if a council member attended a council meeting and - when members of the public were present - orally, in writing or by any other means made a representation of fact or opinion that a local government employee was incompetent or dishonest, the council member's conduct of making the representation of fact or opinion will be unlawful under section 345 of *The Criminal Code* (i.e. *The Criminal Code* Chapter XXXV) where, in a prosecution under that section:

- (a) there is sufficient evidence for the prosecution to prove *beyond a reasonable doubt* that the council member published matter defamatory of the employee, and that, at the time of such publication, the council member did so knowing the matter to be false or without having regard to whether the matter is true or false (i.e. the council member did so with 'malice', in the defamation sense) and with his or her intention being to cause serious harm to the employee or the local government concerned or any other person or without having regard to whether such harm is caused; and

- (b) the council member then fails to prove *on the balance of probabilities* that, having regard only to the circumstances happening before or at the time of the publication, he or she would have had a defence - which malice does not defeat - for the publication if the employee had brought civil proceedings for defamation against the council member.

What does the term 'serious harm' mean?"

8. In the light of regulations 10(3)(a) and 10(4) and the context and purposes of section 345 of *The Criminal Code*, when considering the intent of a council member, the term 'serious harm' in section 345 is a reference to:

- (a) significant financial injury or harm; or
- (b) significant mental or psychological injury or harm that is, or is likely to be, significant and longstanding, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.

What representations of fact or opinion will be a breach of regulation 10(3)(a)?

9. The types of representations of fact or opinion that will be a breach of regulation 10(3)(a) are:

- (a) an express statement that a local government employee is "incompetent" or "dishonest" - e.g. "The CEO is incompetent" or "The Manager, Compliance is dishonest"; or
- (b) a statement implying that a local government employee is incompetent - i.e. implying that the employee is of inadequate ability or fitness, or is lacking the requisite capacity or qualification, or is incapable; or
- (c) a statement implying that a local government employee is dishonest - i.e. implying that the employee is lacking in probity or integrity, is untrustworthy, or has a tendency to steal, cheat, lie or act fraudulently.

What is malice (in the sense that the term is used in the law of defamation)?

10. At common law a defamatory statement is published with malice (i.e. in the sense that the term is used in the law of defamation) if the person making it: knew at the time of publication that the representation was false; or made the representation recklessly indifferent to whether it was true or false. At common law, malice includes ill will, spite and improper motive⁸

Regulation 10(3)(b)

11. Regulation 10(3)(b) is an example of a strict liability provision. This means that a council member who breaches regulation 10(3)(b) will have committed a minor breach, simply by virtue of the proof of the fact of the breach (as the intent or purpose of the disclosure is irrelevant). No proof of intention, knowledge, recklessness or negligence is required. There are no fault elements for any of the physical elements of the breach.

⁸ *Horrocks v Lowe* [1975] AC 135 at 149-151.

What is an "expression"?

12. Among the meanings of the word "expression" in the Macquarie Dictionary is "a particular word, phrase, or form of words". For the purposes of regulation 10(3)(b), the term 'expression' means a *particular word, phrase, or form of words*.
13. In the term 'offensive or objectionable expression' in regulation 10(3)(b), the word 'or' is properly construed to be used in the disjunctive so that separate meanings may be determined for each of the terms 'offensive expression' and 'objectionable expression'.

What is an "offensive expression"?

14. For the purposes of regulation 10(3)(b) the term '*offensive expression*' means '*a particular word, phrase, or form of words that is likely to cause offence or displeasure and is insulting*'.⁹

What is an "objectionable expression"?

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

*"...reg 10(3) is designed to ensure that councillors do not use their position to publicly criticise employees within their local government. It is predicated on the proposition that concerns about the performance of employees should be dealt with within the local government organisation and through proper channels, rather than aired publicly."*¹⁰
17. The public criticism referred to by Chaney J in the passage quoted in paragraph 16 above includes the use of an expression to make an adverse reflection on the character or actions of a local government employee.
18. To an ordinary person, an 'offensive expression' will always be an 'objectionable expression' – however, an expression may be an 'objectionable expression' and not also an 'offensive expression' if, viewed objectively, the expression is a particular word, phrase, or form of words that is distasteful or unacceptable.
19. For the purposes of regulation 10(3)(b) the term '*objectionable expression*' means '*a particular word, phrase, or form of words that viewed objectively is distasteful or unacceptable*'.

⁹ *Hargreaves and Local Government Standards Panel* [2008] WASAT 300, per Judge J Chaney (as he then was) at [20]

¹⁰ *Hargreaves and L*
he then was) at [17]

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 31 & 40 of 2010 (DLG 20100195/20100211)
Heard: Determined on the documents
Considered: 11 May 2011 & 29 June 2011
Coram: Mr B. Jolly (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)

Complaint No. SP 31 of 2010

Complainant: (Mr) Ian Craig McDOWELL

Council member complained about: Councillor Donald YATES

And

Complaint No. SP 40 of 2010

Complainant: (Ms) Michelle STUBBS

Council member complained about: Councillor Donald YATES

Local Government: Town of Bassendean
Regulation found breached: Regulation 10(3)(a) of the *Local Government (Rules of Conduct) Regulations 2007*

DECISION AND REASONS FOR DECISION

DEFAMATION CAUTION

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

FINDING OF MINOR BREACH

In dealing with the subject complaints the Panel has made a finding of minor breach (herein, **the Finding**) - namely, that on 13 July 2010 Donald Yates, a member of the Council of the Town of Bassendean, committed a breach of regulation 10(3)(a) of the *Local Government (Rules of Conduct) Regulations 2007* during the debate on item 10.9 at the Town's Ordinary Council Meeting when members of the public were present, in that he orally made statements implying that Mr Ian Craig McDowell (a Town employee at that date and the author of the officer report that was before Council on such item) was dishonest by deliberately including in that report: (a) unnecessary items of expenditure to improperly inflate the total budget for the project concerned to such an extent that Council would not approve the carrying out of the project; and (b) pricings that were dishonest in that they were deliberately 'exaggerated'.

SUMMARY OF DECISION

The Panel's decision was to deal with the said minor breach (herein, **the subject Minor Breach**) pursuant to section 5.110(6)(b)(ii), by ordering that Councillor Yates apologise publicly to Mr McDowell as specified 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 Panel notes that through its Presiding Member it has given to Councillor Yates: notice of the Finding (herein, **the notice of finding**); a copy of the Panel's *Findings and Reasons for Findings* in this matter (herein, **the Reasons for Findings**); and a reasonable opportunity for Councillor Yates to make submissions about how the subject Minor Breach should be dealt with under section 5.110(6)¹.

Councillor Yates' response - no relevant submission

3. The Panel notes that:

- (a) Councillor Yates did not respond to the notice of finding within the 21-day submissions period given to him;
- (b) after that period, a course of email correspondence occurred with him – such course consisting of: an email of 23 June 2011 from him; preceded by an email of 17 June 2011 to him; preceded by an email of 16 June 2011 from him; preceded by an earlier email of 16 June 2011 to him; and
- (c) in Councillor Yates' most recent email (i.e. his email of 23 June 2011):
 - (i) although he requests in effect a deferment of the Panel's decision in this matter for an unspecified period, he does not in the Panel's view provide any sufficient reason or ground for any deferment; and
 - (ii) he sets out a considerable amount of material that in the Panel's view is not relevant to the Finding or to the issue of how the subject Minor Breach should be dealt with by the Panel under section 5.110(6); and
 - (iii) he makes no submission on that issue.

¹ Section 5.110(6) reads:

"The breach is to be dealt with by —

(a) dismissing the complaint;

(b) ordering that —

(i) the person against whom the complaint was made be publicly censured as specified in the order;

(ii) the person against whom the complaint was made apologise publicly as specified in the order; or

(iii) the person against whom the complaint was made undertake training as specified in the order; or

(c) ordering 2 or more of the sanctions described in paragraph (b)."

The general interests of local government in WA

4. Pursuant to clause 8(6) of Schedule 5.1 to the Act, each of the Panel's members is to have regard to the general interests of local government in the State.

Panel's views on how the subject Minor Breach should be dealt with under section 5.110(6)

Councillor Yates' antecedents

5. At the time of signing these Reasons, Councillor Yates has previously been found under Part 5 Division 9 of the Act to have committed 7 minor breaches (one of which is the subject Minor Breach). The details of the other 6 minor breaches (two of which are to be treated as one minor breach for the purpose of section 5.110(6)), and how the Panel has respectively dealt with them (if at all) to date pursuant to that section, are as indicated in the following table:

Matter details	Description of minor breach/es the Panel has found has occurred	Details of action taken under section 5.110(6)
<p>Matter #01: (1 minor breach)</p> <p><u>Complaint:</u> SP 34 of 2010</p> <p><u>Complainant:</u> Cr Michelle Stubbs</p>	<p>That on 5 September 2009 Councillor Yates committed a breach of regulation 8 by using a Town resource (namely, the boundary fence of Bassendean Oval) to place or cause the placement of 4 banners on it, for the purpose of the interests of the beneficiaries and other persons associated with the brand "Fresh Faces, New Directions", without such use and such purpose being authorised under the Act or by the Council or the Town's Chief Executive Officer.</p>	<p>The Panel dealt with the minor breach pursuant to section 5.110(6)(a) by dismissing the complaint.</p>
<p>Matter #02: (1 minor breach)</p> <p><u>Complaint:</u> SP 35 of 2010</p> <p><u>Complainant:</u> Cr Michelle Stubbs</p>	<p>That on 9 March 2010 Councillor Yates committed a breach of regulation 7(1)(a) in that he made improper use of his office as a Council member to gain directly or indirectly an advantage for an immediate next-door neighbour of his, a Ms C McGregor, when he sent an email to his fellow Town Councillors giving wrong advice to them, and inappropriately lobbying or attempting to influence and putting pressure on them, in relation to a request by Ms C McGregor to the Town of Bassendean to have the R coding of her property at 12 Thompson Road, Bassendean increased from residential R25 to R40 (the matter), knowing that he had a proximity interest in the matter, and knowing that he was precluded from participating in the discussions and the decision making procedure relating to the matter when it was before the Town's Council later on that date.</p>	<p>The Panel dealt with the minor breach pursuant to section 5.110(6)(b)(i) by ordering that Councillor Yates be publicly censured as specified in the Minute of Order attached to its <i>Decision and Reasons for Decision</i> in the matter.</p>
<p>Matter #03: (2 minor breaches)</p> <p><u>Complaint:</u> SP 37 of 2010</p> <p><u>Complainant:</u> Cr Michelle Stubbs</p>	<p>That in early March 2010 Councillor Yates committed a breach of regulation 8 by directly or indirectly using the Town of Bassendean's resources (namely, its official logo) without the requisite authorisation when he placed an advertisement for a Town Community Workshop to be published in the Eastern Reporter newspaper.</p>	<p>[Note: The evidence before the Panel in relation to this minor breach and the immediately following minor breach in Matter #03 was the same evidence.]</p>

[Matter #03 cont]	That on or before 16 March 2010 Councillor Yates committed a breach of regulation 9(1) in that he undertook a task that contributed to the Town of Bassendean's administration -- namely, the placement of an advertisement for a Town community workshop to be published in a newspaper, with the advertisement including a mark or design substantially similar to the Town's official logo -- without being authorised by the Council or the Town's CEO to place the advertisement.	The Panel has not as yet dealt with these 2 minor breaches pursuant to section 5.110(6).
Matter #04: (1 minor breach) <u>Complaint:</u> SP 37 of 2010 <u>Complainant:</u> Cr Michelle Stubbs	That Councillor Yates committed a breach of regulation 8 by directly or indirectly using the Town of Bassendean's resources (namely, its official logo) without the requisite authorisation when: he tabled his two alternative designs at the meeting of the Town's Council's Cyril Jackson Physical Education & Community Recreation Centre Management Committee on 11 February 2010 , and he sent copies of those designs to a Ms Pepper of the Cyril Jackson School Management on or about 10 March 2010 .	The Panel has not as yet dealt with this minor breach pursuant to section 5.110(6).
Matter #05: (1 minor breach) <u>Complaint:</u> SP 37 of 2010 <u>Complainant:</u> Cr Michelle Stubbs	That in or about early March 2010 Councillor Yates committed a breach of regulation 8 by directly or indirectly using the Town of Bassendean's resources (namely, its official logo) without the requisite authorisation when he submitted his banner artwork to the Ashfield Soccer and Sports Club Inc.	The Panel has not as yet dealt with this minor breach pursuant to section 5.110(6).

Is a public apology appropriate?

6. A public apology of the kind ordered by the Panel is a significant sanction, as it involves a high degree of public admonition of the conduct of the council member concerned.

7. The circumstances that will in almost all occasions deserve the sanction of a public apology to another person include those where a council member's offending conduct is or conveys a slight or a personal attack on the other person, particularly where the other person is an employee of the council member's local government.

8. It is the Panel's view that Councillor Yates' said offending conduct in this matter was a personal attack on Mr Ian Craig McDowell (herein, Mr McDowell), who at the time was a Town employee and the author of the officer report in relation to which Councillor Yates made the relevant offending statements.

9. In light of the contents of paragraphs 6 to 8 above, it is the Panel's view that it is appropriate to deal with the subject Minor Breach by making an order that Councillor Yates apologise publicly to Mr McDowell, who is no longer a Town employee.

Is a public censure also appropriate?

10. A public censure of the kind ordered by the Panel is a significant sanction. It involves a high degree of public admonition of the conduct of the council member concerned.²

11. The Panel acknowledges that when it makes an order that a Notice of Public Censure be published, the Notice is to be published by the local government's CEO at the expense of the local government, which is a significant expense.

12. In the Panel's view while Councillor Yates' offending conduct in this matter was serious it does not warrant, in addition to an order that he apologise publicly to Mr McDowell, the making of an order that he be publicly censured for having committed that conduct.

Is training also appropriate?

13. The Panel notes that its consideration of how a breach should be dealt with under section 5.110(6) must embrace the issue of whether or not it is appropriate for the Panel to order that the council member concerned undertake such training as it may specify.

14. After due consideration of the information available to the Panel when it made the Finding (including Councillor Yates' responses to the then subject allegation) it is the Panel's view that it is not appropriate that, in addition to an order that he apologise publicly to Mr McDowell, it make an order that he undertake training so as to not repeat his offending conduct in this matter.

Is a dismissal of the complaint appropriate?

15. In light of the contents of paragraph 9 above, it is the Panel's view that it is not appropriate to deal with the subject Minor Breach by dismissing the complaint.

Form of the public apology

16. The Panel notes that:

- (1) When it has dealt with a minor breach by ordering that a council member publicly apologise, the form of the apology specified by the Panel has often been a concise description of the found minor breach/es and a statement by the council member that he or she apologises to the person/s concerned for the offending conduct and for any embarrassment or distress that such conduct caused to such person/s.
- (2) In the context of Part 5 Division 9 of the Act and the Regulations, the components of a full apology (or, a good apology) appear to consist of an acknowledgment of the offending conduct, acceptance of responsibility, expression of remorse or regret, and a promise or undertaking not to repeat the offending conduct.

² *Mazza and Local Government Standards Panel* [2009] WASAT 165 per Judge J Pritchard (Deputy President) (as Her Honour then was) at [107].

- (3) However, a forced public apology in the form described in paragraph 16(1) above will often be sufficient to publicise the relevant council member's conduct in such a way that his/her unacceptable conduct is identified to the public and he/she is effectively sanctioned.
- (4) Where it thinks appropriate, the Panel may order that the person against whom the complaint was made make a full public apology in terms that consist of all of the components mentioned in paragraph 16(2) above.

Panel decision

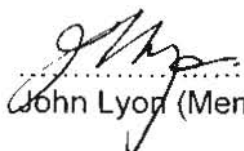
17. Having regard to: the Reasons for Findings; the reasons above; and the general interests of local government in Western Australia, the Panel's decision on how the subject Minor Breach is dealt with under section 5.110(6) is that, pursuant to subsection (b)(ii) of that section, it orders that Councillor Yates publicly apologise to Mr McDowell as specified in the attached Minute of Order.



.....
Brad Jolly (Presiding Member)



.....
Carol Adams (Member)



.....
John Lyon (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) hereby gives notice that:

- (1) Under section 5.125 of the *Local Government Act 1995* the person making a complaint and the person complained about each have the right to apply to the State Administrative Tribunal (the SAT) for a review of the Panel's decision in this matter. In this context, 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 *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).

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."*

Attachment

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 31 & 40 of 2010 (DLG 20100195/20100211)
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Complaint No. SP 31 of 2010
Complainant: (Mr) Ian Craig McDOWELL
Council member complained about: Councillor Donald YATES
And
Complaint No. SP 40 of 2010
Complainant: (Ms) Michelle STUBBS
Council member complained about: Councillor Donald YATES

Local Government: Town of Bassendean
Regulation found breached: Regulation 10(3)(a) of the *Local Government (Rules of Conduct) Regulations 2007*

MINUTE OF ORDER

THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Donald Yates, a member of the Council of the Town of Bassendean, publicly apologise to Mr Ian Craig McDowell as specified in paragraph 2 below.
2. Within the period of 29 days to 43 days from the day following the date of service of this Order on him, the said Donald Yates arrange the following Notice of Public Apology to be published, in no less than 10 point print:
 - (a) as a one-column or a two-column display advertisement in the first 15 pages of "The West Australian" newspaper; and
 - (b) as a one-column or a two-column display advertisement in the first 15 pages of the "Eastern Suburbs Reporter" newspaper.

NOTICE OF PUBLIC APOLOGY

Two separate complaints have been made to the Local Government Standards Panel (the Panel) about my conduct, **as a member of the Town of Bassendean's Council at its meeting on 13 July 2010**, during the debate regarding the officer report on safe traffic movement at the Morley Drive/Wicks Street intersection.

The Panel has considered the complaints, and made a finding of minor breach – namely, that during the said debate, when members of the public were present, I committed a breach of regulation 10(3)(a) of the *Local Government (Rules of Conduct) Regulations 2007* in that I orally made statements implying that Mr Ian Craig McDowell, a Town employee at the time and the author of the said officer report, was dishonest.

I apologise to Mr McDowell for my conduct, and regret any hurt, inconvenience or unpleasantness I have caused to him.

DONALD YATES